



U.S. Citizenship
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[REDACTED]

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FILE:

EAC 05 140 51384

Office: VERMONT SERVICE CENTER

Date: FEB 05 2007

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:

[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

Robert P. Wiemann, Chief
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 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, the petitioner submits a statement and additional evidence. In general, the petitioner notes that he is in the United States pursuant to a nonimmigrant O-1 visa, a similar classification to the immigrant classification now sought. The regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts*, however, are dramatically different. The regulation at 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.” The criteria for *nonimmigrant* aliens of extraordinary ability in the arts, set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv), are significantly different than those for immigrant aliens of extraordinary ability, set forth at 8 C.F.R. § 204.5(h)(3). 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.

In addition, the petitioner asserts that the agent who filed the O-1 nonimmigrant visa petition has failed to properly promote the petitioner in this case. The petitioner further asserts that two attorneys specializing in immigration law advised him of the strength of his documentation. Finally, the petitioner requests oral argument to provide evidence of the failure of his nonimmigrant visa sponsor to properly promote him. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b).

In this instance, the petitioner identified no unique factors or issues of law to be resolved. Specifically, the petitioner filed the instant petition on April 19, 2005, only a few months after entering the United States pursuant to his nonimmigrant visa. Thus, assuming the petitioner’s nonimmigrant sponsor has failed to properly promote the petitioner as claimed, the petitioner can still rely on his accomplishments prior to entering the United States as evidence of sustained national or international acclaim outside the

United States. Regardless, even if the petitioner's claims about his sponsor are true, we cannot speculate as to the petitioner's possible reception in the United States had he been better promoted.

Finally, the petitioner's assertion that two attorneys who specialized in immigration law advised him that his evidence was stronger than the evidence they have seen for other aliens who were approved is not persuasive evidence in this matter. Each case must be decided on its own facts.

We will consider the petitioner's more specific assertions and the new evidence below. We note at the outset, however, that CIS does not make subjective determinations of talent. At issue is whether the petitioner, through objective evidence, can demonstrate sustained national or international acclaim in his field.

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 pianist. 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.¹

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.

While the petitioner does not explicitly claim to meet this criterion, on appeal he submits evidence that he was registered as a delegate as of May 31, 2005 for the 2005 National Conference of the American Symphony Orchestra League, which he characterizes as a membership. The record lacks evidence that serving as a delegate is comparable to election to membership. The petitioner also failed to submit the official criteria for selection as a delegate. Finally, the record lacks evidence of any memberships prior to the date of filing, April 14, 2005. The petitioner must establish his eligibility as of that date. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, 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.

Initially, the petitioner characterized his three compact discs as “published material.” The petitioner’s own compact discs are not the type of independent journalistic coverage appearing in major media contemplated by this criterion. The petitioner also submitted newspaper reviews, including a March 29, 2003 review of the petitioner’s performance as the piano soloist in Rachmaninoff’s Third Piano Concerto with the Siemens Ensemble in [REDACTED] an April 12, 1989 review of the petitioner’s piano performance in the Salerno edition of [REDACTED] a 1989 promotion of an upcoming performance by the petitioner in [REDACTED]. In response to the director’s request for additional evidence, counsel noted the March 29, 2003 performance review.

The director concluded that a single article was not persuasive evidence of sustained acclaim and that the petitioner had failed to establish that [REDACTED] is major media. On appeal, the petitioner asserts that the paper is one of Munich’s daily papers. The petitioner concedes that while one article is insufficient to establish eligibility as a whole, it should be considered in the context of the remaining evidence.

We are satisfied that the article in [REDACTED] is sufficiently about the petitioner. It is inherent to the field of performing arts, however, to have one’s performance reviewed in local papers. Without evidence that [REDACTED] has a national circulation or evidence that the petitioner has been covered in several significant local or regional papers nationwide, we cannot conclude that the

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

petitioner meets this criterion. While we acknowledge that the evidence submitted to meet a given criterion need not establish eligibility by itself, the evidence must be evaluated as to whether it is indicative of or consistent with national or international acclaim if that statutory standard is to have any meaning. In its report, the House of Representatives indicated that in the absence of a one-time achievement such as a Nobel Prize, an alien could demonstrate eligibility through a “career of acclaimed work in the field.” H.R. Rep. No. 101-723, 59 (September 19, 1990). Minor reviews and promotional materials that do not appear to be independent journalistic coverage in 1989 and a single review in 2003 are not indicative of a career of acclaimed work.

In light of the above, 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 petitioner has never claimed to meet this criterion. Nevertheless, we acknowledge the submission of evidence that in 1996 he was appointed Commissioner to oversee aptitude tests of students who had applied for placement in a first year introduction to music class at an Italian junior high school. On appeal, the petitioner submits a letter from a current student.

Evaluating the aptitude of junior high school students who have yet to begin studying music is not judging the work of others in the field. Moreover, it is an inherent responsibility of teachers to evaluate their students. Not every piano teacher enjoys national or international acclaim.

Without evidence that the petitioner has judged nationally recognized piano competitions or comparable responsibilities, the petitioner cannot establish 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 petitioner relies on reference letters to meet this criterion. The director concluded that the letters did not “go to great lengths to describe” the petitioner as an alien of extraordinary ability, that they were not indicative of the petitioner’s recognition beyond other pianists and that an alien of the caliber contemplated by the statute should be able to produce more than “a handful of reference letters.”

On appeal, the petitioner quotes from several of the letters submitted, asserting that they “demonstrate sustained international acclaim, since they come from extremely qualified people from every corner of the world.”

The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim of sustained national or international acclaim. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS

is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of widespread acclaim and vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation are the most persuasive. Ultimately, however, evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce unsolicited materials reflecting that acclaim.

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. To be considered a contribution of major significance in the field of music, it can be expected that the contribution will have had a demonstrable impact on how music is taught, played or appreciated.

██████████ Vice President and Co-Chair of the Artistic Direction of the Siemens Orchestra in Munich, asserts that the petitioner toured with the orchestra in 2003. Mr. ██████████ characterizes the petitioner's performance as "flawless and enchanting." Mr. ██████████ does not explain how this tour has influenced the field of music in any way. Talent alone is not a contribution of major significance to the field. Mr. ██████████ assertions regarding the nature of one of the performance halls and the sales of compact discs from the concert will be discussed below as they relate to the criteria set forth at 8 C.F.R. § 204.5(h)(3)(vii) and (x).

██████████ a member of the piano faculty at Montclair University and the Manhattan School of Music, asserts that he attended the petitioner's performance with a German orchestra and was impressed with the petitioner's rendition of Rachmaninoff's Piano Concerto Number 3, a piece known as one of the most challenging piano concertos. We do not question that the concerto is challenging. The record, however, does not establish that successfully playing this piece is so unusual and attracts so much attention as to constitute a contribution that adds to or significantly impacts the field of concert piano.

██████████ a composer residing in New York, indicates that he hired the petitioner to record one of his compositions, which he plans to publish and use as a soundtrack. Mr. ██████████ professes satisfaction with the petitioner's performance and expresses an interest in hiring the petitioner again.

Mr. [REDACTED] does not indicate that the recording has been published or accepted as a soundtrack. Moreover, not every published recording or soundtrack is a contribution of major significance. The record lacks evidence that this work has been recognized as influential in the field.

[REDACTED] a pianist who consistently tours worldwide and has recorded with the London Symphony Orchestra, expresses his admiration for the petitioner's "rich, unique, variety of tone color in his performances as well as the powerful and constructive formal logic." The record includes similar letters from other pianists who have observed or taught the petitioner. Such general praise is insufficient evidence that the petitioner has significantly impacted his field.

In response to the director's request for additional evidence, the petitioner submitted two new letters. [REDACTED], a member of the music faculty at Sarah Lawrence College and President of a classical music artist management agency, praises the petitioner's talent but does not characterize him as influential. He does not indicate that he had ever heard of the petitioner through his reputation prior to meeting him. In a letter addressed to the petitioner, [REDACTED] Composer in Residence with the Israel Stage Orchestra, thanks the petitioner for introducing Mr. [REDACTED] to Mr. [REDACTED] and expresses interest in inviting the petitioner to play Rachmaninoff's Piano Concerto Number 3 with the Israel Stage Orchestra.

While the evidence demonstrates that the petitioner is a talented pianist, it falls short of establishing that the petitioner had already made contributions of major significance. Thus, the petitioner has not established that he meets this criterion.

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

As discussed above, the petitioner toured with the Siemens Orchestra, including as the solo pianist for Rachmaninoff's Piano Concerto Number 3 at the Hurkulesaal der Residenz, described by Mr. [REDACTED] as "one of the most famous concert halls in the world." As the petitioner was the solo pianist, we are satisfied that the concerts showcased his work. While the director questioned the significance of this venue, we are satisfied that the petitioner meets this criterion. For the reasons discussed above and below, however, the evidence falls far short of meeting any other criterion.

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

Mr. [REDACTED] asserts that the petitioner sold out the Hurkulesaal der Residenz and other venues and that the compact discs of the concert sold out and will be reissued. Mr. [REDACTED] does not indicate how many discs were originally manufactured and sold. The petitioner submitted three compact discs that were purportedly "published." None of them appear professionally manufactured for widespread commercial distribution; the packaging does not identify any record company as the manufacturer or distributor, nor does it show catalog numbers, bar codes, or other typical indicia of retail distribution. The only disc to identify a copyright holder is a recordable disc, or CD-R, which the petitioner admits

he produced at his own expense. The director concluded that the petitioner had not demonstrated any commercial success.

On appeal, the petitioner references Mr. [REDACTED]'s letter and asserts that in response to the request for additional evidence, he submitted materials from the Siemens Orchestra's website demonstrating that the compact disc is now only available to members of the orchestra.

In order to demonstrate commercial success through ticket sales, the regulation at 8 C.F.R. § 204.5(h)(3)(x) is explicit that a petitioner must submit "box office receipts." The regulation at 8 C.F.R. § 103.2(b)(2) provides that a petitioner may not rely on affidavits without demonstrating that primary evidence and secondary evidence are both unavailable. The record does not contain the primary evidence required, box office receipts for the petitioner's 2003 performances or official ticket sale numbers provided by the Hurkulesaal der Residenz, or secondary evidence, such as reviews referencing the show as sold out. The petitioner has not established that such evidence is unavailable. Thus, while we do not question Mr. [REDACTED]'s credibility, his unsupported attestation of ticket sales is insufficient.

Similarly, without actual sales numbers for the compact discs, we cannot conclude whether those numbers are indicative of commercial success. Selling out a small number of discs prepared by the orchestra itself for limited release is not evidence of commercial success.

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 pianist 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 pianist, 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.