U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

B2

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 14 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Elizabeth O'Brien
for Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition, filed on January 6, 2003, seeks to classify the petitioner as an alien with extraordinary ability as an opera singer. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability.

Although not identifying any specific criteria that he claims to meet, the petitioner, through counsel, in addition to documenting his educational and training background, submitted evidence that addresses the following criteria.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The record contains a 1995 certificate from the City of Mexico, acknowledging the petitioner's participation in a concert of "Teacher Giuseppe Di Stefano;" a 1998 certificate from the Municipal Town Hall and the Guerrerense Institute of Culture of Eduardo Neri, Guerrero, acknowledging the petitioner's participation in the Grand Lyric Art celebration; and a 1993 certificate from the city of Dallas, Texas, conferring an honorary citizenship upon the petitioner. The evidence does not establish that these local acknowledgements and the certificate of honorary citizenship are nationally or internationally recognized awards for excellence in opera.

The record also contains a letter from Opera Index, Inc., notifying the petitioner that he was selected to receive a grant from the organization in 2002. The letter indicates that Opera Index, Inc. is a voluntary non-profit organization that "provides financial support to young singers." The petitioner submits no other evidence about the organization or the selection process and criteria for the grant. Further, such grants are normally given to assist in funding one's education and training in recognition of one's potential, and not as an award for past excellence in the field. No evidence provided by the petitioner establishes that a grant from this organization is a nationally or internationally recognized award for excellence in the field.

The evidence does not establish that the petitioner meets this criterion.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

To demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or work experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

The petitioner submitted two letters verifying his membership in the Musical Association, Kalman IMRE. The petitioner submitted no evidence of the membership requirements of this association, and the evidence does not establish that outstanding achievement is a prerequisite for membership in the association. No evidence establishes that the petitioner meets this criterion.

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

In order to meet this criterion, published materials must be primarily about the petitioner and be printed in professional or major trade publications or other major media. To qualify as major media, the publication

should have significant national distribution and be published in a predominant language. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

The petitioner submitted a copy of an excerpt from an article printed in the September-October 2002 edition of the magazine *Pro Opera*. We note that the translation accompanying the article does not comply with the provisions of 8 C.F.R. § 103.2(b)(3), which requires that documents submitted in a foreign language "shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." According to the translation provided, the article was about "Mexico in the world." The evidence indicates that a short biography of the petitioner is included along with that of several other individuals. The evidence does not suggest that the petitioner's accomplishments were highlighted more than that of the other individuals named, and no evidence establishes that the article was about the petitioner. Additionally, the evidence does not establish that *Pro Opera* is professional or major trade media.

The record also contains an article from the August 27, 2001 edition of *Il Gazzettino*, which is apparently a Venetian newspaper. The translation accompanying this document also fails to comply with the regulation in that it does not contain the translator's name or certification. The article discusses the performance of the opera *Don Giovanni* the previous night. The petitioner is listed as one of the performers. This article is not about the petitioner in satisfaction of this criterion. Further, there is no evidence that *Il Gazzettino* is major media, or professional or major trade media.

The petitioner also submitted several programs and flyers announcing operatic productions in which he performed. Performance programs and advertisements publicizing the performances are not published material about the petitioner or his work, and do not satisfy the requirements of this criterion.

On appeal, the petitioner submitted a copy of an article from the January-February 2003 edition of *Pro Opera*, which reports on a recital he gave; copies of articles that appeared in the August 2003 edition of *Il Gazzettino*, which reported his participation in a mass held in Poffabro, Italy; and an article that appeared in the May 7, 2003 edition of the *Reforma* newspaper, which discusses an upcoming production of the opera *Il Trovatore* and credits the petitioner with organizing its production. A copy of an article from the July-August 2003 edition of *Pro Opera* is not accompanied by a translation and does not appear to be about the petitioner. In addition to failing to satisfy the regulatory requirements regarding translations, all of these articles were published after the date the petitioner filed his petition for visa classification preference. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

On appeal, the petitioner also submits an article that counsel identifies as from a Czech Republic newspaper *Inzerce*, and which counsel states is about the petitioner's performance with the Hradec Kralove Philharmonic Orchestra in March 2003. Counsel states that the article is accompanied by a translation, but none appears in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As the article is not translated, it has no evidentiary value. Further, according to counsel, the article was published after the date the petitioner

filed his petition, and thus it cannot be used to establish his eligibility for visa classification preference. *See Matter of Katigbak, supra.* The petitioner has not established that he meets this criterion.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The record contains a letter from a casting director apparently requesting the petitioner's presence in Vienna to assist in selecting singers for the 2003-2004 season. The record also includes a letter from the Interstate Opera Association, Inc. in New York requesting the petitioner's assistance on a board to judge singers for roles in the association's production of *Cosi Fan Tutte*, and a letter from the Parish Council of Poffabro, Italy, indicating that the petitioner would have an opportunity to participate in judging a contest of different choral groups. While the evidence establishes that the petitioner has been requested to participate as a judge of others in his field, the evidence does not establish that he has ever done so.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The wording of this criterion indicates it is intended for those in the visual arts such as sculptors and painters. The petitioner submits numerous copies of programs of the operatic productions in which he has performed. He also submits photographs that he states are of him in concert or in rehearsal. The programs show that the petitioner was part of ensemble casts. The evidence also indicates that the petitioner participated in some recitals, where he was one of several who sang during the performances. As operas and recitals are designed to be performed before audiences, virtually every professional singer will display his or her work in this manner. The evidence does not establish that the petitioner or his work was the focus of the presentations, and does not establish that the petitioner's participation in these performances evidence acclaim in the field.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

To meet this criterion, the petitioner must establish that he performed in a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

As noted above, the petitioner was an ensemble cast member in several operatic productions. However, there is no evidence in the record to establish that these productions were organizations or establishments within the meaning of this criterion or to indicate that the petitioner performed in a leading or critical role in any of the productions. The record does not reflect that the petitioner played a leading or critical role in any of the organizations that staged the productions, or that these organizations have distinguished reputations. The record contains evidence that the petitioner organized a production of the opera *Il Trovatore*. However, there is no evidence in the record of the organization that was responsible for the production, the petitioner's role in that organization, or that the organization has a distinguished reputation.

The evidence does not establish that the petitioner meets this criterion.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

In response to the director's request for evidence (RFE) dated March 27, 2003, the petitioner submitted copies of the covers of two compact disc recordings of his performances. On appeal, the petitioner submitted a CD recording featuring compilations of his live performances in Europe and a video production of *Il Trovatore*, which he produced and in which he appeared. Nonetheless, the petitioner provided no evidence to indicate that the CDs and video are offered for sale or of the revenue generated from their sales. The petitioner has not established that he meets this criterion.

Other comparable evidence.

The regulation at 8 C.F.R. § 204.5(h)(4) states: "*If the above standards do not readily apply to the beneficiary's occupation*, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." [emphasis added]. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation. However, we will briefly address other evidence that the petitioner submitted under this provision.

The petitioner submitted several letters inviting him to perform at different events. These letters indicate that there was some demand or interest in the petitioner's work. However, they do not provide evidence that the petitioner is one of the few opera singers at the top of his profession. Although Arturo Spinetti, the artistic director of Teatro Felice, Bronx, New York, stated that the petitioner's performances had "attracted the interest of people from the Metropolitan Opera," as noted by the director, no evidence was submitted that the petitioner's services are in demand by any of the better-known opera houses. Additionally, the petitioner's performances do not appear to have been the subject of major media coverage.

The petitioner also submitted several letters in support of his petition for visa classification preference. Mr. Spinetti states that the petitioner has a "powerful voice, great flexibility and musicianship and a fabulous stage presence." Michael Capasso, general director of the Dicapo Opera Theater in New York, describes the petitioner as "reliable and useful" as a young artist with the company. Dr. David Reeves, musical director of the Dicapo Young Artist Program, states that the petitioner has a "rich" voice, "deep sound with good flexibility and evenness from top to bottom." Mark Oswald, who states he is a leading baritone with the Metropolitan Opera, also states that the petitioner has been studying voice with him for the past few years. Mr. Oswald states that the petition "has all the qualities that opera companies are looking for. Refined, large voice; compelling stage presence, fine diction, and consummate professionalism."

While the authors of these letters express praise for the petitioner's talents, they do not provide evidence that the petitioner is an opera singer with extraordinary ability who is among those at the very top of his profession.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of his field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as an opera singer to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner is a talented singer, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.