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U.S. Citizenship  
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Services

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[REDACTED]

FILE:

SRC 05 063 51824

Office: TEXAS SERVICE CENTER

Date: OCT 11 2006

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

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]

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 classification as an “alien of extraordinary ability” in the arts, 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 matter should be remanded to the director for a new request for additional evidence (RFE) because the RFE issued did not relate to the petitioner. The RFE did indicate that the petitioner had not claimed a criterion that he did, in fact, claim and does, in three instances, refer to the petitioner as a female martial artist. Overall, however, the RFE was clear regarding the type of evidence required for the classification sought. Moreover, the final decision was specific to the petitioner. The best remedy for the director’s error would be to consider on appeal any evidence that might have been submitted in response to an RFE specific to the petitioner. The petitioner, however, submits no new evidence on appeal and does not assert that additional evidence is available that could be submitted in the longer response time for an RFE. Thus, the petitioner has not established that remanding the matter would serve as a useful remedy. Counsel’s assertions regarding the specific conclusions by the director will be considered below. In general, however, we note that the petitioner did not submit complete translations for all of the foreign language documents and that none of the translations submitted are certified as required under the regulation at 8 C.F.R. § 103.2(b)(3). As such, the foreign language documents and translations have little evidentiary value.

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

This petition seeks to classify the petitioner as an alien with extraordinary ability as a “professional musician, composer and producer.” 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 petitioner has submitted evidence that, he claims, meets the following criteria.<sup>1</sup>

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

Initially, the petitioner submitted the following evidence alleged to relate to this criterion:

1. A November 25, 2001 letter from [REDACTED] Executive Director of Capif, asserting that an album by Bravo, for whom the petitioner played bass guitar, produced by RKO and distributed by BMG Argentina went Platinum in 1993 upon the sale of 60,000 units.
2. Information about the New York *festivals* Radio Programming and Promotion for 2004. The information indicates that the festival awards Grand, Gold, Silver and Bronze awards and recognizes “Finalists.” The petitioner included a copy of a brochure page entitled “Certificate of Distinction, Finalist Winner” listing six individuals and companies, including the petitioner. The text under each listing is illegible on the copy submitted.
3. An uncertified translation of information about the Lapid de Oro Competition discussing the objective of the Argentine competition. The translation indicates that the petitioner won this competition while working for Raya Productions. The original Spanish text does not include the petitioner’s name. The award certificate indicates that in 2000 Raya Design of Music and Sound won the Lapid de Oro in the “Jingles” category. The award does not list the petitioner in the credits.
4. A certificate of appreciation issued to the beneficiary in appreciation and recognition for volunteering at the Special Olympics.
5. Evidence that Zubi Advertising won a 2003 local Silver ADDY from the Ad Federation of Greater Miami. The beneficiary is credited with the original musical score. Also included were materials about the Cleveland ADDY awards, limited to ads within the Cleveland area.

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

In the RFE, the director requested evidence of the prestige of the awards documented. In response, the petitioner submitted evidence that Zubi Advertising won a national Silver ADDY for a four-color brochure for Ford and a print campaign for the Florida Lottery. The record contains no evidence that the beneficiary, a musician, worked on either print campaign. The petitioner also submitted evidence from the website [www.animalmiami.com](http://www.animalmiami.com) reflecting Zubi's television campaigns for Ford. The record contains no evidence that these television campaigns won national ADDY awards.

The director concluded that the petitioner had not established that he had ever personally won a national award. On appeal, counsel reiterates that petitioner submitted the evidence discussed above, asserting for the first time that Capif is a major South American Record Company. Counsel further asserts that the ADDY award competition is very "tough."

Counsel does not resolve the director's concern that the petitioner did not personally receive the Lapiz de Oro or an ADDY award. We concur with the director's analysis. The statute requires evidence of personal national or international acclaim. The regulation at 8 C.F.R. § 204.5(h)(3)(i) requires evidence of the alien's "receipt" of a nationally or internationally recognized award. The petitioner has not even established that he worked on the project that received the Lapiz de Oro. Even assuming he did so, we reiterate that the petitioner's alleged employer, not the petitioner, received both the Lapiz de Oro and the ADDY award. Moreover, as stated above, the only ADDY award for a project on which the petitioner clearly worked is the local Miami ADDY. The national ADDY awards won by Zubi were print campaigns to which the petitioner, a musician, is not presumed to have contributed. An award limited to marketing campaigns in Miami is not a nationally or internationally recognized award.

Despite a specific conclusion by the director that the New York *festivals* information did not clearly establish that the petitioner won an award at this festival, the petitioner submits no clarifying evidence on appeal, such as the award certificate itself. A "Finalist" is not an award winner in a competition that issues Grand, Gold, Silver and Bronze prizes. We concur with the director that the record contains no evidence that the petitioner won a Grand, Gold, Silver or Bronze prize at the festival.

Further, the petitioner does not explain why the president of another record label, Capif, is the appropriate individual to verify that Bravo's 1993 album, produced by RKO and distributed by BMG Argentina, went platinum. The petitioner did not submit the sales records or official designation of the album as platinum or even confirmation from RKO or BMG Argentina. Regardless, platinum designation is based solely on sales numbers. It is not a prize or award for excellence awarded to a small number selected from a pool of competitors. As such, it is best considered under the criterion set forth at 8 C.F.R. § 204.5(h)(3)(x).

Finally, a certificate issued in recognition of participation as a volunteer at the Special Olympics is not an award or prize for excellence in the petitioner's field of endeavor, music and music production.

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

The petitioner initially submitted an untranslated financial statement from Sindicato Argentino de Musicos listing the petitioner and his group, Bravo. The petitioner also submitted an uncertified translation of Internet materials about Sindicato Argentino de Musicos indicating that it “guards artists rights and informs them of the minimal fees they can charge regarding any aspect of their work, [for] example: TV appearances, CD’s, Films, Recitals, etc.” The petitioner submits another untranslated financial statement issued to the petitioner by the Asociación Argentina de Interpretes. An uncertified translation of Internet materials indicates that the association “is an organization that protects and enforces the rights of artists and producers regarding their work.” Finally, the petitioner submitted his membership card for the Screen Actor’s Guild of the Associated Actors and Artistes of America. The materials for this association reflect that it is an umbrella organization for nine unions.

The director’s RFE erroneously asserted that the petitioner did not claim to meet this criterion. The RFE also stated, however:

Please send a copy of any membership bylaws for the associations to which you are a member. In order 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.

The petitioner submitted no new evidence relating to this criterion in response to the RFE. In the final decision, the director stated that memberships based on employment or activity in a given field, minimum education or experience, recommendations by colleagues or current members or payment of dues are insufficient. The director further noted that the overall prestige of the association is not determinative. Rather, we must evaluate the membership criteria. The director concluded that the petitioner had not submitted the bylaws or official membership requirements and, thus, could not establish that the associations of which he is a member require outstanding achievements of their members.

On appeal, counsel asserts that the petitioner submitted “concrete evidence” of his memberships. Counsel makes no attempt to address the director’s concerns regarding the absence of evidence regarding the membership criteria of these associations. We concur with the director. The membership criteria are a fundamental element of this criterion pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii). Without such evidence, the petitioner cannot meet his burden of establishing that he meets this criterion. We note that the Screen Actor’s Guild appears to be a union. A union typically requires only employment in the field. As stated by the director, employment in one’s field, even a competitive field, is not an outstanding achievement that set the alien apart from others in the field.

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

The petitioner submitted the following published materials: (1) a 1992 article in *Nueva! Chicas* about [REDACTED] noting that Bravo had recently replaced Ricky Martin on the FM 105.5 Chart, (2) two undated one-paragraph articles in unidentified newspapers announcing a new release by a newly formed Bravo that includes the petitioner, (3) undated magazine articles about Bravo, some with only a summary translation, naming the

petitioner as a member of the band, (4) undated articles in *Querida* and *Ves* naming the petitioner as a band member, (5) a 1992 article in *Nueva! Chicas* about Bravo naming the petitioner as a member of the band, (6) an undated article in *Musico Pro* naming the petitioner as a vocalist at an unidentified event and (7) a profile of the petitioner's solo work on [www.garageband.com](http://www.garageband.com).

In the RFE, the director advised that it was the petitioner's obligation to provide not only the articles, but evidence that they appeared in publications with a significant national circulation. In response, counsel asserted that the petitioner had provided references to his work "published in a variety of national and international magazines, newspapers and the internet." The director concluded that the published materials were not primarily about the petitioner and did not appear in media established as major media.

On appeal, counsel merely reiterates that the petitioner submitted references to his work published in a variety of national and international magazines. The appeal is not responsive to the director's concerns. The record remains absent evidence of the national circulation of any of the publications that featured articles on Bravo. 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). Moreover, some of the publications were not even identified. Further, we concur with the director that the articles are not primarily about the petitioner. Finally, with regard to [www.garageband.com](http://www.garageband.com), the petitioner has not established that this represents independent journalistic coverage of the petitioner. Rather, the profile appears to be initiated and maintained by the petitioner as a promotion of his recent work.

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

*Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.*

The director acknowledged the submission of several recommendation letters but concluded that they did not explain how the petitioner has already impacted the field of music or advertising. Counsel does not address this criterion on appeal.

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. The letters all provide general praise of the petitioner and list advertising campaigns on which he worked. The letters from successful artists do not explain the petitioner's influence in the field. The remaining letters are all from fellow band members and employers in Florida and Buenos Aires. Such letters cannot establish the petitioner's influence beyond his immediate circle of colleagues. Thus, the petitioner has not established that he meets this criterion.

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

In response to the RFE, counsel asserted that the petitioner had been a chief musical producer and sound engineer for Animal Music and that he works for large and prestigious advertising firms, such as Zubi Advertising. The petitioner submitted Internet materials from Animal Music's website listing several advertising campaigns and clients, including Zubi. These materials do not credit the petitioner as a chief musical producer. The letter from Animal Music does not provide the petitioner's position with the company.

The petitioner is credited with the original music scoring for Zubi Advertising's television campaign that won a local Silver ADDY award, but this credit does not provide the petitioner's job title with Zubi. Moreover, without an organizational chart, we cannot determine how the petitioner's role compares with others at Zubi.

The director did not address this criterion and, on appeal, counsel merely reiterates the claim that the petitioner served as chief musical producer. As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

At issue for this criterion are the role the petitioner was hired to fill and the reputation of the entity that hired him. The petitioner did not submit such evidence to support counsel's assertions relating to this criterion. As such, the petitioner has not established that he 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.*

As discussed above, the petitioner submitted evidence that Bravo's album went platinum in 1993 but the letter is not from a record company that was involved with producing or distributing the album. The director determined that the petitioner had not submitted evidence that allowed a comparison with other artists in Argentina. On appeal, counsel reiterates that the petitioner's albums is alleged to have gone platinum and asserts that the petitioner is able to demonstrate recent commercial success through his work on nationally and internationally televised commercials for Toyota, Coca Cola, Volkswagen, Nike, Renault, Ford and others. The petitioner submitted letters from Florida-based and Argentine studios confirming the petitioner's work on various advertising jingles. Commercial success does not mean successfully working on a commercial. As is evident from the plain language of the regulation, 8 C.F.R. § 204.5(h)(3)(x), the type of evidence required to meet this criterion includes box office receipts and unit sales data. Commercials are not sold to consumers and cannot produce ticket or unit sales numbers. As such, the petitioner's work on commercials cannot serve to meet this criterion. Diego Jinkus, President of the J Project in Florida, asserts that in 2002 the petitioner gained acclaim for the production of a musical anthem for the Volleyball "World Cup." The record contains no evidence of such acclaim, such as articles in music or volleyball trade journals noting the popularity of the anthem.

Without evidence that any acclaim in 1993 was sustained through 2005, the platinum sales numbers by themselves cannot serve to establish eligibility. In light of the above, the petitioner has not established that he 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 himself as a musician 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 shows talent as a musician, 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.

Finally, while Citizenship and Immigration Services (CIS) approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude CIS from denying an immigrant visa petition based on a different, if similarly phrased standard. The regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts* are dramatically different. 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) as simply “distinction,” which is further defined as follows:

Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

The regulation relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field 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.” While the ten immigrant criteria set forth at 8 C.F.R. § 204.5(h)(3) appear in nonimmigrant regulations, 8 C.F.R. § 214.2(o)(3)(iii), they refer only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. Rather, separate criteria for nonimmigrant aliens of extraordinary ability in the arts are set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv). The distinction between these fields and the arts, which appears in 8 C.F.R. § 214(o) does not appear in 8 C.F.R. § 204.5(h). As such, the petitioner’s approval for a non-immigrant visa under the lesser standard of “distinction” is not evidence of his eligibility for the similarly titled immigrant visa. Regardless, each petition must be adjudicated on its own merits under the regulations which apply to the benefit sought.

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).

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).

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 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.