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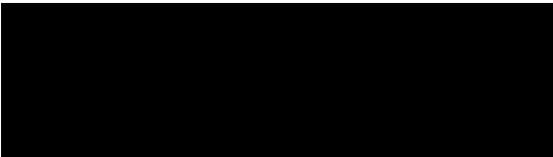
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: APR 29 2009

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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.

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 AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

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 sole basis for denial was the director's determination that the petitioner had not submitted clear evidence that he would continue to work in his area of expertise in the United States.

On appeal, counsel argues that the petitioner intends to continue working in his area of expertise in the United States.

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.

The regulation at 8 C.F.R. § 204.5(h)(5) states:

No offer of employment required. Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

This petition, filed on June 25, 2007, seeks to classify the petitioner as an alien of extraordinary ability as a musician and vocalist. The documentation accompanying the petition included a May 16, 2007 letter from the manager of Peace Land's Travel & Tours, Inc. stating:

I am glad to advise you that the management has considered your request and has decided to offer you a position in this company after you become a permanent resident of the U.S.A.

The management has also decided to organize your Solo Concert in around [sic] East Coast in future and will offer you separate contract for the show.

On January 7, 2008 the director requested further evidence demonstrating that the petitioner is “coming to the United States to continue work in the area of expertise.” The director’s request for evidence stated: “As Peace Land’s Travel & Tours is a travel agency, it is unclear how you would be working as a musician within the company.”

In response, the petitioner submitted a February 12, 2008 letter from the president of Peace Land’s Travel & Tours, Inc. stating:

This is to certify that Peace Land’s Travel continues to offer [the petitioner] a mutually beneficial arrangement as a business promoter utilizing his services as a Singer for our marketing program.

Peace Land’s Travel is a renowned travel agency in the area and especially well known in the Nepalese community. . . . The job offer to [the petitioner] is solely for the purpose of company’s marketing strategy. It will help advance their exposure of the company to its target market: the Nepali Community. The company will be organizing solo concerts as well as multi group functions for the promotion of company’s business. In the past, the company has organized such kind of events for the community and experienced an immediate boost in the company’s business.

Based on [the petitioner’s] past performances and looking at his success, the company is certain that the name [the petitioner] will sell itself. A well known singer in Nepal, his overwhelming performances in Europe, Far East, India, and United States will ascertain the boost [sic] in the forth coming company’s business.

Peace Land’s Travel intends to keep this marketing strategy as its continuing policy and organizing such events will be on a regular basis. [The petitioner] will be on an annual retainer basis as well as will also benefit from the events that Peace Land’s Travel will organize.

In addressing the preceding letters, the director’s decision questioned whether “a travel agency would have any knowledge or experience” in organizing concerts and whether the petitioner was coming to the United States to perform primarily as a musician rather than to perform unrelated duties within the travel agency. The director also noted a lack of evidence showing that Peace Land’s Travel & Tours, Inc. “organizes musical concerts or similar events.” The director’s decision concluded by stating: “The record contains no evidence to resolve why a travel agency would offer a

position to a musician on annual retainer, and contains no credible evidence that the petitioner would actually be coming to the United States to continue working in his field of expertise.”

On appeal, the petitioner submits an affidavit from the president of Peace Land’s Travel & Tours, Inc. providing further clarification regarding the company’s proposed business arrangement with the petitioner. The affidavit states:

Our Manager has previously drafted and signed two statements of our company’s interest in utilizing [the petitioner’s] fame as a Nepalese musical talent for a targeted marketing plan we have drafted and hope to implement. Our marketing approach is to tap the national fame, well-known and sought after musical and vocal talents, and wholesomely positive personal image of [the petitioner] to help raise our exposure in the Nepalese community in the United States – one of our niche markets that this company targets in its marketing.

* * *

The intent of this company is to enter a contractual (preferably a long-term contract) arrangement with [the petitioner] to sponsor him in concerts and musical festivals to which this company benefits by lending its name as a primary sponsor. [The petitioner] would also be available to lend his talent, resultant image and fame, to help promote our travel packages in this country’s growing Nepalese community. We firmly believe that, while he has great fame as a Nepalese singer/vocalist that who has gathered this reputation from outside the United States – we are making a bet that once [the petitioner] performs in the United States, cuts some recording for sale, etc. in this huge market, that his fame, reputation, and marketability (all derived from his superior musical/vocalist talent) shall grow dramatically, increasing in value and, therefore, increasing the value our company gets in return for using his services as proposed from early in the United States phase of his career. We view this as being little different from companies utilizing and signing sports stars, or young budding musical or other new talents to promotional contracts for marketing various other product lines to particular targeted audiences

* * *

The contractual arrangement that we envision with [the petitioner] is by no means an exclusive deal where he would be “employed” by this company and would therefore, not be able to perform on his own, or do recordings, etc. Except for a contract term where he could not enter a similar marketing/promotional deal with a competitor of this company, he would be free to pursue his music and singing as he sees fit.

The petitioner also submits a notarized letter from the petitioner detailing his plans for continuing his work in the United States. The petitioner states:

Through my natural talent and ability to perform independently, there are several forthcoming events that can help me to bring my talent to my fans in North America. I have been

participating in the Nepali musical programs in different parts of the United States. I have already performed in New York, Washington D.C., Baltimore, Boston and Virginia etc. The evidences for all are attached with the [petition].

I am also invited as one of the major performers in the forth-coming Annual Convention of ANA (Association of Nepalese in America) to be held in Baltimore – MD on 4, 5 & 6th of July 2008.

Further, there are many small businesses approaching to cast me in the advertisement for their products, both in the newspaper and Nepalese television. This will certainly boost their product's marketing.

All of the above mentioned events, business deals, advertisements, the royalties on my CD's etc. is enough evidence to show that I am . . . a person in demand for the Nepalese Community. There are enough events round the year alone in United States, enough business that would like to cast me for their product, and enough solo performances to keep me busy all round the year. All of these round the year performances will obviously eliminate the question of financials and sustainability.

In support of his notarized letter, the petitioner submits letters from Nepali community organizations in Maryland, Washington, D.C., New York, and Virginia discussing the petitioner's previous and upcoming musical performances for their programs. The petitioner also submits letters discussing his collaboration with a community service website of the American-Nepali community and with a Nepali singer and composer in Richmond, Virginia.

The statute and regulations require that the petitioner seeks to continue work in his area of expertise in the United States. *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii), and 8 C.F.R. § 204.5(h)(5). While we agree with the director that the record initially lacked clear evidence indicating that the petitioner intended to continue working as a musician in the United States, we find that the evidence submitted on appeal is sufficient to satisfy the regulation at 8 C.F.R. § 204.5(h)(5). The record includes a credible offer from a prospective employer, evidence of prearranged commitments with Nepali community groups, and a detailed statement from the petitioner regarding his plans for continuing his work as a musician in the United States. Accordingly, the petitioner has overcome the stated grounds for denial and established his eligibility pursuant to Section 203(b)(1)(A)(ii) of the Act. Therefore, we withdraw the director's finding on this issue.

Beyond the decision of the director, section 203(b)(1)(A)(i) of the Act requires an individual seeking extraordinary ability classification to demonstrate sustained national or international acclaim and that his achievements have been recognized in the field through extensive documentation. 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. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating

that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

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 director's decision failed to address whether the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The petitioner has submitted evidence pertaining to the following criteria.¹

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

The petitioner submitted an Honorary Diploma, a Letter of Felicitation, certificates of appreciation, letters of appreciation, and certificates of participation in recognition of his musical performances and achievements. The petitioner has not established that these awards reflect national or international recognition rather than local or institutional recognition. The petitioner also submitted letters and internet material from Nepali radio stations Hits FM 91.2 and Image 97.9 FM listing musical categories won by the petitioner in their annual awards programs. The record lacks evidence demonstrating that these individual radio station awards are nationally or internationally recognized awards in the field of endeavor.

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

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner submitted an August 2, 2006 letter reflecting that he was awarded a "Life Time Membership" in the "Pokhara Artist of Musical Association." There is no evidence (such as membership bylaws or official admission requirements) showing that this association requires outstanding achievements of its members, as judged by recognized national or international experts

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

in the petitioner's field or an allied one. Accordingly, the petitioner has not established 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 general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should 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 petitioner submitted articles about him in Nepali newspapers and magazines, but the accompanying English language translations did not identify the author of the material or the name and date of the publications. The petitioner also submitted circulation information from the internet sites of the Kamana Group and Himalmedia for their publications, but the self-serving nature of their website material is not sufficient to demonstrate that their publications qualify as forms of major media. The record lacks evidence such as objective circulation information from an independent source showing the distribution of the publications relative to other national media to demonstrate that the submitted articles were published in professional publications or major media.

In light of the above, 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 submitted letters of recommendation praising his talent and discussing his work as a musician. Musical talent and activity in the field, however, are not necessarily indicative of artistic contributions of major significance. The record lacks evidence showing that the petitioner has made original contributions that have significantly influenced or impacted his field. The reference letters do not specify exactly what the petitioner's original contributions have been, nor is there an explanation indicating how any such contributions were of major significance in his field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner has earned the admiration of those providing letters of support, there is nothing to demonstrate that his work has had major significance in the music industry. For example, the record does not indicate the extent of the petitioner's influence on

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.

other musicians nationally or internationally, nor does it show that the field has somehow changed as a result of his work. Without extensive documentation showing that the petitioner's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

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

The petitioner submitted evidence of his performances at benefit concerts and other community events. There is no evidence showing that these performances were consistent with sustained national or international acclaim at the very top of his field. Nevertheless, the plain language of this regulatory criterion indicates that it is intended for visual artists (such as sculptors and painters) rather than for musicians such as the petitioner. In the performing arts, national or international acclaim is generally not established by the mere act of appearing in public, but rather by attracting a substantial national or international audience. For this reason, the regulations establish separate criteria, especially for those whose work is in the performing arts. The petitioner's musical performances are far more relevant to the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x).

In light of the above, the petitioner has not established 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.

At issue for this criterion are the position the petitioner was selected to fill and the reputation of the entity that selected him. In other words, the position must be of such significance that the alien's selection to fill the position, in and of itself, is indicative of or consistent with national or international acclaim.

The petitioner submitted a January 18, 2008 letter from the program manager of the Pokhara Community Support Group expressing appreciation for the petitioner's performance at a fund raising concert for landslide victims. The petitioner also submitted a newspaper article that includes a paragraph discussing his role in organizing the benefit concert. We cannot conclude that organizing a one-time event such as a benefit concert is tantamount to performing in a leading or critical role for an organization or establishment with a distinguished reputation. In this case, the petitioner has not submitted evidence establishing that he was responsible for a distinguished organization's success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim. Accordingly, the petitioner has not established 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.

The petitioner submitted a “Letter of Felicitation” from the Chhinnalata Lyrical Award Trust stating: “This Letter of Felicitation is conferred on with [sic] Chhinnalata Debutant Award 2062 alongwith [sic] Cash Prize of Rs. 10,000 (Ten Thousand) to [the petitioner].” The term “Debutant” indicates that this award was intended for a musical performer at the beginning stage of his career.³ The petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. *See* 8 C.F.R. § 204.5(h)(2). Nevertheless, the plain language of this regulatory criterion requires the petitioner to submit evidence of a high salary “in relation to others in the field.” The petitioner offers no basis for comparison showing that his compensation as a musician was significantly high in relation to others in his field. Accordingly, the petitioner has not established 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 response to the director’s request for evidence, the petitioner submitted a letter from the Chairman of Samjhana Audio & Video Pvt. Ltd. stating that the petitioner received \$4,037.68 for his album *Old Boat* in 2003, \$5797.10 for his album *Half Dream* in 2005, \$7,720.81 for his album *Love* in 2007, and \$5404.57 for his album *My Diary* in 2007. The petitioner also submitted a letter from the Managing Director of Ranjana Music Industries Pvt. Ltd. stating that the petitioner’s band Madhyanha released three album volumes selling 38,550; 17,375; and 6,583 units respectively. The letter further states that the petitioner’s albums *Best of [the petitioner]* and *Best of Madhyanha* sold 10,000 and 11,000 units respectively. The petitioner has not established that the preceding earnings and unit sales for his albums demonstrate commercial successes in the performing arts. For example, there is no evidence showing that the above albums were among the top sellers in their particular music category. Accordingly, the petitioner has not established that he meets this criterion.

In conclusion, while the petitioner has overcome the director’s grounds for denial and satisfied the regulation at 8 C.F.R. § 204.5(h)(5), our review of the record does not establish the petitioner’s receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). However, as the director’s decision did not address the relevant criteria, the petitioner had no opportunity to submit a meaningful appeal related to these issues.

Accordingly, as the petition is not approvable, we must remand the matter to the director for issuance of a new decision that properly addresses the preceding deficiencies in the petitioner’s evidence for each of the applicable regulatory criteria at 8 C.F.R. § 204.5(h)(3). The director may also address any further deficiencies found in the petitioner’s evidence not included in the AAO’s discussion of the regulatory criteria.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

³ In fact, the “Chhinnalata Awards for Songs Dedication Program 2006/07” accompanying the Letter of Felicitation states that the petitioner was recognized in the “New Talent” category.

ORDER: The director's decision is **withdrawn**. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.