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FILE: EAC 04 101 50869 Office: VERMONT SERVICE CENTER

Date: MAR 03 2006

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 Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an “alien of extraordinary ability” in business, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). 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.

On appeal, counsel asserts that the director erred in issuing a final denial without first issuing a request for additional evidence. Even if we were to conclude that the director erred as claimed, the most expedient remedy for such an error would be to consider any evidence the petitioner might have submitted in response to such a request on appeal. The only new evidence on appeal is a letter from the petitioner and evidence of local wages in the field for the New York area, which will be considered below.

Counsel further asserts that the director erred in failing to consider that the beneficiary is also the beneficiary of approved nonimmigrant visas in a similar category. We will address this issue at the end of this decision. At the outset, however, we note that the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Counsel’s remaining assertions will be discussed below. In general, the evidence submitted does not carry the weight ascribed to it by counsel. Thus, we are not persuaded that the petitioner has established the beneficiary’s eligibility for the classification sought.

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 have 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 the beneficiary has sustained national or international acclaim at the very top level.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as a “management executive” in the music industry. 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.

The director stated that “meeting three of the ten categories of evidence suggested by regulation does not automatically establish the beneficiary’s eligibility for the classification of ‘Alien of Extraordinary Ability.’ Determinations of eligibility are made on the basis of the quality and caliber of the evidence presented.” While we may not agree with the exact wording of the above statements, we do not find that the director “dismissed” the regulatory criteria as claimed by counsel on appeal. A more rational interpretation of the director’s decision is that the petitioner submitted documentation which related to or addressed three criteria, but that the evidence itself did not demonstrate national or international acclaim. A petitioner cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria. In determining whether a petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim.

The petitioner has submitted evidence that, is claimed, meets the following criteria.¹

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

Initially, counsel asserted:

[The beneficiary] has been the recipient of numerous Gold and Platinum Records from the RIAA for her contributions to the success of various artists that she is associated with including TINA ARENA and SLEEPER to name a few.

The petitioner submitted poor quality photocopies of photographs purporting to demonstrate that albums promoted by the beneficiary, Tina Arena’s “In Deep” and two Sleeper albums were certified platinum. “RIAA” is not visible on any of the plaques. The plaque for Tina Arena appears to reference the beneficiary, but the record does not satisfactorily establish that the beneficiary is the recipient of an award or prize from a recognized recording industry association. The plaques for the Sleeper albums are illegible in the photographs submitted. Thus, the director concluded that the petitioner had not established that the beneficiary meets this criterion. Counsel does not challenge this conclusion on appeal other than to assert, in response to the director’s

¹ The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

general conclusion that the record lacked evidence establishing a link between the beneficiary and the success of the artists on whose behalf she has worked:

We are herewith submitting documentation which includes awards as well as artist credits that [the beneficiary] has received for her contributions to the success of the musical artists that she has been associated with over the years. In addition, we are submitting letters from experts in the field confirming [the beneficiary's] contributions.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires evidence of “the alien’s receipt” of awards or prizes. First, platinum certification is evidence of sales numbers and does not constitute an award or prize for excellence, such as a Grammy Award. Even if we were to accept that certification of platinum status is an award or prize, the record does not establish that the beneficiary is the recipient of this certification.

In light of the above, the petitioner has not established that she 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.

Initially, counsel stated:

[The beneficiary’s] success in the entertainment industry and contributions are evidenced through articles about her in several publications over the year, discussing her involvement with various well known award winning artists including [REDACTED]

The bulk of the published materials submitted, however, are solely about the artists, some of which have no known connection to the beneficiary individually (as opposed to her employer), such as Coldplay and Bare Naked Ladies. An undated article in the [REDACTED] on a music seminar for teenagers quotes the beneficiary and chronicles her three years in the business before discussing the history and potential of a musician attending the seminar. A July 19, 2000 article in Allentown, Pennsylvania’s *Morning Call* discussing an upcoming visit by [REDACTED] quotes the beneficiary as Ms. [REDACTED] manager. Finally, a September 29, 2001 article in *Billboard* on DJ Rap quotes the beneficiary as DJ Rap’s manager.

The director concluded that these articles were insufficient evidence of the beneficiary’s personal acclaim. Counsel does not challenge this conclusion on appeal.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published materials be about the alien and that they appear in major media. None of the articles submitted are “about” the beneficiary. Moreover, the petitioner has not established that the *Guardian* and the *Morning Call* are major media publications.

In light of the above, the petitioner has not established that she meets this criterion.

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

Initially, counsel asserted that the beneficiary was working for the petitioner as a management executive and had previously worked for Magus Entertainment as an artist manager. Counsel further asserts that the beneficiary has been “associated with” top artists in the field. Finally, counsel praises the beneficiary’s “track record” in the industry, noting her contacts in the field that have allowed her to provide successful guidance to the artists she has promoted.

The petitioner did not initially submit a letter from the petitioner or Magus Entertainment affirming the beneficiary’s position title with either employer. The petitioner did submit letters from [REDACTED] PR, band members and promoters confirming her past employment as a press officer. [REDACTED] of Sleeper confirms that her band requested the beneficiary to “join our management company” based on her talent as a press officer. [REDACTED] of Big Brother Management confirms that in 1997 the beneficiary was offered a “co-manager” position for Sleeper. The A&R Manager for Lamb, [REDACTED], confirms that the beneficiary “acts as management” for that band. As stated above, press articles reference the beneficiary as the manager for [REDACTED] and DJ Rap.

The director concluded that the petitioner had not demonstrated that the beneficiary’s “roles have been leading or critical in comparison to any number of executives or managers employed in similar capacity for those same distinguished establishments.”

On appeal, counsel asserts that the submission of letters on appeal should address the director’s concerns. Only one of the letters submitted, however, is new. [REDACTED] a representative of the petitioner, affirms that the beneficiary is an artist manager for some of the petitioner’s most prestigious clients. Mr. [REDACTED] lists [REDACTED], [REDACTED] and [REDACTED] as clients of the petitioner and their reputation is undisputed and supported in the record. Mr. [REDACTED] however, asserts only that the beneficiary has personally managed [REDACTED] and [REDACTED] for the petitioner. The record is absent evidence that these groups enjoy a similar reputation. As such, the petitioner has not established that the beneficiary is one of the petitioner’s leading managers.

While the petitioner has not demonstrated the beneficiary’s leading or critical role for management companies, we cannot ignore that she has played at least critical roles for bands that have enjoyed notable success, such as Sleeper and DJ Rap. As such, we are persuaded that the beneficiary minimally meets this criterion.

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

Initially, counsel asserted that the beneficiary “will continue to be compensated at an annual salary of \$115,000 plus discretionary bonuses.” The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The director concluded that the petitioner had not compared the beneficiary’s remuneration with “other managers and executives employed in comparable positions within the metropolitan New York area.”

On appeal, the petitioner submits the letter from Mr. [REDACTED] in which he asserts that the beneficiary is compensated with “a profit sharing deal with a guaranteed minimum base draw of \$117,000 plus all expenses, office overhead and support staff covered by” the petitioner. The petitioner also submits evidence that the level 2 wage for agents and business managers of artists, performers and athletes in the New York is \$98,446 annually.

While we recognize that the director specifically noted the lack of evidence comparing the beneficiary's wages to local wages, the petitioner must establish that the beneficiary earns significantly high wages in comparison with others in the field nationally. Thus, the New York data is not useful. Moreover, the petitioner provides no information on how the level two wage is calculated. Thus, the petitioner has not demonstrated that the level two wage represents the wages of the most renowned and experienced members of the field with which the beneficiary must compare.²

In light of the above, the petitioner has not demonstrated that the beneficiary 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.

Initially, counsel asserted that the status of the recording artists with whom the beneficiary has been associated and the reference letters submitted demonstrate the beneficiary's "critical success." The director concluded that the record contained "no evidence as to the commercial success of the beneficiary's artistic endeavors."

The standard is "commercial success," not "critical success." 8 C.F.R. § 204.5(h)(3)(x). We concur with the director that this criterion applies to artistic achievements, not business achievements. While we have considered the commercial success enjoyed by Sleeper in considering whether that group enjoyed a distinguished reputation under the criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii), we are not persuaded that their commercial success warrants a finding that the beneficiary, as a press officer, personally enjoyed commercial success. Thus, the petitioner has not demonstrated that the beneficiary meets this criterion.

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 the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished herself as a management executive to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence indicates that the petitioner shows talent as a management executive, but is not persuasive that the petitioner's achievements set her significantly above almost all others in her 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.

In addition, we note that on June 13, 2005, another employer filed a nonimmigrant visa petition in a similar category, receipt number EAC 05 181 52229. The director approved the petition on June 16, 2005. As the beneficiary appears to be working for another employer, it is not clear that the petitioner in this matter is still pursuing the petition. This issue would need to be resolved in any future action regarding this petition.

² As the director erred in implying that a local wage comparison could serve to establish eligibility under this criterion, we attempted to find the relevant national data, although we are under no obligation to do so. According to the Department of Labor's website, www.bls.gov, the 90th percentile wages for agents and business managers of artists, performers and athletes is \$145,600 annually, far more than the beneficiary receives. Thus, the beneficiary's wages do not appear to compare with the wages of the most renowned and experienced members of her field.

Finally, counsel asserts that the director erred in not considering as a “favorable factor” that the beneficiary is currently in the United States as an O-1 nonimmigrant, a visa classification that requires that the alien seek to enter the United States “to continue work in the area of extraordinary ability.” See section 101(a)(15)(O) of the Act, 8 U.S.C. § 1101(a)(15)(O).

While Citizenship and Immigration Services (CIS) approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude CIS from denying an immigrant visa petition based on a different, if similarly phrased standard. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant petitions. See e.g. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of beneficiary’s qualifications).

Moreover, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. Due to the lack of required initial evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant visa petition.

As discussed above, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See e.g. *Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d at 1090.

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The director is instructed to review the previous nonimmigrant approval for possible revocation, pursuant to 8 C.F.R. § 214.2(o)(8).³

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.

³ While the beneficiary works in the recording business, her occupation as a press officer and manager does not fit within the definition of “arts” at 8 C.F.R. § 214.2(o)(2). Thus, in reviewing the nonimmigrant visa, the director should consider whether the petitioner has demonstrated the beneficiary’s extraordinary ability in business under 8 C.F.R. § 214.2(o)(3)(iii), not arts under 8 C.F.R. § 214.2(o)(3)(iv).