U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 28 2009
SRC 07 040 53761

IN RE: Petitioner: [redacted]
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.

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 Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in business, 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 sets forth several allegations of error and asserts that he will submit a brief and or additional evidence within 30 days. Counsel dates the appeal January 15, 2008. As of this date, more than 19 months later, this office has received nothing further. Thus, the appeal will be adjudicated based on the allegations of error set forth on the Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO).

Counsel notes that the director considered the evidence under some criteria as if the petitioner were seeking classification in the arts rather than in business. While we concur with counsel that the director erred in sometimes characterizing the petitioner as a musician rather than a music manager, the director did state that the evidence did not demonstrate eligibility in the arts or in business. In addition, as explained below, the director's analysis regarding deficiencies in the evidence submitted is applicable regardless of the field under which the petitioner is considered. Moreover, for the reasons discussed below, the director's analysis resulted in the wrong conclusion for only one criterion, the leading or critical role criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii). As the petitioner must meet at least three of the ten regulatory criteria, the director's error did not prejudice the petitioner.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). As the AAO is competent to evaluate the evidence under the correct field on appeal, we find that the most expedient remedy is to consider the evidence under the correct field on appeal rather than remanding the matter to the director for a new decision. For the reasons discussed below, the petitioner has not submitted sufficient evidence to meet the regulatory requirements as a music manager.

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, 60898-9 (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 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 music manager. 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 receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The petitioner submitted a 1997 newsletter for the band Farmer's Daughter indicating that the petitioner, the manager of this group, was awarded Manager of Year at the Canadian Country Music Awards (CCMA). An undated article in *West Coast News* also mentions this award but does not appear to be contemporaneous news coverage of the award. The petitioner did not submit a copy or photograph of the actual award. The petitioner did submit evidence that he was nominated for the same

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

award in 2003, 2005 and 2006. The petitioner also received a plaque in 2007 from Midas Records in recognition of a number one single from the band he managed, The petitioner also submitted evidence of CCMA and Juno awards won by groups managed by the petitioner.

The director acknowledged the 1997 award but concluded that it was not evidence of *sustained* acclaim ten years later in 2007 when the petition was filed. On appeal, counsel asserts that the petitioner and the bands he represents have won "several lesser nationally or internationally recognized awards."

The regulation at 8 C.F.R. § 204.5(h)(4) only allows the submission of comparable evidence where the criteria at 8 C.F.R. § 204.5(h)(3) are not readily applicable. The record demonstrates that there are awards in the petitioner's occupation. Thus, we will not accept comparable evidence to meet this criterion. As such, according to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i), the petitioner must demonstrate his receipt of qualifying awards or prizes; awards won by groups managed by the petitioner that he did not personally receive will not be considered.

Recognition from a record label for managing a group whose song reached number one is not a nationally recognized award or prize. We will consider this recognition, however, in considering whether the petitioner has performed in a leading or critical role for an organization with a distinguished reputation, the criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii).

A claim that the petitioner won the 1997 CCMA Manager of the Year award contained in a band's newsletter is not primary evidence of an award or prize. As stated above, the petitioner did not submit a copy or photograph of the 1997 award. Only where the petitioner demonstrates that primary evidence is nonexistent or unavailable may the petitioner submit secondary evidence. 8 C.F.R. § 103.2(b)(2). The record contains no evidence that the petitioner's alleged 1997 CCMA Manager of the Year Award is unavailable. Thus, we need not accept secondary evidence of that award. Moreover, a contemporaneous listing in an official publication or other major media would carry more evidentiary weight than a band newsletter.

The remaining "awards" are nominations. The petitioner has not established that the industry awards issued by the CCMA are so prestigious that a mere nomination can be considered a nationally or internationally recognized award or prize. The regulatory criterion specifically requires the alien's receipt of nationally or internationally recognized prizes or awards.

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 evidence that "12 Gauge" is a corporate member of the Canadian Country Music Association. The petitioner did not submit evidence of his own personal membership at

that time. The director noted the lack of evidence of the petitioner's membership in her request for additional evidence. In response, the petitioner submitted his personal membership card for his "sterling" membership in the association. The petitioner did not submit the requirements for sterling membership. Thus, the director concluded that the petitioner had not established that he meets this criterion. On appeal, counsel merely reiterates this membership.

The plain language of the criterion at 8 C.F.R. § 204.5(h)(3)(ii) requires membership in an association that requires outstanding achievements of its members. Thus, the membership requirements of the association are an element of this criterion for which the petitioner must submit evidence. Without evidence setting forth the sterling membership criteria, such as the official association bylaws, we cannot determine whether the association requires outstanding achievements of its sterling members. Thus, the petitioner has not submitted the initial required evidence to meet 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 only published materials submitted that are "about" the petitioner are an article about him in *West Coast News* and an article in a band newsletter. The remaining published materials are about bands the petitioner manages. In the request for additional evidence, the director noted that most of the materials were about bands the petitioner manages and noted the lack of evidence regarding the circulation of the publications. In response, the petitioner failed to submit the requested circulation evidence or other evidence that might demonstrate that the publications covering the petitioner are professional or major trade publications or other major media.

The director concluded that the published material submitted was not about the petitioner. On appeal, counsel asserts that the petitioner "has published material about his work promoting the bands under his tutelage."[2] Counsel mischaracterizes the regulation at 8 C.F.R. § 204.5(h)(3)(iii), which requires evidence about the alien relating to his work, and not simply about his work. The petitioner has not demonstrated that this criterion is not readily applicable to him. In fact, the record does contain two articles about the petitioner. Thus, we will not consider comparable evidence under 8 C.F.R. § 204.5(h)(4).

Despite the director's specific request, the petitioner has not documented the circulation of *West Coast News* or the band newsletter. The petitioner has also not provided other evidence suggesting that either publication constitutes a professional or major trade journal or other major media. The requirement that the published materials appear in such publications is explicitly stated in the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, the regulation also provides that the petitioner must provide the date of any published material, but the material about the petitioner in the record is undated. Thus, the petitioner has not provided the required initial evidence to meet this criterion.

[2] Counsel's use of the word "tutelage" is not consistent with the role of a band manager, who, rather than providing music coaching or instruction, handles the business issues that arise with the band.

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.

Initially, counsel asserted that the petitioner meets this criterion because the petitioner is "frequently asked for his expertise is [sic] judging talent as well as market trends." Counsel further asserted that the petitioner judges the talent of prospective clients.

The director concluded that the petitioner had not established that the petitioner's activity as a judge had earned him any acclaim and that it was expected for a musician to judge the talent of less experienced musicians. On appeal, counsel notes that the petitioner is a business manager, not a musician.

We concur with counsel that the director appears to have erred in considering this criterion as if the petitioner were a musician. Nevertheless, this error did not prejudice the petitioner. Considering the evidence properly, it does not reflect that the petitioner has judged others "in the same or an allied field." Rather, the petitioner, a business manager, judged the work of musicians and, according to counsel, "market trends," which do not represent the work of others.

Even if we considered musicians to be in an allied field to business management, the inherent business management duties involved in informally reviewing musicians seeking the petitioner's representation are not indicative of or consistent with national or international acclaim.

In light of the above, the petitioner has not established that he meets this criterion through selection to perform in an official judging capacity of others in the business management field or an allied field.

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

Initially counsel asserted that the petitioner "has served a unique role for the music industry through his efforts to develop a new generation of Country artists." Counsel credited the petitioner with country music's success in Canada. The petitioner submitted letters from members of the music industry praising the petitioner's skills and professionalism as a music manager, crediting him with helping the bands he represents succeed in a competitive industry. None of the letters identify specific original contributions or explain how the petitioner has influenced the field of music management.

The director concluded that the petitioner had not demonstrated that he meets this criterion. On appeal, counsel asserts that the letters serve as "comparable evidence" under 8 C.F.R. § 204.5(h)(4). The regulation at 8 C.F.R. § 204.5(h)(4) permits the submission of comparable evidence where the regulatory criteria are not "readily applicable" to the petitioner's field. Counsel has not demonstrated that the regulatory criteria are not "readily applicable" to the petitioner's field. It remains that the

record lacks evidence that the petitioner has made original business-related contributions of major significance to the music management field.

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

As noted by counsel on appeal, the director erred in considering the evidence under this criterion as if the petitioner were a musician rather than a music manager. The record reflects that the petitioner is a music manager for award-winning music groups and that his role had garnered him nominations for Manager of the Year and mentions in the media. Thus, we are satisfied that the petitioner meets this criterion. The director's error, however, did not prejudice the petitioner as the petitioner has still not demonstrated that he meets at least three of the regulatory criteria.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

Initially, the petitioner submitted a letter from [redacted], the petitioner's certified public accountant, asserting that his company's gross earning were $227,046 in 2004 and $162,301 in 2005. In response to the director's request for additional evidence, the petitioner submitted the petitioner's 2006 Form I-140 attachment Schedule C reporting the income of his company, Big Ride Management, LLC. The Schedule C reflects gross income of $135,707. The gross income of the business, however, does not reflect the petitioner's personal remuneration. For example, Part II, line 11 reflects $58,920 paid in contract labor. Thus, these funds constitute someone else's remuneration.

As noted by counsel, the director erred in stating that the evidence submitted under this criterion was not evidence of the petitioner's significantly high remuneration as a musician. The director did state, however, that the evidence was also insufficient to demonstrate extraordinary ability as a music manager.

Significantly, the record lacks evidence that the petitioner's actual remuneration is significantly high "in relation to others in the field" as required under 8 C.F.R. § 204.5(h)(3)(ix). According to the plain language of this regulation, the petitioner must provide evidence of the high end remuneration in the occupation nationally for comparison purposes. The record contains no such evidence. Thus, the petitioner has not provided the initial required evidence to meet 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 music manager 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 music manager, 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.