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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted]
LIN 03 202 50156

Office: NEBRASKA SERVICE CENTER

Date: APR 18 2005

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.

Robert P. Wiemann, Director
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.¹ 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 asserts that the director failed to consider evidence of the petitioner's accomplishments in Cuba and failed to consider his work as a musical director. We will consider all of this evidence below, but note that a petitioner must demonstrate sustained acclaim as of the date of filing. Nevertheless, we acknowledge that the petitioner continued to enjoy success in his career after entering the United States, making his accomplishments in Cuba more relevant. For the reasons discussed below, however, we find that the petitioner has only established that he meets two of ten regulatory criteria; a petitioner must meet three in order to establish eligibility. While counsel's assertions and the petitioner's resume and press releases hint at other accomplishments worthy of consideration, the petitioner has failed to support these assertions with the type of evidence necessary to establish eligibility.²

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 have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

¹ As noted by the director, the immigrant classification sought has different criteria from the nonimmigrant classification of the same name for which the petitioner has been approved.

² The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft*, 14 I&N Dec. 190, 193-194 (Reg. Comm. 1972), broadened in *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) and *Matter of Ho*, 22 I&N Dec. 206, 211 (Comm. 1998).

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. While counsel criticizes the director for failing to consider some of the petitioner's older accomplishments, we note that the petitioner must demonstrate that he has sustained any prior acclaim up until the date of filing. Nevertheless, given the regional success and upward trend of the petitioner's career in the United States, we will consider all of the evidence below.³

This petition seeks to classify the petitioner as an alien with extraordinary ability as a musician. We concur with counsel that the petitioner has worked and continues to work as a music director in addition to playing piano and that the two responsibilities are very related in the type of work he performs. Thus, we will consider all of his accomplishments below.

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.⁴

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

The petitioner does not claim to meet this criterion and the director does not discuss it. We note, however, that Alberto Nacif, a Latin Music show host for the Michigan radio station WEMU, asserts that the petitioner won "numerous awards in Cuba." An article posted at www.allaboutjazz.com asserts that while musical director for Bakuleye, he won the Cuban Nobel Prize of the Year for Best Orchestra. An article on Bakuleye, posted at www.ahinama.com, however, makes no mention of this award. Without the award itself, listing the petitioner as the recipient, and evidence of its significance, we cannot conclude that this award can serve to meet this criterion.

The record also suggests that the petitioner's prior group, Cubanismo, was nominated for a Grammy at some point, although the director found no evidence of this nomination. The only evidence we could find was in the discography for Cubanismo, which includes a various artist compact disc with a song by Cubanismo's bandleader that was nominated for a Grammy in 1998. The record, however, lacks evidence an album on which the petitioner performed or otherwise worked was nominated for a Grammy as of the date of filing. Thus, the petitioner has not established that he meets this criterion.

³ Far from being limited to performing at local cultural festivals, small restaurants, libraries and schools, the petitioner performs in a nationally known jazz club, generates regional media coverage and released a solo compact disc reviewed in a national magazine.

⁴ The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

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 director did not address this criterion. On appeal, counsel asserts that the petitioner has submitted sufficient evidence to meet it. We acknowledge that the petitioner submitted a letter from the President of the Music Association and Union of Writers and Artists of Cuba (UNEAC) confirming the petitioner's membership based on "his optimum qualities as a pianist, arranger and producer, which is referenced by his artistic trajectory in multiple international tours with other great musicians." The petitioner did not provide the bylaws or other official documentation of the union's membership requirements. In general, union membership requires employment in one's field. Being able to work in one's field, regardless of how competitive that field may be, is not an outstanding achievement. Thus, the petitioner's union membership cannot serve 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 petitioner submitted coverage of his music in the *Star Tribune* and a preview of his performance at the New York jazz club Birdland posted at www.allaboutjazz.com. The petitioner also submitted another preview of the petitioner's performance at Birdland posted on Babelogue, part of the Twin Cities Babelogue Community; an interview with the petitioner posted at www.urbanpoioneer.org; the original article from *Urban Pioneer* indicating it appeared in the first issue of this "literature for locals" publication; a review of his compact disc in the June/July 2003 issue of *Latin Beat* and reviews of Cubanismo, some of which mention the petitioner briefly. The director concluded that the published materials were either not primarily about the petitioner or did not appear in major media.

On appeal, counsel cites *Racine v. INS*, 1995 WL 153319 (N.D. Ill. 1995), and *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995), for the proposition that the director took too restrictive an approach to the above materials. First, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. Second, the court in the above cases was concerned that the legacy Immigration and Naturalization Service (INS), now Citizenship and Immigration Services (CIS), was requiring that the articles identify the alien as one of the best in the field. *Racine* 1995 WL 153319 at *6; *Muni* 891 F. Supp. at 445. The court did not find that we cannot examine whether the article is primarily about the alien and whether it appears in major media, both explicitly required by 8 C.F.R. § 204.5(h)(3)(iii).

At the outset, we note that while the petitioner challenges the director's failure to consider whether the petitioner had national acclaim in Cuba, the petitioner has submitted no Cuban media coverage of the petitioner. Regarding the remaining evidence, all evidence must be evaluated as to whether it is indicative of or consistent with international acclaim, the ultimate standard for the classification sought. The press package from the petitioner's agent contains very similar information and language to the posting on www.allaboutjazz.com, suggesting that the posted article was the result of a press release, and not independent journalistic coverage. Independent journalistic coverage is far more persuasive evidence of national or international acclaim than the

reprinting of a press release. Similarly, reviews of an album in a magazine that reviews much of the new music in a genre and reviews of concerts in local papers are not as persuasive as journalistic coverage of the petitioner and his work in general. Finally, while the petitioner has received some journalistic coverage, it appears to be limited to the Minneapolis/St. Paul, Minnesota area. In light of the above, we must concur with the director that the media coverage in the record is not indicative of national or international acclaim and, thus, cannot serve to meet 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.

Counsel asserts for the first time on appeal that the petitioner meets this criterion. Counsel notes that the petitioner "included on his resume that he was a member of the National Music Evaluation Committee, Cuba, evaluating other bands to represent Cuba on tours to other countries." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record, including the letter from the President of UNEAC, does not confirm this responsibility. Thus, the petitioner has not established 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.

The petitioner submits several reference letters from jazz and music professionals praising his talent. [REDACTED] freelance writer in the Minneapolis area specializing in jazz reviewing, asserts that the petitioner ranks at "the top of my list of extraordinary jazz performers." Mr. [REDACTED] continues that the petitioner "has no limits as a pianist" and that he is "booked regularly to play premier jazz venues." Mr. [REDACTED] concludes that the petitioner's "contributions to music education, as well as to jazz composition and live performance, have been invaluable."

Paul Babcock, Director of the School at MacPhail Center for the Music in Minneapolis, asserts that he recruited the petitioner to teach at MacPhail after seeing him perform. He further asserts that some of the piano faculty have indicated that the petitioner has the best technique they have ever seen. The petitioner's performance for the faculty resulted in a standing ovation. Mr. Babcock concludes:

[The petitioner] brings an incredible insight to the world of jazz music. With [his] presence at MacPhail we are significantly growing our jazz and world music programming as well as achieving a higher level of recognition in the area.

The petitioner submitted additional letters in response to the director's request for additional evidence. Leigh Kamman, producer of a weekly jazz program on Minnesota Public Radio,⁵ compares the petitioner to the "illustrious" Afro-Cuban artists of the 1950s that brought Latin music beyond the "Latin crowd." Mr. Kamman indicates that he added the petitioner's music to his own program. Mr. Kamman recounts the petitioner's career

⁵ Counsel asserts that Mr. Kamman's program, Jazz Image, is broadcast nationwide, but the interview with Mr. Kamman included in the record only indicates that it airs on Minnesota Public Radio. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

and notes that the petitioner imparts his knowledge to others through teaching. Mr. Kamman further asserts that the petitioner has “played in the top venues around the world.”

Giancarlo Guerrero, Music Director and Conductor for the Eugene Symphony Orchestra in Minnesota, praises the petitioner’s performance as Music Director for the Latin Renaissance, a fund raiser for the Women’s Association of the Minnesota Orchestra and a women’s shelter. Mr. Guerrero indicates that the petitioner inspired the other musicians to a higher level and was hired on the spot to serve as Music Director the following year. Mr. Guerrero notes that he has conducted the petitioner’s compositions.

Manny Laureano, co-music director of the Minnesota Youth Symphonies and a member of the Minnesota Orchestra, asserts that working with the petitioner at the Latin Renaissance “was a most enjoyable experience due to the sheer joy that he puts into what he does.” Mr. Laureano concludes that the petitioner “can contribute to the variety of music heard by Minnesotans in a very big way.”

While the above letters are general in nature and mostly from individuals in the St. Paul, Minnesota area, the record contains other information worth noting. A review of another artist’s album reflects that he “pays particular tribute to some of Cuba’s most talented artists,” including the petitioner, and lists the petitioner as the composer and arranger of two of the songs. The petitioner also served as music director for a local Minnesota group, Sabor Tropical, that was nominated for a Latin Grammy. Given the record as a whole, we find that the petitioner has submitted sufficient evidence to meet this criterion.

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

We will not consider the evidence of the petitioner’s participation at the St. Lucia Jazz Festival after the date of filing, submitted on appeal, as it does not relate to his eligibility as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Nevertheless, the petitioner lists several jazz festivals where he performed with Cubanismo in 1997, such as the Montreal Jazz Festival, the 1997 North Sea Jazz Festival and the 1997 Montreaux Jazz Festival. The record confirms the petitioner’s performance at the Montreal Jazz Festival before a crowd of 120,000. Thus, the petitioner appears to meet this criterion, albeit with evidence from several years prior to the filing of the petition.

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

The petitioner claims to have served as music director for Cubanismo in addition to performing as their pianist. The director did not contest Cubanismo’s distinguished reputation. Rather, the director concluded that the band enjoyed its biggest success prior to the time the petitioner joined the band and that his role as pianist was not more critical than other members of the group. The press materials about Cubanismo and the album credits only identify the petitioner as the solo pianist on most songs and arranger of a single song who joined the group after their first successful album. While the petitioner appears to have played a more significant role for Bakuleye, the record contains less persuasive evidence of that group’s distinguished reputation. Specifically, while the petitioner submitted a “biography” of the group on www.ahinama.com, the record does not contain the original press coverage of the group. Moreover, the petitioner must demonstrate sustained acclaim. While the group released albums in 1998 and 2001, the petitioner does not list the 2001 album on his resume.

Finally, while the petitioner clearly played a leading role for the Latin Renaissance in Minnesota, the record contains no evidence that this festival enjoyed a distinguished reputation nationally. Specifically, there is no evidence that it generated national media attention.

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

While the petitioner does not claim to meet this criterion, we simply note that the contracts submitted and the documentation reflecting that he was approved for "second level of salary" in Cuba does not reflect that he has ever commanded high remuneration comparable with those at the top of the field. Specifically, the record contains no evidence of what constitutes high remuneration in the field to which we can compare his remuneration.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

In response to the director's request for additional evidence, the petitioner submitted the June/July 2003 issue of *Latin Beat Magazine* listing the petitioner in the top 20 Hit Parades for San Francisco and Puerto Rico. The petitioner has not demonstrated that appearing on a "hit parade" is indicative of high record sales. Similarly, the petitioner did not explain the significance of the "KFAI Top Jazz Releases." We note that KFAI Radio is a St. Paul, Minnesota station.

As noted by the director, Cubanismo's first album apparently "broke record sales in Europe and the US, naturally making it the Top 10 List of Billboard and Latin Beat magazine" according to the press materials about the group. The record clearly establishes that the petitioner did not perform on that album. Despite counsel's assertion that the director ignored "sales figures" for the more recent Cubanismo albums, the record contains no such figures for the albums on which the petitioner performed. That information is not included in the reviews, press releases, or materials from www.amazon.com. The record does not contain ticket sale information for the petitioner's tours, not all of which were in the United States.⁶ Thus, the petitioner has not established 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 the 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 shows talent as a musician, 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.

⁶ We acknowledge that the embargo prevents Cuban musicians from making money on their U.S. tours, but the record does not establish that the petitioner was under similar restrictions in Canada and Europe, where he also toured.

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.