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FILE:

Office: NEBRASKA SERVICE CENTER

Date:

MAR 06 2009

[REDACTED]
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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:

[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).

Mai Plussa

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.

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 seeks to classify the petitioner as an alien with extraordinary ability as a musician. 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 petitioner has submitted evidence that he claims meets the following criteria.¹

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 submitted documentation that reflects he is a member of the American Society of Composers, Authors and Publishers (ASCAP). According to the documentation submitted by the petitioner, to join ASCAP as a writer:

[Y]ou must be the writer or co-writer of a musical composition or a song that has been:

- commercially recorded (CD, record, tape, etc.);
- or, performed publicly in any venue licensable by ASCAP (club, live concert, symphonic concert or recital venue, college or university, etc.);
- or, performed in any audio visual or electronic medium (film, television, radio, Internet, cable, pay-per-view, etc.);
- or, published and available for sale or rental.

In her May 9, 2007 letter accompanying the petitioner's response to the director's request for evidence (RFE) dated February 15, 2007, counsel stated, "ASCAP is the most recognized organization in the field for musicians, authors, composers and publishers and it is only the select few who are accepted to its membership" and that "Their stringent criterion is a hallmark for their reputation." Nonetheless, the documentation submitted does not support counsel's assertions. The membership requirements do not establish any threshold of success for the applicant, merely that his or her work has received more than a private screening.

On appeal, counsel again asserts that ASCAP has stringent criterion for membership and states that the organization "is dominated by well known and successful professionals in the field of music" and names several well-known artists such as Madonna, John Mayer, Lenny Kravitz, Usher, Coldplay and Jay-Z. However, the success of some of ASCAP's members does not

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

impute a requirement that all of its members must exhibit and maintain a similar level of success prior to becoming a member. The documentation submitted by the petitioner does not establish that ASCAP requires outstanding achievement as a condition of membership.

With the petition and again on appeal, counsel asserts that the petitioner also meets this criterion based on his membership in EMI and Drummer Zone. However, the petitioner submitted no documentary evidence of his membership in either of these organizations and provided no evidence as to their membership requirements.

The evidence does not establish that the petitioner meets 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.

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.

In her letter accompanying the petition, counsel states:

[The petitioner] and his work has [sic] been the subject of numerous artistic profiles, articles, magazine covers and reviews in major media throughout the world for his membership [in] the internationally famed Band "The Chelsea Smiles" as well as his former bands, Steel Prophet and Vindikation.

The petitioner submitted a copy of an article about his band, [REDACTED], that he stated appeared in the August 25 to September 1, 2005 edition of *LA Weekly*. We note that nothing in the article or in the document indicates that it was published in *LA Weekly*. 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, however, submitted another article from the March 10-16, 2006 edition of *LA Weekly* by the same writer. This article mentions a performance by the petitioner's band but does not name the petitioner or discuss his individual performance. The petitioner submitted copies of articles from other publications, such as *Skratch Magazine* reprinted on the website Myspace, Blabbermouth.net, the *Long Beach Union Weekly*, and the *Daily Forty-niner* also reprinted on Myspace, all of which discuss performances of the petitioner's bands. However, none mentions the petitioner or his individual work. Other documentation includes reviews of the recordings

released by groups in which the petitioner played. However, none discussed the specifics of the petitioner's work as the drum player with the groups.

In response to the director's RFE, the petitioner submitted a copy of a press kit for his group, [REDACTED]. As noted by counsel, "the publications are released as publications about the band itself and not [the petitioner] alone." The documentation includes several articles written in foreign languages that were 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.

On appeal, counsel asserts:

Music Bands, no matter how popular or large scale their reputation is, is oftentimes referred to by the name of the lead singer. U2, one of the most popular music group[s] in the world since [the] mid-80's composed of 4 members is usually referred to by its lead vocalist, Bono. The Supremes, a Motown all female singing group and most successful african-american [sic] musical act is often referred to as Diana Ross. The same is true in the case of petitioner's band(s). Publications featured the band as a whole and not its members individually. Although, names and brief description of members were mentioned, focus of the publication was on the band.

As counsel stated, the articles focused on the group and does not single out any specific individual, either as the leader or otherwise. The articles refer to the groups by their band names and not by that of the lead singer. The point of counsel's argument is therefore unclear. The evidence does not establish that the petitioner meets this criterion.

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

Counsel asserts that the petitioner meets this criterion based on his full-time membership as a member of the band [REDACTED] and his status as a founding member of the band [REDACTED]. Counsel asserts that the petitioner wrote songs for the bands and "created original lyrics and music on all of the albums which garnered rave reviews from international music critics." The petitioner submitted a copy of his band's compact disc and a copy of an agreement with Warner Brothers Entertainment for use of his music on a television show.

In response to the director's RFE, counsel asserts that the petitioner's talent as a drummer is an integral part of the sound and success of [REDACTED]. The petitioner submitted several letters, including those of his band mates, attesting to his talent and his contribution to the group. However, neither the petitioner nor those who wrote letters on his behalf attest to any contribution of major significance made by the petitioner to the field of music.

In denying the petition, the director stated that the petitioner submitted “no evidence which demonstrates the petitioner has provided any original contributions to the field such as a new drumming methodology or technique which has been adopted [by] others.” On appeal counsel asserts that “it is not required that petitioner be able to show some original work or techniques which has been adopted by others,” and that the petitioner “was able to establish during the initial filings that he has had artistic and business related contributions of major significance.” Counsel then again outlines the petitioner’s success as a musician, delineating the tours made by the groups and the commercial success of the albums they released. Counsel asserts, “The wide scale nature of [the petitioner’s] contributions undoubtedly suggest that they are significant in scope.”

Counsel’s arguments are completely without merit. We note first and significantly that counsel attempts to truncate the language of the criterion by omitting the words “in the field.” She then attempts to correlate the petitioner’s commercial success, which is the subject of another criterion discussed further below, with that of a major contribution. The petitioner provided no documentation to establish that any of his work, whether adopted by others or not, constituted a contribution of major significance to the field of music.

The evidence does not establish that the petitioner meets this criterion.

Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases.

In her letter accompanying the petition, counsel states that the petitioner’s “artistic talent as a drummer [] has been showcased tremendously,” and submitted copies of contracts with Warner Brothers Television, the petitioner’s band tours and a contract with Warner Brothers Entertainment, Inc., for inclusion of one of his songs on the soundtrack of a television show. Counsel reasserts these claims in her letter accompanying the petitioner’s response to the RFE, and argues on appeal that the petitioner has “worked with big corporations” and on productions and recordings that are “prestigious and reputable.” We note that the contracts with Warner Brothers are, in fact, one contract for use of a single composition co-written by the petitioner.

Nonetheless, the plain language of this criterion reveals that it relates to the visual arts. The petitioner submitted no documentation that he has been the subject of any production that showcased his specific work or his talents as a drummer. His work with Warner Brothers and his various bands are more appropriately considered under the criterion that follows.

The evidence does not establish that the petitioner 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.

The petitioner claims to meet this criterion based, in part, on his contract with Warner Brothers Entertainment. As discussed previously, the contract is for the use of one song co-written by the petitioner for which he and his partner were paid \$1,000. The petitioner submitted no documentation to establish that the use of this composition played a leading or critical role for Warner Brothers.

Counsel also asserts that the petitioner meets this criterion as his band has been the opening act for bands such as the Red Hot Chili Peppers, Social Distortion, the New York Dolls and The Cult, and that his band has played in prestigious venues such as the Roxy, Key Club and the Viper Room. However, the petitioner submitted no evidence that his band's opening for these various groups was in a leading or critical role for them, or that he himself played a leading or critical role for the various groups.

Counsel states that the petitioner meets this criterion based on the record contracts that his band has with recording labels such as Capitol Records, Atlantic Records and Warner Brothers. Letters submitted by the petitioner attest to his band's recording contract with Capitol Records; however, no documentation of record supports counsel's statements that the band had recording contracts with Atlantic Records or Warner Brothers. Further, the petitioner submitted no documentation to establish that these recording contracts were in a leading or critical role for either of the recording labels.

The petitioner also claims to meet this criterion based on his leading role with the various bands with which he has been associated. While the evidence establishes that the petitioner has played a leading role in the bands, including founding one and writing music for the groups, the evidence does not sufficiently establish that any of these bands have a distinguished reputation. The evidence establishes that the bands have enjoyed some commercial success and critical acclaim; however, the petitioner submitted no documentation to establish the reputation of these groups within the music industry.

We withdraw the director's determination that the petitioner meets this criterion. The petitioner must establish that he played a leading or critical role for an organization or establishment and that the organization or establishment enjoys a distinguished reputation. The petitioner cannot meet this criterion by establishing only one prong of the criterion. The evidence does not 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 her letter accompanying the petition, counsel stated that the petitioner "is remunerated per performance, talent fee for composition, and royalties." However, except for the contract with Warner Brothers Entertainment, the petitioner submitted no documentation of any compensation that he received. The Warner Brothers contract indicates that the petitioner and his co-writer would be paid \$1,000 for the use of the composition. The petitioner submitted no documentation

to establish that this fee was significantly high compared to others in the field. In her May 9, 2007 letter accompanying the petitioner's response to the RFE, counsel stated that "the contract with Warner Brothers and Capitol Records is evident of high remuneration due to the long standing reputation of the establishments whose list of talented artists and musicians marks their hallmark." Counsel's arguments are without merit. Simply because a recording label has success is not evidence that all of its artists enjoy that same level of success, and the petitioner again submitted no documentation to establish any other remuneration that he received or to establish that his compensation is significantly high in relation to others in his field.

Counsel repeats these assertions on appeal, and states that the petitioner's success "made him one of the sought after talents in the industry" and that "[c]onsequently, the amount of compensation and other kinds of remuneration that [he] stands to get is high." A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has not submitted evidence 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.

In her May 10, 2006 letter accompanying the petition, counsel asserts that the petitioner's "commercial success in the performing arts is ubiquitous as illustrated in his long list of achievements," and that he "has enjoyed sustained commercial success not only by his performance as the percussionist with the [REDACTED] but with other successful bands." As evidence, the petitioner relies primarily upon the contract with Warner Brothers Entertainment, Inc. and the positive reviews of the band's music and performances.

In response to the RFE, the petitioner submitted the results of a May 9, 2007 Google search of his bands combined with the search term "[REDACTED]." The search indicates, according to counsel, that the petitioner's band, [REDACTED], had sold 3.2 million copies of its debut album (the archive date of the report was October 14, 2006, but the document did not indicate the album's release date). The Google search also indicated other units or copies sold and references [REDACTED]s and the petitioner's previous band, [REDACTED]. However, the search returns were not clear as to what the numerical numbers actually referred and counsel did not address them in her letter. In his decision, the director stated that a review of the website indicated that the 3.2 million copies of the petitioner's record allegedly sold actually referred to an album by Guns 'N Roses, and that the other numbers referred to albums by other artists and not to any work by the petitioner or his bands.

Counsel does not address this discrepancy on appeal and reverts to her previous argument that the petitioner's list of achievements is evidence of his commercial success. Counsel asserts that [REDACTED]s record "Nowhere Ride" "topped the rock charts and [was] voted number one pick," and was chosen by Sony Playstation and Microsoft X-Box to be featured in one of their

video games. Counsel also asserts that the record was featured in the movie “Annapolis,” which grossed \$17 million in the United States.

Nonetheless, the petitioner submitted no evidence of the actual sales of records by either of his bands as required by the criterion, and therefore has failed to establish that he meets 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 his field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a musician 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 is talented, successful and respected musician and drummer, 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.