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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

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 26 2009
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IN RE: Petitioner:
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:

SELF REPRESENTED

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 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.

On appeal, the petitioner submits a personal statement that lists her achievements, but which does not address the director's specific concerns. She also submits additional evidence. For the reasons discussed below, we uphold the director's findings.

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. 26, 1991). Specific supporting evidence must accompany the petition to document the "sustained national or international acclaim" that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international acclaim through evidence of a "one-time achievement (that is, a major, international recognized award)." *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.* However, the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), or under 8 C.F.R. § 204.5(h)(4), must depend on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. 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).

This petition, filed on December 15, 2006, seeks to classify the petitioner as an alien with extraordinary ability as a pianist. The petitioner initially submitted the information she submitted in support of her non-immigrant O-1 visa petition, her employment contract, education certificates, information about performances, news articles, letters of recommendation, and information about her apprentice position. In response to a Request for Evidence ("RFE") dated May 13, 2008, the petitioner submitted additional letters of recommendation and documents previously submitted as part of her O-1 visa petition. On appeal, the petitioner submits additional letters of recommendation and information about performances.

In her original submission, the petitioner relied heavily upon the approval of her O-1 nonimmigrant visa petition as the reason her immigrant petition for extraordinary ability in the arts should be granted. While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different standard. It must be noted that many I-140 immigrant petitions are denied after USCIS 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 USCIS 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 USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

Moreover, the regulation at 8 C.F.R. § 214.2 (o)(3)(iv), relating to nonimmigrant aliens of extraordinary ability in the arts, provides a different standard and different eligibility criteria than those for the immigrant classification discussed below. Section 101(a)(46) of the Act. 8 C.F.R. § 214.2(o)(3)(ii) requires that an alien demonstrate "distinction" to be classified as one with extraordinary ability in the arts and further defines "distinction" as follows:

> Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

The regulation relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field 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." While the ten criteria set forth at 8 C.F.R. § 204.5(h)(3) appear in the nonimmigrant regulation at 8 C.F.R. § 214.2(o)(3)(iii), those criteria apply only to nonimmigrant aliens who seek extraordinary ability in the fields of science, education, business or athletics. Separate criteria for nonimmigrant aliens of extraordinary ability in the arts are set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv). The distinction between these fields and the arts, which appears in the nonimmigrant regulations at 8 C.F.R. § 214.2(o), does not appear in the immigrant regulations, which govern this petition, at 8 C.F.R. § 204.5(h). As such, the petitioner's approval for a non-immigrant visa classification under the lesser standard of "distinction" is not evidence of her eligibility for the similarly titled immigrant classification. Each petition must be adjudicated on its own merits under the statutory provisions and regulations which apply to the classification sought.

Regardless, 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 (BIA 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

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).

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 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 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). The petitioner has submitted evidence pertaining to the following criteria. The petitioner does not claim to meet any of the criteria not discussed below.

On July 2, 2008, the director denied the petition, finding that the petitioner did not meet any of the regulatory criteria for establishing sustained national or international acclaim at 8 C.F.R. § 204.5(h)(3).

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

The director noted that the awards and certificates received by the petitioner were "for participation in local and regional competitions and festivals, not national or international competitions." On appeal, the petitioner does not contest this finding but reiterates instead that she won the awards.

The petitioner originally stated that she won "The Ode for Pleasure" in the 1998 National Competition for Young Composers, however, we find no evidence of that award in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I. & N. Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm. 1972)).

The petitioner submitted an award for an award for participation in the 2000 Omsk Regional Competition for Orchestras and Ensembles of String Instruments, a certificate for being "The Spring dew-drop" in the 1999 Competition for Creativity of Young Performers, a certificate of participation in the "From Heart to Heart"

regional music festival, and a certificate of recognition for participating in the "concert program-presentation of Courses for Higher Qualification in ADMEV." We note that these awards and certificates were given at least three years prior to the filing of this petition so cannot demonstrate sustained acclaim. In addition, these certificates and awards were given for participation in contests and events that seem to be limited to youth or student participants and are regional in nature. A student or youth competition would not generally qualify an alien under this criterion because it would not allow the most experienced and renowned members of the field to compete so it cannot demonstrate that the alien is one of the few at the top of the field. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I. & N. Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.[1] Similarly, the language of this criterion requires national or international recognition, meaning that regional competitions would be insufficient to establish the acclaim required by this highly restrictive classification. The petitioner provided no information regarding the contests themselves such as the number of participants, the qualification of the judges, the eligibility requirements for entry in the contest, or how the participants would be judged. We also note that the plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor. The petitioner submitted no evidence of recognition for the receipt of any of these certificates or awards through, for example, news reports of the contests' results.

The petitioner provided a certificate evidencing her receipt of first place in "The Youth of the Third Millennium" contest sponsored by Omsk State University. That certificate indicates that it was awarded in the subsection of "History of musical performing arts" in the scientific competition indicating that the petitioner submitted an essay or other written work instead of performing. The petitioner submitted no evidence to show that authoring an essay about the performing arts falls within her field of endeavor which is actual performance.

To the extent that the petitioner argues that her acceptance into or graduation from the Music School No. 1 or Omsk State University constitutes an award or a prize, academic study is not a field of endeavor, but rather training for a future field of endeavor. Although a program of study may be highly competitive, only those persons who have not received a degree previously and potentially are of a particular age compete to be

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[1] While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

> [T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court's reasoning indicates that USCIS's interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

accepted by the scholastic institution. As such, those working within the field are not competing for admittance to a particular institution so that being accepted into or graduating from a particular school or program cannot constitute an award or prize within the field as a whole.

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

> *(iii) 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 petitioner and, as stated in the regulation, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should generally 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 director concluded that the materials submitted were local and not about the petitioner. The petitioner does not contest this conclusion on appeal. We review the evidence of record.

The petitioner submitted the following articles: "Schmoozing with Shostakovich" which was published in the October 2006 edition of *Executive Living*; an announcement on the Utah Symphony & Opera Education's website; and "Opera takes to the schools, including Clearfield's Holt Elementary" published September 14, 2006 in the *Ogden Standard-Examiner*. None of these articles are primarily about the petitioner as they instead talk about events or concerts and mention the petitioner only as one of the performers instead of focusing on the petitioner herself. In addition, the petitioner did not submit any information about any of these publications, for example circulation statistics, to indicate that they are professional or major trade publications or other major media. Although these articles appeared on the Internet, we are not persuaded that international accessibility by itself is a realistic indicator of whether a given publication is "major media." The petitioner submitted no evidence as to the regular readership of the websites or circulation of the publications to indicate that they constitute major media under this criterion.

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

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

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must not only be original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus,

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[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.

that it has some meaning. To be considered a contribution of major significance, it can be expected that the national or international impact will be readily apparent.

The petitioner submitted letters of recommendation in support of her petition. While letters such as these provide relevant information about an alien's experience and accomplishments, they cannot by themselves establish the alien's eligibility under this criterion because they do not demonstrate that the alien's work is of major significance in her field beyond the limited number of individuals with whom she has worked directly. Even when written by independent experts, letters solicited by an alien in support of an immigration petition carry less weight than preexisting, independent evidence of major contributions that one would expect of an alien who has achieved sustained national or international acclaim.

The letters submitted are highly complimentary of the petitioner's abilities, however, none state that she has made an original contribution of major significance to the field. For example, the December 8, 2006 letter from [redacted], adjunct associate professor at The University of Utah, states that the petitioner "is a meticulous accompanist and performer who not only provides music of high quality but adapts easily and quickly to the musical demands placed upon her." The letter from [redacted] Hample states "The sincerity and beauty [the petitioner] is able to convey is something that cannot be taught. She is an invaluable asset to her field." Other similar letters were authored by [redacted], and [redacted] These letters are insufficient to establish the petitioner's eligibility under this criterion as they do not state or demonstrate that the petitioner made an original contribution of major significance to the field as opposed to being a talented pianist.

The letter from [redacted] states that the petitioner has a "unique musical style" and that she excelled in her musical composition classes at the University. This letter does not specify how the petitioner's musical style is original nor does it state that her style has affected the field as a whole so as to be considered a contribution of major significance. In addition, no other evidence, such as articles in trade publications, was submitted to show that the petitioner employs a unique style or that such any such style impacted the field.

The petitioner also indicates that the letters should be considered as comparable evidence. The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence," but 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 in the petitioner's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). The evidence submitted by the petitioner directly applies to the above criteria and does not demonstrate sustained national or international acclaim. Where an alien is simply unable to meet three of the regulatory criteria, the plain language of 8 C.F.R. § 204.5(h)(4) does not allow for the substitution of comparable evidence.

Accordingly, the petitioner has not established that she meets this criterion.

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

This criterion generally applies to the visual, not performing, arts. Musical performances are intrinsic to the music profession just as display of art is inseparable from the profession of a visual artist. Given the statutory

requirement for sustained national or international acclaim, the evidence under this criterion must reflect sustained national or international acclaim, not simply document an alien's work experience in her field.

Most of the concerts or events identified by the petitioner, including the "Golden Voices" performance with [redacted] and the premiere of "The Grapes of Wrath" opera, occurred after the date that this petition was filed. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In any event, the evidence provided shows that the petitioner performed as a member of an ensemble or larger group of musicians and was not a headliner or a focal point of any performance such that the concerts can be considered to showcase the petitioner's art. For example, the petitioner submitted evidence that she performed as a backing singer with the "Golden Voices" choir at a Josh Groban concert. [redacted] was thus the headliner whose work was on display. The petitioner's name was not included in any of the materials submitted about this concert, thus she has not demonstrated any recognition or acclaim. Similarly, the petitioner's participation with "The Grapes of Wrath" opera did not showcase her work in particular as opposed to showcasing the work of the composer, conductor, or operatic soloists. The petitioner's performances are far more relevant to the "leading or critical role" criterion at 8 C.F.R. § 204.5(h)(3)(viii) discussed below.

Accordingly, the petitioner has not established that she meets this criterion.

> *(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

In order to establish that she performed in a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of her role within the entire organization or establishment and the reputation of the organization or establishment nationally or internationally. The selection of the petitioner for a role must be indicative of or consistent with national or international acclaim.

The petitioner submitted a July 16, 2008 letter from opera artistic director for the Utah Symphony, which stated that the petitioner "fulfilled a critical role" for the Symphony through her participation in the "Ensemble" program. The June 15, 2006 letter from [redacted] states that the petitioner was responsible for participating in the Symphony's school outreach program which is "of great significance" to the Symphony. In addition, the petitioner was responsible "for rehearsing and coaching [the] Apprentice Artists" to perform in concerts and performances. The welcome letter from [redacted], education assistant for the Symphony, indicates that "Ensemble" members are apprentices who serve for a period of one year. Three of the other four apprentices for the 2006-07 term graduated from a field of study immediately prior to joining the "Ensemble" program so were not established artists before accepting the apprentice position. The petitioner submitted no evidence differentiating her role from other performers employed by the Symphony or its management. Presumably the petitioner was not the only performer visiting the schools, giving workshops, or performing with the Symphony, so she has not provided evidence showing how her role was leading or critical. For example, the January 22, 2008 letter from [redacted] states that the petitioner "was directly responsible for accompanying a mixed quartet of singers for half a dozen programs used in nearly 250 performances." In other words, she supported four singers who were the focal point of the performance and thus has not established that this accompaniment amounted to a leading or critical role for the Symphony.

Even if the petitioner had submitted evidence showing that her role was leading or critical, the evidence submitted about the Symphony is insufficient to demonstrate that it is an organization with a nationally distinguished reputation. The January 22, 2008 letter from [redacted] states that the Symphony "is home to only one of eighteen, 52-week orchestras in the United States." The July 16, 2008 letter from [redacted] states that the Symphony "is the most prestigious and respected symphonic music and opera organization in the state of Utah." The record does not include supporting evidence to corroborate [redacted] assertions that the Symphony has a distinguished reputation. In addition, the petitioner submitted evidence that the auditions for the Ensemble program were held in several cities nationwide. The Symphony's presence in several cities has no relation to the reputation it enjoys nor does it indicate that those chosen for the Ensemble program are leading or critical. No further information was submitted about the Symphony including information about its background, standing in the community or the nation, or any other aspect of its reputation. We are unable to conclude that it enjoys a distinguished reputation.

The petitioner also submitted other letters from [redacted] and [redacted] indicating that she collaborated or performed with or otherwise provided services for other establishments in the area. These letters do not indicate the type of role that the petitioner operated in for those establishments. For example, the December 8, 2006 letter from [redacted] states that he intends to employ the petitioner for 10 to 20 hours per week but that intention "is based on availability and current hourly rates among the other pianists in [the] department." The petitioner submitted no evidence showing how part-time accompaniment would constitute a leading or critical role for any of the organizations utilizing her services. Even if the petitioner's role had been established as leading or critical, the petitioner presented no evidence regarding these establishments' background, standing in the petitioner's field, or any other aspect of their reputations.

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

In this case, the petitioner has failed to demonstrate receipt of a major, internationally recognized award, or that she meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). Review of the record does not establish that the petitioner has distinguished herself to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence is not persuasive that the petitioner's achievements set her significantly above almost all others in her field at a national or international level. **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.