

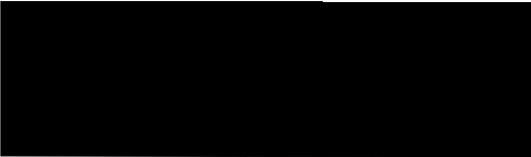
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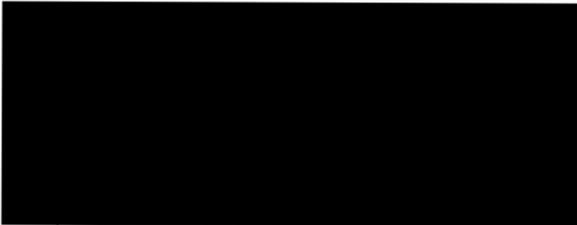


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: OCT 06
SRC 06 007 51053

IN RE: Petitioner: [REDACTED]
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:



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.

2 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 The director's decision will be withdrawn, and the petition will be remanded for further action and consideration.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability. 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 argues that that the director erred by denying the petition without allowing the petitioner twelve weeks to respond to the director's request for evidence.

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):

Initial evidence: A petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is, a major, international recognized award), or at least three of the following:

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

- (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) 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;
- (iv) 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;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
- (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The Form I-140 petition was filed on September 23, 2005. Citizenship and Immigration Services' (CIS) records reflect that the director issued a request for additional evidence (RFE) on October 28, 2005. On December 8, 2005, or 41 days after the RFE was issued, the director denied the petition.

On appeal, counsel states:

The RFE states that "Failure to reply within twelve weeks may result in the denial of your application." The deadline to respond to the RFE as set out by the TSC [Texas Service Center] was February 1, 2006. Petitioner was gathering additional evidence to respond to the RFE when . . . the TSC issued a decision denying the I-140 visa petition without giving the petitioner an opportunity to respond to the RFE, in direct violation of 8 C.F.R. § 103.2(b)(8).

The regulation at 8 C.F.R. § 103.2(b)(8) provides, in pertinent part:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted

either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence.

In this instance, we agree with counsel that the director erred by denying the petition without allowing the petitioner twelve weeks to respond to the director's request for evidence.

However, we agree with the director that the evidence accompanying the petition failed to demonstrate that the petitioner meets at least three of the criteria that must be satisfied to establish the sustained national or international acclaim necessary to qualify as an alien of extraordinary ability. The director's decision cited the deficiencies in the record as they relate to the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

Counsel also argues that evidence in this case should be evaluated pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). This regulation allows for the submission of "comparable evidence," but only if the ten criteria "do not readily apply to the beneficiary's occupation." Therefore, the petitioner must demonstrate that the preceding regulatory criteria are not applicable to jazz musicians. Where an alien is simply unable to meet three of the ten regulatory criteria, the wording of the regulation does not allow for the submission of comparable evidence.

In this case, while we agree with the director that the initial evidence accompanying the petition was not adequate to demonstrate the petitioner's eligibility for the benefit sought, the director should have allowed the petitioner twelve weeks to respond to the RFE. Therefore, this matter is remanded to the director for further action. The director may request any additional evidence deemed warranted and should allow the petitioner 12 weeks to respond. Pursuant to 8 C.F.R. § 103.2(b)(12) and *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), any evidence submitted in response to the director's request must demonstrate eligibility at the time of filing (September 23, 2005). As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.