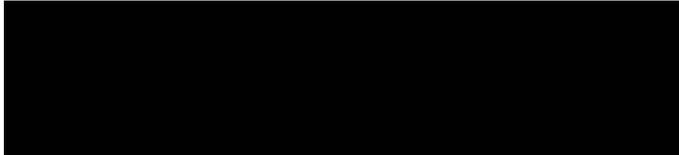


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FILE:



Office: TEXAS SERVICE CENTER Date:

SRC 05 225 51381

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, Chief
Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary 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. The director determined the petitioner had not established that the beneficiary has earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel states: "The petitioner strongly alleges that it has shown that the beneficiary qualifies for classification as an Alien with Extraordinary Ability, and therefore the director erred . . . in denying this application."

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.

Citizenship and Immigration Services (CIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (November 29, 1991). 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 earned sustained national or international acclaim at the very top level.

This petition, filed on August 12, 2005, seeks to classify the beneficiary as an alien with extraordinary ability as a disc jockey. 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 pertaining to 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 petitioner submitted a promotional flyer and information printed from the DJ Music Awards internet website indicating that the beneficiary was nominated for an award in the "House Music" category at the "first annual 2005 Miami DJ Music Awards." The internet website material submitted by the petitioner states: "The nominees were picked from a poll of local DJs with either a monthly or weekly residency at a major Miami night club." The plain language of the criterion at 8 C.F.R. § 204.5(h)(3)(i), however, requires beneficiary's receipt of "nationally or internationally recognized prizes or awards" rather than a local nomination. Therefore, the petitioner has not established that the beneficiary 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 for published material to meet this criterion, it must be primarily about the beneficiary and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national or international level from a local publication or from a publication in a language that most of the population cannot comprehend. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.¹

The petitioner submitted a June 7, 2003 article about the beneficiary printed from the *Cultura Dance* internet website. This article states: "In 2002, [the beneficiary] began to be part of the team of *amateur* hosts of the electronic music program 'Cultura Dance,' in the city of Valencia" [emphasis added] The author of this material was not provided as required by this criterion.

The petitioner also submitted a June 2003 profile of the beneficiary and a three-sentence May 2003 piece briefly mentioning him appearing in the publication *RumbaCaracas.com – Your Party Guide*, an entertainment night guide for Caracas, Venezuela. The author of this material was not provided as required by this criterion.

The petitioner's evidence also included several promotional flyers and printed cards announcing upcoming events for which the beneficiary served as a disc jockey. Promotional items, which are not the result of

¹ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, cannot serve to spread an individual's reputation outside of that county.

independent journalistic reportage, cannot serve to meet this criterion. Such material does satisfy the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) and is simply not indicative of national or international acclaim.

In response to the director's notice of intent to deny, the petitioner submitted an article about the beneficiary appearing in *Vida Americana*, a Spanish language publication for "Latin American immigrants in south Florida." The date and author of this material were not provided as required by this criterion.

The petitioner also submitted an interview of the beneficiary appearing in Miami's *Street Weekly* (a local publication) and further promotional items related to events where he disc jockeyed.

On appeal, the petitioner submits an article about the beneficiary appearing in *Fashion Nights*, a free magazine circulated in Caracas, Valencia, and Maracaibo that consists almost entirely of advertisements. The petitioner also submits an article appearing in *El Correo del Pueblo Vasco*, a local publication, but this article is not primarily about the beneficiary. The plain language of this criterion, however, requires "published materials about the alien." If the beneficiary is not the primary subject of the material, then it fails to demonstrate his national acclaim.

The petitioner also submits a photograph of the beneficiary and two others, which was accompanied by a two-sentence explanation, appearing in *Gasteiz con Estilo*. The date and author of this material were not provided as required by this criterion.

The petitioner's appellate submission also includes a February 16, 2006 article appearing in *Critica* and a February 26, 2006 article appearing in *El Universal*. These articles were published subsequent to the petition's filing date. A petitioner, however, must establish the beneficiary's eligibility at the time of filing. 8 C.F.R. § 103.2(b)(12); see *Matter of Katigbak*, 14 I&N Dec. 45 (Comm. 1971). Accordingly, the AAO will not consider these articles in this proceeding.

The petitioner has not submitted any circulation statistics showing that any of the preceding publications had substantial national readership. Without evidence demonstrating that the beneficiary has been the primary subject of major media attention, we cannot conclude 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.

On appeal, counsel states: "The beneficiary has been asked to play at events sponsored by multinational corporations such as BACARDI and PEPSI." Counsel does not specifically identify the events to which she refers, nor does she cite any evidence to support her assertion. 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). Nevertheless, the plain language of this criterion requires "[e]vidence of the alien's participation . . . as a judge of the work of others." We do not find that being asked to disc jockey at an event that had corporate sponsors constitutes judging the work of others. Thus, the petitioner has not established that the beneficiary meets this criterion.

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

On appeal, counsel states: "The beneficiary has made significant musical contributions to the national and international music world despite his physical handicap." Counsel does not specifically identify the contributions to which she refers, nor does she cite any evidence to support her assertion. As stated previously, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 533, 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503, 506.

In order to satisfy this criterion, the petitioner must show that the beneficiary's original contribution has demonstrably influenced the greater field at the national or international level. The record in this case, however, includes no evidence showing that the beneficiary is among the most influential disc jockeys currently active in the field or that the field has changed as a result of the beneficiary's work. For example, there is no evidence showing that a number of disc jockeys from throughout the United States or Venezuela have adopted the beneficiary's particular mixing techniques. We find that the petitioner has failed to demonstrate an original accomplishment of the beneficiary that rises to the level of contribution of major national or international significance in his field. Thus, the petitioner has not established that the beneficiary meets this criterion.

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

On appeal, counsel states: "The beneficiary's DJ skills have been displayed at concerts, social events, promotional parties and famous local night clubs." The plain language of this criterion, however, indicates that it is intended for visual artists (such as sculptors and painters) rather than for the beneficiary's occupation. Further, national acclaim in the entertainment industry is generally not established by the mere act of appearing at local public venues, but rather by attracting a substantial national or international audience. The record includes no evidence showing that the petitioner has attracted such a following.

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

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

On appeal, counsel states: "The beneficiary has played a vital role in the growing Miami and International music scene." Counsel, however, does not specifically identify the organizations or establishments for which the beneficiary has performed in a leading or critical role.

In order to establish that he performed a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of the beneficiary's role within the entire organization or establishment and the reputation of the organization or establishment. We accept that the beneficiary has been contracted to perform as a disc jockey at various dance clubs in Miami and Venezuela, but there is no evidence that the organizations for which he has worked have distinguished national reputations or that he has performed in a leading or critical role for these organizations in a manner reflective

of sustained national or international acclaim. Thus, the petitioner has not established that the beneficiary 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.

On appeal, counsel states: “[The beneficiary] has received high remuneration by appearing with headline bands such as STING, INXS and UB 40 and to be asked by multinational companies to guest DJ and their promotional events.” The record, however, includes no supporting evidence (such as payroll records or income tax forms) showing the beneficiary’s actual earnings for any specific period of time. As stated previously, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 533, 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503, 506. Further, the plain language of this criterion requires the petitioner to submit evidence of a high salary “in relation to others in the field.” The petitioner, however, offers no official wage statistics as basis for comparison showing that the beneficiary’s compensation was significantly high in relation to others in his field. There is no evidence showing that the beneficiary has earned a level of compensation that places him among the highest paid disc jockeys in Venezuela or the United States. Thus, the petitioner has not established 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.

The petitioner submitted evidence showing that the beneficiary produced electronic music song recordings such as “Thanks to the Lord” and “Feel the Drums.” The plain language of this criterion, however, requires evidence of commercial success in the form of record “sales.” The record includes no evidence showing that the beneficiary’s music recordings had a high national or international sales volume. Therefore, the petitioner has not established that the beneficiary meets this criterion.

In this case, we concur with the director’s finding that the petitioner has failed to demonstrate the beneficiary’s receipt of a major internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability.

Beyond the regulatory criteria, the petitioner submitted several letters of support from the beneficiary’s professional contacts. We cite representative examples here.

[REDACTED], President, Sindicato del House, DJ Association of Venezuela, states:

As a professional Disc Jockey, [the beneficiary] is considered an extraordinary talent because beyond his physical impediment of being born with only one hand, he has always performed at the highest of levels, including mastering all the necessary techniques that a DJ needs to perform. Beside his creative talent, the ability to do the same job as other DJ’s, but with only one hand, has earned [the beneficiary] great respect and recognition among his peers and the public that go to any of his shows.

[REDACTED], Director, RumbaCaracas.com, Venezuela, states:

As a medium, we publish a print guide, website, electronic guide, organize events and have a radio program.

As a Director/Producer, I worked closely with [the beneficiary] in several events in Venezuela organized by rumbaCARACAS.com. [The beneficiary] is a professional DJ/Producer that served as main talent for some of our events and parties.

[The beneficiary] has always displayed an excellent level of professionalism in the events we have worked in the past.

[REDACTED], Production Department, La Mega 95.7, Venezuela, states: “[The beneficiary] . . . worked for our radio station La Mega Estacion 95.7, performing satisfactorily in the positions of Music Producer and DJ of the show ‘Matarile Mix’ from 1999 to 2002. The quality and responsibility he took in his duties were flawless; and his team work skills were outstanding”

[REDACTED], Fashion Café, Inc., Valencia, Venezuela, states that the beneficiary exhibited “seriousness, honesty, and good behavior in the performance of his duties at all times.”

[REDACTED], Owner, Kadoc Disco, Carabobo, Venezuela, states that the beneficiary performed as a “guest DJ on several occasions, generating a good nightlife atmosphere due to his up-to-date musical programs.”

[REDACTED], Living Room Lounge, Valencia, Venezuela, states that the beneficiary has performed “satisfactorily” and “has shown to be a serious and responsible person in his labor duties.”

[REDACTED], Producer, Digital 105.3 FM, Venezuela, states that the beneficiary “has worked as a DJ and producer of this station from January 2001” and “has demonstrated that he is a responsible person and capable in his artistic abilities.”

The preceding letters of support indicate that the beneficiary has performed admirably as a disc jockey, but they are not adequate to demonstrate that he has earned sustained national or international acclaim at the very top of his field. Pursuant to the statute and regulations, the classification sought requires documentary evidence of sustained national or international acclaim, and the petitioner cannot arbitrarily replace such evidence with attestations from the beneficiary’s associates, who assert that they find his abilities to be extraordinary. The regulation at 8 C.F.R. § 204.5(h)(3) requires documentation meeting at least three of the ten criteria. These criteria require specific documentation beyond mere testimony, such as awards, published material about the alien, and evidence of a high salary. While letters of support from one’s associates may place the evidence for the regulatory criteria in context, they cannot serve as primary evidence of the specific achievements required by the regulatory criteria. Further, while the regulation at 8 C.F.R. § 204.5(h)(4) permits “comparable evidence” where the ten criteria do not “readily apply” to the alien’s occupation, the regulation

neither states nor implies that letters of support attesting to the alien's standing in the field are "comparable" to the strict documentation requirements in the regulations setting forth the ten criteria.²

Documentation in the record indicates that the alien was the beneficiary of an approved O-1 nonimmigrant visa petition filed in his behalf. On appeal, counsel argues that "the underlying criteria for a First preference with Extraordinary Ability has previously been established and deemed relevant and true by the Service by virtue of the Service approving [the beneficiary's] current O-1 visa." Extraordinary ability in the nonimmigrant context, however, means distinction, which is not the same as sustained national or international acclaim. Section 101(a)(46) of the Act explicitly modifies the criteria for the O-1 extraordinary ability classification in such a way that makes the nonimmigrant O-1 criteria less restrictive for an individual in the arts, and thus less restrictive than the criteria for immigrant classification pursuant to section 203(b)(1)(A) of the Act.

While CIS has approved one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, that prior approval does not preclude CIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. In publishing the proposed rule, legacy INS specifically distinguished the O-1 nonimmigrant category from the high standard set for immigrant visa extraordinary ability category. *See* 56 Fed. Reg. 30703, 30704 (July 5, 1991). 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).

Review of the record does not establish that the beneficiary has distinguished himself 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 is not persuasive that the beneficiary's achievements set him significantly

² In the present case, 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.

above almost all others in his field at the national or international level. Therefore, the petitioner has not established the beneficiary's 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.