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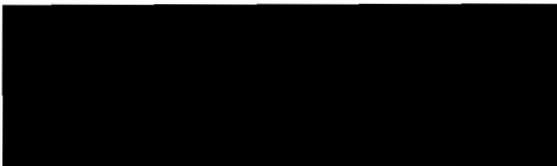


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: APR 23 2009
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner, an entertainment company, 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 argues that the evidence presented by the petitioner was sufficient to establish that the beneficiary meets the requirements for classification as an alien of extraordinary ability

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 into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) 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, 60898-99 (Nov. 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 sustained national or international acclaim at the very top level.

This petition, filed on November 30, 2007, seeks to classify the beneficiary as an alien with extraordinary ability as an executive in the entertainment industry. The record reflects that the

beneficiary has worked as the Vice President for Quality at [REDACTED] since March 2007. The petitioner submitted a September 14, 2007 letter from [REDACTED], President and Chief Executive Officer, [REDACTED], stating:

[REDACTED] is an international entertainment conglomerate consisting of two record labels, a publishing company, a management firm, booking agency, a music advertising firm and an education and consultancy group. Our company was established in 2005. The majority of our businesses were previously run by Silverlight Records, LLC. Silverlight no longer exists as its business and assets have been absorbed by [REDACTED].

An international entertainment conglomerate with so many branches needs the skills of a [sic] extremely well prepared professional who can skillfully supervise and improve the quality of all of its products. [The beneficiary] is an extremely well prepared and competent executive. He completed satisfactorily his studies with a Bachelor Degree in . . . International Business Administration.

Prior to his employment with [REDACTED], the beneficiary worked as a Sales Manager at the Ikea home products store in San Diego, California from July 2003 to October 2006.

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, internationally 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. A petitioner, however, cannot establish the beneficiary's eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R. § 204.5(h)(3). In determining whether the beneficiary 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. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" 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." 8 C.F.R. § 204.5(h)(2). The petitioner has submitted evidence pertaining to 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.

On appeal, the petitioner submits two December 11, 2007 certificates of recognition presented to the beneficiary by the Fermatta Music Academy for "his assistance and notable dedication in the Clinic 'Quality, how to obtain it and preserve it in different aspects of your profession'" and for "being a clear example of professionalism, dedication and innovation in the XXI century." The beneficiary received these certificates 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)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Accordingly, the AAO will not consider this

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

evidence in this proceeding. Nevertheless, there is no evidence showing that these certificates are nationally or internationally recognized prizes or awards for excellence in the field rather than institutional forms of recognition issued by a school with which the beneficiary has a direct business relationship (providing consulting services). Accordingly, the petitioner has not established that the beneficiary meets this criterion.

Published material 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 general, 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 level from a local publication. 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.²

The petitioner submitted articles and online content about rock singer and songwriter Elan Sara DeFan, sister of Jan Carlo DeFan. For example, a January 2006 article in the *Guadalajara Reporter* entitled "Tapatia singer writes songs in English" states:

In order to succeed in the music industry, Guadalajara native Elan Sara Defan and her family left home when she was 16 and headed to the United States. Now, at 22, she is the first internationally successful Latin American independent artist, as well as the first Latina to begin her career with an entirely self-written English language album ("Street Child").

* * *

(the entertainment company [REDACTED] started with her brother [REDACTED]), will bring the Fermatta Academy of Music to Guadalajara in 2006.

* * *

and her brother [REDACTED] pieced together most of "Street Child" in the spare bedroom of their parents' apartment, opened Silverlight Records and never looked back.

None of the published articles submitted by the petitioner were about the beneficiary. The plain language of this regulatory criterion, however, requires that the published material be "about the

² 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, for instance, cannot serve to spread an individual's reputation outside of that county.

alien.” Further, the articles all predate his employment with [REDACTED] and there is no supporting evidence showing that they were published in major media.

In light of the above, 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.

We acknowledge the petitioner’s submission of several reference letters praising the beneficiary’s talent as an administrator and discussing his work for [REDACTED]. Talent and employment in one’s field, however, are not necessarily indicative of original business-related contributions of major significance. The record lacks evidence showing that the beneficiary has made original contributions that have significantly influenced or impacted his field.

[REDACTED] with the firm [REDACTED]
California, states:

[The beneficiary] is the Vice President for Quality for [REDACTED] which is the entertainment company who signed Latin superstar Elan. I represent [REDACTED] as its General Counsel and in a variety of matters.

As the head of his Division, [the beneficiary] monitors technical and administrative quality of the entire organization. [The beneficiary] makes the organizational and administrative divisions run efficiently. [The beneficiary’s] contribution to [REDACTED] is of extreme benefit to the company, and has led to increased sales, promotion and productivity. I do not hesitate to say he is among the best in his field.

Senior Commercial Director, Corporación Interamericana de Entretenimiento,
Mexico, states:

[The beneficiary] works at [REDACTED] which is the parent company of [REDACTED] which in turn is the record label Latin star [REDACTED] is signed to. [The beneficiary], who holds the post of Vice President of the Quality Division at [REDACTED], is responsible for the technical quality and administrative quality of the entertainment company. [The beneficiary] makes sure the company’s organizational and administrative divisions are functional to the highest of standards. He is in my estimate a very bright executive. He is a very good administrator and has a very unique way with people, he has an ability to make things go right.

[REDACTED] Mastering Engineer, Capitol Mastering, California, states:

[The beneficiary’s] diligent work at [REDACTED] which is [REDACTED] record label is greatly appreciated for our continual business with [REDACTED] and their artist.

[The beneficiary] is currently the Vice President for Quality at the company. He is responsible for the administrative as well as the technical quality. He is very good at what he does, in my personal experience, working with [REDACTED] has been a pleasure and having [the beneficiary] supervising the company's administrative as well as technical quality will ensure many years of prosperous business with the company.

While the beneficiary has helped improve the quality of business operations for [REDACTED] there is no evidence demonstrating that this work constitutes original contributions of major significance in his field. For example, there is no evidence showing that the beneficiary's work has impacted the entertainment industry beyond his employer and its business relationships.

[REDACTED] Market Expansion Manager, Microsoft Corporation, states: "A university graduate with a major in international business administration, [the beneficiary] is also a natural administrator and understands the music business."

Senior Director of Latin Music, Broadcast Music, Inc. (BMI), California, states:

I deal with [REDACTED] on a regular basis due to the fact that [REDACTED] is one of BMI's affiliate publishing companies. I can confidently say that [the beneficiary] is a key element of the organization, making sure it functions 100%. I am not hesitant in saying that he is one of the best in his field.

[REDACTED], California, states:

I currently represent [REDACTED] in several matters and it is through [REDACTED] that I had the opportunity to become acquainted with [the beneficiary] who is the Vice President for Quality for such company.

[REDACTED] is a relatively young corporation but has been very successful and is now branching out to different countries around the world. It is my belief that since [the beneficiary] started his employment with [REDACTED] there has been a marked improvement in the quality of the products offered by the company and each of its affiliates with whom [the beneficiary] is involved.

[REDACTED] Associate Director, Epiica Consultants, Mexico, states:

Due to the close relationship I have with [REDACTED] and his sister [REDACTED] I have seen up close the admirable work of [the beneficiary]. [REDACTED] has flourished since [the beneficiary] started working as Senior Vice President for Quality at [REDACTED]. From what I have observed [REDACTED] career is at its highest point of success since her professional career launched over 14 years ago.

I have attended several shows given by [REDACTED]. Performance wise they have always been great but recently I have notice [sic] a tremendous improvement in the quality of the show in many different aspects of their production. The audio, video coordination and lighting for starters are absolutely amazing. This is directly attributable to [the beneficiary's] quality supervision of the show.

We acknowledge that the beneficiary has performed admirably in ensuring the quality of Elan's concerts and products, but there is no evidence showing that his work was original or that it was of major significance to the entertainment industry.

Director, Fermatta Music Academy, Mexico, states:

I deal with [REDACTED], on a regular basis. I can state that [the beneficiary] is a key element of the organization and a very skillful worker making sure it is 100% operational all the time and correcting any quality problems on the spot and establishing firm policy to prevent any future problems. I truly believe [the beneficiary] to be an essential part of the company, he is from what I have observed a very hard worker.

[REDACTED] Executive Director, Fermatta Music Academy, states:

I have had the pleasure of working with [the beneficiary] on several different areas, one of them being quality inspection work he has done at the Fermatta Music Academy.

* * *

From the beginning of his consultancy work in regards to quality at Fermatta, the school has had a tremendous increase in student enrollment. Under his guidance new equipment has been purchased, facility usage has been maximized and student graduations is at its [sic] highest point.

Latin superstar [REDACTED] is the spokesperson for our institution so I am very well aware of her career. Coinciding with the time when [the beneficiary] started working with [REDACTED] supervising quality control of her career, her career has flourished.

While the beneficiary may have performed admirably as a consultant for the Fermatta Music Academy, there is no evidence demonstrating that this work is tantamount to original contributions of major significance in his field.

[REDACTED], Executive Director, Satus Media, Mexico, states: "[REDACTED] is at a crucial point in her career and [the beneficiary] has made it possible for her to have the best quality in products and concerts."

[REDACTED], Chief Executive Officer, Undercover Media, Australia, states:

[The beneficiary] is one of the unique members of Elan's team and from the start he has made a huge difference in many aspects. . . . Elan is an inspiring example of artistic integrity and this has been carefully safeguarded by [the beneficiary].

Elan has sold over 1.5 million units of her music worldwide and is now one of the most sought after independent artists from Latin America. This is a result in part by [the beneficiary's] work.

We note that the beneficiary did not begin working with [REDACTED] until 2007 and there is no evidence showing that the success of Elan's first two albums was primarily attributable to the beneficiary's work.

With regard to the beneficiary's achievements in the entertainment industry, the letters of recommendation do not specify exactly what the beneficiary's original artistic or business-related contributions have been, nor is there an explanation indicating how any such contributions were of major significance in his field. 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. While the beneficiary has earned the admiration of those offering letters of support, the record lacks evidence showing that his work constitutes original contributions of major significance in his field consistent with sustained national or international acclaim. For example, the record does not indicate the extent to which his work has impacted others in his field nationally or internationally, nor does it show that the entertainment industry has significantly changed as a result of his work.

In this case, the recommendation letters submitted by the petitioner are not sufficient to meet this regulatory criterion. USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the beneficiary's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Thus, the content of the writers' statements and how they became aware of the beneficiary's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of an entertainment industry executive who has sustained national or international acclaim. Without extensive documentation showing that the beneficiary's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude 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.

On appeal, the petitioner submits a June 11, 2008 letter from

stating:

I am a musical artist and have been a professional musician for more than 15 years. I also hold and executive position at [REDACTED] . . . and I am the official Spokesperson for the Fermatta Music Academy (one of the few Berklee College of Music affiliates around the world).

* * *

Since [the beneficiary] started working at [REDACTED] as Vice President for Quality the company's statistics have risen to an all time high. [The beneficiary] has also been working directly with me as Chief Quality Supervisor in every aspect of my career. Since [the beneficiary] started working with me, my statistics as an artist have also risen tremendously.

* * *

He has maintained impeccable quality of my products (CDs, Videos, Merchandising, Touring, Recordings, Marketing and Show Production).

Last year I received an Independent Diamond Record Award for the sale of over 1.5 Million Records of my music. This an unheard of number for a Latin American independent artist.

* * *

We have received great praise from fans and critics for the production of the shows, the quality of the sound and the video synchronization as well as staging. All this has been, in a large degree, created and supervised by [the beneficiary].

* * *

Ever since [the beneficiary] has been involved in the day to day activities of [REDACTED] as well as on my own personal singing career, I have seen clear improvements with real statistics.

The demand for our shows have risen over 500%. Before we had 3 or 4 main shows in each country. Now we are doing over 25 shows.

CD sales have skyrocketed and we have sold more merchandising in this tour than we ever sold on previous tours.

I strongly believe that if it wasn't for the strict guidance of [the beneficiary], I wouldn't have had this much success.

The petitioner also submits a June 12, 2008 letter from

stating:

I personally hand picked [the beneficiary] as Vice President for Quality and chose him to supervise every aspect of [redacted] career, from the quality of her CDs, merchandising, production of her shows (this involves performance, audio, video among many other things) as well as her music videos. He is an admirable professional with expertise in many areas.

* * *

[The beneficiary] has earned a very special place in [redacted] and is most certainly one of our most valuable employees.

[redacted] does not specify how many employees work for [redacted], nor is there any organizational chart or other similar evidence showing the beneficiary's position in relation to that of the other company executives or employees.

A second letter submitted on appeal from [redacted] dated June 18, 2008, primarily discusses the successes and achievements of his sister [redacted] and her band rather than focusing on the beneficiary's role for [redacted] states that the beneficiary "has done exemplary work with [redacted] and has become an extremely valuable member of our team."

The record lacks evidence showing that [redacted] has a distinguished reputation in the entertainment industry. Further, the letters submitted by the petitioner do not establish that the beneficiary's role for his employer was leading or critical in the same manner as that of [redacted] or [redacted]. The documentation submitted by the petitioner shows that the beneficiary has performed admirably as Vice President for Quality at [redacted] since March 2007, but it does not establish that he was responsible for his employer's success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim.

In light of the above, 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 compact discs and videos of [redacted] musical performances, but there is no evidence establishing that her achievements as a performing artist were primarily attributable to the beneficiary or that he receives a substantial percentage of royalties from Elan's music sales. Further, there is no evidence of documented "sales" in the form of audited financial statements. According to Part 5, item 2 of the Form I-140 petition, [redacted] has a "Gross Annual Income" of \$900,000 and "Net Annual Income" of \$300,000. The petitioner has not established that these income amounts demonstrate significant commercial success for [redacted] or the beneficiary. Accordingly, the petitioner has not established that the beneficiary meets this criterion.

In this case, 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 at 8 C.F.R.

§ 204.5(h)(3). The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

On appeal, counsel argues that the position held by the beneficiary is unique and that the standard categories of evidence do not apply to his field. Counsel does not identify any evidence in the record that supports such a conclusion. The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of “comparable evidence” only if the ten criteria “do not readily apply to the beneficiary’s occupation.” The regulatory language precludes the consideration of comparable evidence in this case, as there is no evidence that eligibility for visa preference in the beneficiary’s occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). For example, there is no evidence showing that the high salary criterion at 8 C.F.R. § 204.5(h)(3)(ix) is not applicable to executives in the entertainment industry. Where an alien is simply unable to meet three of the regulatory criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

Nevertheless, the evidence submitted in support of this petition has already been addressed in our discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). Counsel does not specify the documentation the petitioner requests re-evaluation of as comparable evidence. Further, there is no evidence showing that such documentation constitutes achievements and recognition consistent with sustained national or international acclaim at the very top of the beneficiary’s field. While reference letters can provide useful information about an alien’s qualifications or help in assigning weight to certain evidence, such letters are not a substitute for objective evidence of the alien’s achievements and recognition as required by the statute and regulations. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Further, the classification sought requires “extensive documentation” of sustained national or international acclaim. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). The commentary for the proposed regulations implementing the statute provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Primary evidence of achievements and recognition is of far greater probative value than opinion letters from individuals selected by the petitioner. 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 opinion letters attesting to the alien’s standing in the field are “comparable” to the strict documentation requirements in the regulations setting forth the ten criteria.

Counsel contends on appeal that the director erred by failing to request further evidence before denying the petition. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) provides:

If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack

of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the record lacks initial evidence or does not demonstrate eligibility, the cited regulation does not require solicitation of further documentation. With regard to counsel's concern, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

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 above almost all others in his field at a 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.