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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**

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LIN 08 028 53573

Office: NEBRASKA SERVICE CENTER

Date: JUN 16 2009

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.

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. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 in the arts. 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.

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.

The 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 has 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, filed on October 9, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a musician and producer. 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.

The record reflects that the petitioner is the beneficiary of an approved nonimmigrant petition as an alien with extraordinary ability under section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i). While USCIS has approved an O-1 nonimmigrant visa petition filed on behalf of the petitioner, that prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. Although the words "extraordinary ability" are used in the Act for both the nonimmigrant O-1 classification and the first preference employment-based immigrant classification, the applicable regulations define the terms differently for each classification. The O-1 regulation explicitly states that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines 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 evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear regulatory distinction between these two classifications, the beneficiary's receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability.

The petitioner has submitted evidence that, he claims, meets the following criteria.¹ A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three of the criteria outlined in 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner 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).

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 May 8, 2007 affidavit from [REDACTED], president of *Associação Brasileira de Documentaristas* (ABD), certifying that the petitioner received an award for Best Soundtrack for the movie *Mente Capto* during the Competitive ABD *Cine Goias* Show, held

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

during the IV International Film and Environmental Video Festival (IV FICA) from June 5-9, 2002. Counsel asserted:

According to the statistics provided by the staff of the IV FICA, held between 05 and 09 of June of 2002, 429 films from 63 countries registered to participate in this international event. 49 films from 24 countries were selected to be present at the event and compete for the awards. Other 100 films from 19 Brazilian states also participated in the festival, as well as musicians, actors, and entertainers. This is a major international event in Brazil and [the petitioner] was recognized and awarded for his distinguished work (best soundtrack) in the movie *Mente Capto*.

The petitioner submitted copies of pages from the website of FICA, which appear to indicate that the film *Mente Capto* won the award for best soundtrack. However, these documents are in Portuguese and not accompanied by English translations. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

In a request for evidence (RFE) dated February 13, 2008, the director advised the petitioner:

You claim that you received an award for Best Soundtrack during the Competitive ABD Cine Goias Show in June of 2002. Please provide a copy of the actual award that clearly identifies the recipient. You must also provide official documentary evidence that establishes the service you provided for the movie *Mente Capto*. Finally, you must provide evidence that establishes the significance of the award, its scope, the requirements necessary to compete for the award, and the criteria utilized to select the recipient.

In response, the petitioner submitted a photograph of the ABD Cine Goias award for Best Soundtrack. The award does not indicate to whom it was given. The petitioner also submitted a February 28, 2008 letter from [REDACTED] who stated that she was the creator, producer and director of the movie *Mente Capto*, and that she shared all of the credits with her team members. She further stated that she supervised the petitioner's work as he created all of the tracks, and produced and recorded the soundtrack for the film. The record indicates that the petitioner wrote the soundtrack for *Mente Capto* and sufficiently establishes that the petitioner was the recipient of the ABD *Cine Goias* award for Best Soundtrack in 2002.

In his March 22, 2008 letter accompanying the petitioner's response to the RFE, counsel points out that the objectives of FICA as stated in its regulations, are to "promote, show and award prizes to . . . films and videos, in either fiction or documentary format, focusing on environmental issued [sic], produced in any part of the world." The petitioner included a page from the website of X FICA, which was scheduled to be held from June 10-15, 2008. Additionally, on appeal, counsel asserts that the IV FICA attracted "over 63 countries and 429 works related to films and short movies about the environment." Counsel argues that "[s]uch an

international festival would not attract so many countries and movies if it was not recognized as an important event.” An event that bills itself as an international event and attracts participants and selects winners from an international pool does not automatically mean the event is internationally recognized as denoting excellence in the field. The petitioner submitted no documentation such as media coverage or similar documentation to establish that awards or prizes presented by FICA are nationally or internationally recognized as awards of excellence in the field.

Counsel also stated in his March 22, 2008 letter that the petitioner was awarded the *Jú Onze e 24* trophy in December 1995, which is presented yearly “by TV entertainer Juilo Vilella, for contributions of professionals in the fields of art, culture and music;” the Best Soundtrack trophy by [REDACTED] for the petitioner’s “contributions in the theatrical arena;” and a 2005 *Jú Onze e 24* award as a member of The Not yet Famous Blues Band (TNYFBB). The petitioner submitted photographs of these awards; however, he submitted no documentation to establish that they are nationally or internationally recognized in his field of endeavor as awards or prizes for excellence.

The petitioner has failed to establish 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.

To demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or work experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

The petitioner claims to meet this criterion based on his membership in the National Academy of Recording Arts & Sciences (NARAS), the organization that sponsors the GRAMMY Awards. Counsel asserts that, as a producer, the petitioner is requested to vote in all “artistic fields being contemplated by the Awards.” The petitioner submitted a membership card indicating that he had become a member of the Los Angeles Chapter of the organization in 2007, the year he filed his petition. However, he submitted no evidence documenting the membership requirements of the organization. On appeal, counsel asserts that to become a member of the organization, “the artist must be referred by another voting member, and must submit a resume of his/her professional career with references.” Nothing in the record supports counsel’s assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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). Even if the record supported counsel's assertions, the membership requirements as outlined by counsel do not indicate that the organization requires outstanding achievements of its members.

The petitioner has failed to establish that he 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 order to meet this criterion, published materials must be primarily about the petitioner and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

The petitioner submitted copies of several newspaper items dating from 1992 to 2006. An article about the petitioner appeared in a publication dated April 2, 1997. The copy of the document submitted by the petitioner, however, did not identify the publication. Other items appeared in *O Popular*, which counsel indicated is a major newspaper. A March 6, 1999 article about music in Goias is not primarily about the petitioner or his work. A March 29, 1998 article about ██████████ ██████████ remake of *Peter Pan* noted that he had chosen the petitioner to compose the music script and choreograph the performance of one of the actors. This article is about Mr. ██████████ and not about the petitioner or his work. A March 17, 2001 article discusses the release of a new compact disc by the petitioner. An October 23, 2002 article discusses the release of a compact disc by ██████████ and notes that the petitioner shared the arrangement and production with ██████████. This article is not about the petitioner but about ██████████. An undated article discusses the invitation received by the petitioner's band, TNYFBB, to appear at an after party for the Latin GRAMMY Awards. The remainder of the items appeared in the publication *O Popular*, and appears to be announcements of the petitioner's performances at various locales. These articles are not about the petitioner or his work.

The evidence submitted by the petitioner, therefore, consists mostly of articles announcing his performance in various forums and do not discuss the petitioner or his work. Others are primarily about other individuals with the petitioner identified only as a contributor to their work. Section 203(b)(1)(A)(i) of the Act requires that the petitioner establish sustained acclaim through extensive documentation. The petitioner submitted only three articles, including one that does not identify the publication as required by the regulation and another undated one that discusses his band, that are about the petitioner or his work. These three articles are not sufficient to establish the sustained acclaim required by section 203(b)(1)(A)(i) the Act.

Additionally, while counsel asserts that *O Popular* is “the most important newspaper in the State of Goias,” the petitioner submitted no documentation regarding the paper’s circulation or any other information about *O Popular* to indicate that publication in the newspaper is consistent with national acclaim rather than regional recognition in Goias. The unsupported statements of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Counsel also asserts that the petitioner’s “extraordinary professional career can be seen and heard at his website” on myspace.com. The fact that information about the petitioner is available on his myspace page is not persuasive. In today’s world, the Internet is an arena available to any user with access to a computer regardless of notoriety or recognition in the arts. To ignore this reality would be to render the “major media” requirement in the regulation at 8 C.F.R. § 204.5(h)(3)(iii) meaningless. We are not persuaded that international accessibility on the Internet by itself is a realistic indicator of whether a given website constitutes publication in “major media.” Moreover, the underlying purpose of this criterion is to demonstrate that major media distributors consider the alien and his work worthy of coverage. Accessibility on a site that allows anyone to upload their information does not carry the evidentiary weight of independent journalistic coverage in the major media. The petitioner has not demonstrated that his page on myspace.com constitutes major media coverage about him and his work.

The petitioner has failed to establish 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.

In response to the director’s RFE, the petitioner submitted a copy of a December 12, 2007 letter from the NARAS, enclosing a “final ballot” for the petitioner to vote for winners in the 50th Annual GRAMMY Awards. He also submitted a copy of a March 10, 2008 letter from The Recording Academy for the Los Angeles Chapter, enclosing a ballot for the petitioner to vote for seats on the Board of Governors. In denying the petition, the director noted that these events occurred after the filing date of the petition and therefore cannot be used to establish the petitioner’s sustained acclaim for purpose of this visa petition.

On appeal, counsel acknowledges that these events occurred after the filing date of the petition but stated:

Whether or not said ballots occurred after the I-140 petition form was filed, [the] fact is that [the petitioner] is contributing along with many other artists with the promotion and success of an international event, The GRAMMYS, which generates millions of dollars to the music industry in the United States and thousands of direct and indirect jobs.

Nonetheless, the petitioner submitted no documentation to establish that the petitioner contributed to the success of the GRAMMYs prior to filing his petition. As noted by the director, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has failed to 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.

According to counsel, the petitioner meets this criterion because his band, TNYFBB, "was the first Brazilian band to perform at the LATIN GRAMMY's," and that "[s]uch participation was very significant because it established the cultural bridge between the United States and Brazil." Counsel further asserted that:

Such invitation was so important, that only three bands were invited and performed at the GRAMMY's that year. One of the bands performing was JUANES, awarded with two GRAMMY's in that same year. Yet, because of the importance of having a Brazilian band at the event, JUANES was requested to be the first band to perform, opening the event to the major presentation by the Brazilian band TNYFBB.

Nothing in the record supports any of counsel's assertions, particularly the importance of having a Brazilian band at the GRAMMYs. *See Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Even if the record supported counsel's assertions that the petitioner's band was the first Brazilian band to appear at the Latin GRAMMY's is not evidence that the petitioner has made a contribution of major significance to his field of endeavor. Additionally, the invitation was issued to the band TNYFBB and it was the band that performed at the GRAMMYs. The petitioner submitted no documentation that his performance or his contribution was significant beyond that of his group.

On appeal, counsel states that the petitioner "has produced over his career over 30 [compact disc] records with song[] interpretations recognized internationally" and that he has "participated as Musical Director and Sound Effects in one film and in theatrical plays." The petitioner provided what he states are copies of the covers of each of these compact discs and information regarding the film *Uma Saga Brasileira* and the play *A Visita da Vehlha Senhora*. The documentation submitted by the petitioner, however, does not confirm his role in all of the work he alleges. Further, the petitioner provides no documentation that his role in any of these productions constituted a contribution of major significance to his field.

The petitioner has failed to establish 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.

To meet this criterion, the petitioner must show that he performed a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

According to counsel:

The highest recognition [the petitioner] received in his brilliant and successful career was an invitation by the Latin Academy of Recording Arts & Sciences, Inc. to perform at the 6th Annual Latin GRAMMY After Party Celebration which took place in Los Angeles, California, on November 3, 2005. [Emphasis omitted.]

The petitioner submitted a copy of a November 17, 2005 letter from the NARAS thanking TNYFBB for its contribution to the after party following the 6th Annual GRAMMY Awards. Nothing in the letter or otherwise in the record establishes that the performance of the petitioner's band at the after party was in a leading or critical role. Further, while the NARAS, in its production of the GRAMMY Awards, enjoys a distinguished reputation, the petitioner submitted no documentation that the after party enjoys a similarly distinguished reputation.

The petitioner has failed to establish that he 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.

In his March 22, 2008 letter accompanying the petitioner's response to the RFE, counsel stated that the petitioner signed a contract to produce a compact disc by [REDACTED] which sold over 500,000 copies. Counsel asserted that the petitioner was entitled to 18% of the price charged by the distributor to the retailer, and was expected to earn the equivalent of about \$317,000.

The petitioner, however, did not provide a copy of this contract and did not provide any information to establish that his contract percentage is significantly high relative to others in his field.

The petitioner does not pursue this issue on appeal and has failed to establish that he 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.

Counsel also asserted in his letter accompanying the petitioner's response to the RFE that the petitioner "signed a contract with a Brazilian major recording company . . . to release and

commercialize [his] compact disk beginning November 2007.” Counsel alleges that the compact disc was “so successful that MB Records . . . decided to commercialize it on iTunes.” We note first that the alleged contract, which the petitioner did not provide, was after the filing date of the petition. Therefore, it is not evidence of the petitioner’s qualifications for this criterion as of the date the petition was filed. *See Matter of Katigbak*, 14 I&N Dec. at 49. Second, the petitioner submitted no evidence to document the sales of the compact disc, as required by the regulation. The same is true of the compact disc that he stated that he produced for [REDACTED]. As noted by the director, the sales of compact discs by [REDACTED] are not evidence of the petitioner’s commercial success under this criterion. Even if the sales of [REDACTED] compact disc were partially attributable to the petitioner, the petitioner submitted no evidence that those sales constitute a commercial success. To the contrary, the printouts submitted from CD Universe and Amazon.com indicate that the recording ranked 481,812 and 350,321, respectively, in sales.

The petitioner has failed to establish that he meets this criterion.

The petitioner submitted letters of reference from several individuals who attest to his talent as a musician. However, none attest that the petitioner is one of the small percentage who has risen to the top of his field.

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 his field of endeavor. Review of the record, however, does not establish that the petitioner 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. 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.