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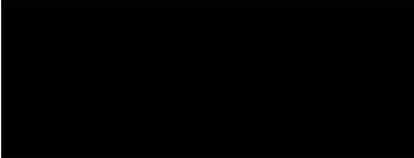
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JUN 15 2005

FILE: EAC 02 262 50740 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:   
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:



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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 that the petitioner had not established the sustained national or international acclaim requisite to classification as an alien of extraordinary ability.

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

(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 into the United States will substantially benefit prospectively the United States.

The applicable regulation defines the statutory term "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). Specific supporting evidence must accompany the petition to document the "sustained national or international acclaim" that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international acclaim through evidence of a "one-time achievement (that is, a major, international recognized award)." *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.*

In this case, the petitioner seeks classification as an alien with extraordinary ability in the arts as a musician and composer. Documents submitted with the petition include copies of the beneficiary's awards and nomination for an award, sixteen letters from individuals who have worked with the beneficiary and the beneficiary's resume and biography. The director determined that the record indicated that the beneficiary had made notable achievements as a young musician and composer, but that the evidence was insufficient to demonstrate that he had garnered the sustained national or international acclaim requisite to classification as an alien with extraordinary ability. On appeal, counsel submits a brief and additional evidence including documents concerning films that the beneficiary has worked on, another nomination of the beneficiary for an award, a statement listing the beneficiary's recording projects and his estimated annual income and two additional letters.

We first address three of counsel's concerns. First, counsel contends that the director contradicted the regulation by stating that the list of evidentiary criteria at 8 C.F.R. § 204.5(h)(3) is "only a representative selection and does not replace the statutory requirement of extensive documentation to demonstrate sustained national or international acclaim." We do not read the director's statement as exceeding the regulation. Rather, the director has correctly noted that the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), as well as comparable evidence submitted pursuant to 8 C.F.R. § 204.5(h)(4), must depend on the extent to which such evidence demonstrates, contributes to, or is consistent with sustained national or international acclaim at the very top of the field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

Second, counsel claims that the director's failure to issue a Request for Evidence (RFE) was egregious. Although 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing," the director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. In this case, the director did not deny the petition based on insufficient evidence of eligibility. Rather, she determined that the evidence submitted did not establish that the beneficiary had garnered the sustained national or international acclaim requisite to classification as an alien of extraordinary ability. Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Third, counsel repeatedly claims that the beneficiary has been recognized as an alien with extraordinary ability by the approval of several O-1 visa petitions. Although the words "extraordinary ability" are used in the Act for both the nonimmigrant O-1 classification and the first preference employment-based immigrant classification, the applicable regulations define the terms differently for each classification. The O-1 regulation explicitly states that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2 (3)(iv)(A), but the immigrant classification requires actual awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear regulatory distinction between these two classifications, the beneficiary's receipt of O-1 nonimmigrant classification is not sufficient evidence of his eligibility for immigrant classification as an alien with extraordinary ability.

Counsel's remaining contentions, the evidence submitted and the director's decision are addressed in the following discussion of the regulatory criteria relevant to the petitioner's case.

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

The petitioner submitted copies of four awards and one nomination that he received for his musical compositions. The record contains a copy of a certificate stating that the beneficiary was nominated for the "BOSE Award for Best Original Music Score" for the film "15 Amore" in the Emirates 2000 Australian Film Institute Awards, but the petitioner submits no evidence of the significance of this nomination or why it should be considered a nationally or internationally recognized prize or award rather than a nomination for an award that the beneficiary apparently did not win. The record also contains a copy of a document or object with several stamps that indicate that the beneficiary received "The D & AD Silver Award for the Most Outstanding Special Effects" in 1999 from British Design & Art Direction. The beneficiary's resume states that this award was granted for "NRMA 'Ladybird,'" a commercial, but the record contains no evidence to explain this work or the significance of the award. Similarly incomplete are the printouts of scanned photographs of an object with the inscription: "1998 Sound Track/Music[,] Microcosmos[.]" [REDACTED] The record contains no explanation of this purported award. It is not listed on the beneficiary's resume or included in the list of awards in counsel's original brief. In 1998, the beneficiary also received the "Marienberg Sydney Spring Award" for outstanding Australian composition for "Entity" at the Sydney Spring International Festival of New Music. The beneficiary's resume states that "Entity" is an octet composed by the beneficiary that premiered at the same festival, but the record contains no documentation of the festival or explanation of the award's significance. Finally, in 1997 the beneficiary received a musical score achievement award for "Nightride" at the Exposure International Short Film Festival. A letter from [REDACTED] that he worked with the beneficiary on this film and that the beneficiary won "the award for 'Best Musical Score' at the Exposure International Film Festival," but the record contains no evidence of the significance of this film festival or the petitioner's award. Although the evidence indicates that the beneficiary has won recognition for his musical compositions, it fails to sufficiently identify the awards or document their significance in a manner consistent with the requisite sustained national or international acclaim. Accordingly, the beneficiary does not meet this criterion.

On appeal, the petitioner submitted evidence that the beneficiary received two nominations for the 2004 APRA – AGSC Screen Music Awards in the category of Best Television Theme and Best Music for an Advertisement.<sup>1</sup> These nominations occurred after the petition was filed and consequently cannot be considered. The beneficiary's eligibility must be established at the time of filing. See 8 C.F.R. § 103.2(b)(12), *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

*(ii) 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.*

The director incorrectly stated that the record contained "verification of [the beneficiary's] membership in various entertainment industry associations." In fact, the petitioner claimed that the beneficiary met this criterion through his purported membership in a single organization, the Australian Music Centre. The record contains a printout from the organization's website that contains a photograph and short biography of the beneficiary. The printout does not state that the beneficiary is a member of the Australian Music Centre and his biography is listed under the heading "Resources: Biographies." The printout also does not state the organization's membership criteria and the record contains no evidence that outstanding achievements are prerequisite to membership in the Australian Music Centre. Accordingly, the beneficiary does not meet this criterion.

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<sup>1</sup> The record does not name the associations or organizations identified by the acronyms "APRA" and "AGSC."

*(iii) Published material 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.*

The petitioner did not claim that the beneficiary met this criterion. However, the director stated that "it would seem reasonable to expect that this E11 petition would contain feature articles or published material written about the beneficiary and his specific recognition as having reached the very top of the profession . . . ." On appeal, counsel claims that the lack of media articles about the beneficiary should not detract from other evidence that the beneficiary has been recognized for his talents. We agree that the beneficiary should not be penalized for the absence of evidence relating to a criterion under which he did not claim eligibility, but we do not read the director's decision as having done so in a manner prejudicial to the petitioner.

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

The petitioner originally submitted 16 letters from professionals with whom he has worked. The director stated that "[t]he letters provide general praise for the petitioner's work without the objective specificity one might expect from a musician/composer at the top of the field." We phrase our concerns differently. While such letters provide relevant information about an alien's experience and accomplishments, they cannot by themselves establish the alien's eligibility under this criterion because recommendation letters solicited by an alien in support of an immigration petition carry less weight than preexisting, independent evidence that one would expect of an alien who has garnered sustained national or international acclaim. Accordingly, we review the letters in conjunction with other relevant evidence.

The record contains a total of 18 one-page letters (including two letters submitted on appeal). Only three of the letters are dated and most appear to have been written in support of the beneficiary's 0-1 visa petition. The letters indicate that the beneficiary has composed music for advertisements and television programs for companies including National Geographic Channels International, Qantas Airways, Chrysler, Channel Seven Sydney and SBS Television in Australia. A printout from the National Geographic website submitted on appeal credits the beneficiary for the original music for the documentary "True Originals: [REDACTED] Harvey." As discussed above under the first criterion, the beneficiary received an award for his work on the NRMA "Ladybird" commercial.

The beneficiary has also composed music for films including "The Gatekeeper," "15 Amore," and the short film "NightRide." As discussed above under the first criterion, the beneficiary was nominated for an Australian Film Institute Award for best original music score for "15 Amore. [REDACTED] and Director of "15 Amore," confirms that the beneficiary "composed the score and orchestrated, produced and conducted the whole project." A list of the 2000 Australian Film Institute Awards submitted on appeal states that "15 Amore" was also nominated for awards in the categories of Best Cinematography and Best Costume Design, but the record contains no evidence that the film won those awards or received any other recognition as a distinguished production. On appeal, copies of six awards won by "The Gatekeeper" are submitted as attached to a thank you letter addressed to the beneficiary from [REDACTED] the director of the film, who describes the beneficiary's musical score as "such an integral and essential part of the project." However, the awards won by "The Gatekeeper" were apparently granted after the petition was filed and

consequently cannot be considered as evidence of the film's reputation. The petitioner must establish the beneficiary's eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12), *Matter of Katigbak*, 14 I&N Dec. at 49. On appeal, the petitioner submits evidence that the beneficiary composed music for two other notable films, but because this work occurred after the petition was filed it cannot be considered. Again, the petitioner must establish the beneficiary's eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12), *Matter of Katigbak*, 14 I&N Dec. at 49. Although the beneficiary won an award for his work on the short film "Nightride," the record contains no evidence that this film has a distinguished reputation.

Almost all of the letters praise the beneficiary's talent and ability to work under tight deadlines. [REDACTED] director of the documentary "Spirits of the Carnival," also notes that the beneficiary not only composed the music for the film, but also conducted, orchestrated and produced the musical score. [REDACTED] a producer who has worked with the beneficiary for five years, and [REDACTED] an editor at Film Graphics who has employed the beneficiary, also praise these versatile talents that the beneficiary brought to several "high profile" commercials. Many of the letters offer glowing recommendations such as that of [REDACTED] a director who has worked with the beneficiary for eight years. [REDACTED] opines that the beneficiary "is a truly gifted artist whose work is both prolific and of the highest standard. He is an utter professional and one of the most focused creative talents I have ever met." [REDACTED] similarly describes the beneficiary as "a gifted and dedicated artist of high repute both within Australia and internationally."

On appeal, counsel claims that the beneficiary's work on the soundtrack for the film "The Lord of the Rings" also meets this criterion. Counsel states that the beneficiary "was hired by Academy-Award winning composer [REDACTED] to work on the soundtrack for the Lord of the Rings. This collaboration ultimately resulted in an academy award for its musical score." Counsel inflates the beneficiary's role. The only evidence of the beneficiary's work on this film is a letter from [REDACTED] Music Co-Producer, thanking the beneficiary for his work "as Lead Music Conformation Editor on the recent recording for *The Lord of The Rings: Fellowship of The Ring* extended-cut DVD." [REDACTED] describes the project as "the task of adding new music to an existing film score." The letter indicates that the beneficiary did not work on the original film score, but on a post-production DVD of the film. Nothing in the record supports counsel's claim that the beneficiary worked on the score that won the Academy Award.

The record indicates that the beneficiary has successfully composed music for notable advertisements for numerous companies and several films. Although the letters attest to the value of the beneficiary's musical contributions to these various productions, the record contains no evidence that the beneficiary held a leading or critical role in any of the production or advertising companies outside of his work on discrete projects. While the beneficiary may have performed a critical role for the films "15 Amore," "The Gatekeeper" and "Nightride," the record contains insufficient evidence that these films have distinguished reputations. Accordingly, the beneficiary does not meet this criterion.

*(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.*

The beneficiary did not originally claim eligibility under this criterion. However, the director stated that "it would seem reasonable to expect that this E11 petition would contain . . . evidence that he has commanded a significantly high salary or remuneration, compared to others in the industry." On appeal, counsel claims that [t]he fact that the beneficiary may not receive a significantly high remuneration should not be considered as a negative factor in demonstrating extraordinary ability." Yet counsel submits on appeal a list of the beneficiary's

recording projects from April 2, 2003 to February 10, 2005 that states the beneficiary's estimated gross annual income as \$75,000. It is unclear what purpose this list serves if counsel does not claim that the beneficiary meets this criterion. Regardless, the list states income earned after the petition was filed and consequently cannot be considered. The petitioner must establish the beneficiary's eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(12), *Matter of Katigbak*, 14 I&N Dec. at 49.

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his or her field. The petitioner bears this substantial burden of proof. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner in this case has not sustained that burden. The evidence indicates that the beneficiary is a talented musician and composer who has received some recognition for his work, but the record does not establish that he was an artist of extraordinary ability at the time of filing. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.