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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 26 2009
SRC 07 800 26518

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:

[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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in the arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). 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. Specifically, the director concluded that the petitioner meets two of the ten regulatory criteria at 8 C.F.R. § 204.5(h)(3), of which an alien must meet at least three.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we uphold the director's ultimate decision. Moreover, while the petitioner did submit probative evidence relating to the awards and published material criteria at 8 C.F.R. § 204.5(h)(3)(i) and (iii), we must withdraw the director's favorable findings under these criteria.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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, 60898-9 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who 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 she 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, singer or composer. 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).

Congress' example of a one-time achievement is a Nobel Prize. H.R. Rep. No. 101-723, 59 (September 19, 1990). The regulation is consistent with this legislative history, stating that a one-time achievement must be a *major, internationally recognized* award. 8 C.F.R. § 204.5(h)(3). Significantly, even a lesser internationally recognized award could serve to meet only one of the ten regulatory criteria, of which an alien must meet at least three. 8 C.F.R. § 204.5(h)(3)(i). The selection of Nobel Laureates, the example provided by Congress, is reported in the top media internationally regardless of the nationality of the awardees, is a familiar name to the general public, and includes a large cash prize. While an internationally recognized award could conceivably constitute a one-time achievement without meeting all of those elements, it is clear from the example provided by Congress that the award must be internationally recognized in the alien's field as one of the top awards in that field.

On appeal, counsel does not challenge the director's conclusion that the petitioner's awards at events for "aspiring performers and entertainers" and in recognition as a "most promising female artist" cannot constitute a one-time achievement. We concur with the director's analysis that awards that preclude the most experienced and renowned members of the field cannot constitute 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, she claims, meets the following criteria under 8 C.F.R. § 204.5(h)(3).[1]

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

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 media reports that she won medals at the World Championships of Performing Arts (WCOPA), a Hollywood, California "Global" event for "aspiring performers and entertainers." The 2008 program submitted in response to the director's request for additional evidence states that there are four "senior" age groups and 14 styles within the "vocal" category. The judges award gold medals in every event category, style and age group and select overall champions in each of two age groups within the "senior" category and a single senior Grand Champion Performer of the World. The Grand Champion "Hall of Fame" page identifies the sole Grand Champion of the World in 2005 as . According to what appears to be a press release from Team Philippines, the petitioner individually won Overall Female Vocals World Champion, gold medals in Pop, Broadway, and "Original" styles and a silver medal in Rhythm and Blues. In addition, the petitioner and Mr. jointly won Overall Duet/Group Vocals World Champion and gold medals in Pop and Broadway styles. The petitioner also submits photographs of herself receiving plaques and evidence that her success and that of was covered in the Filipino media.

The petitioner also submitted a letter from , Executive Director of the Philippine Association of the Record Industry's AWIT Awards, advising the petitioner that the 19th AWIT Awards wanted to recognize "Pilipino" artists who had won in an international competition and that the AWIT Awards would therefore issue "an award" to the petitioner in recognition of her success at WCOPA. The petitioner did not submit a copy of the award itself. Rather, the petitioner submitted a list of finalists for the 19th AWIT Awards, none of whom are the petitioner. The letter from , by itself, cannot establish that the petitioner won an AWIT award, especially given that the petitioner's name is not listed as a finalist for these awards. The letter is not primary or secondary evidence and does not constitute an affidavit. Even if it did meet the requirements of an affidavit, affidavits are acceptable in lieu of primary or secondary evidence only where the petitioner has demonstrated that primary and secondary evidence are both either non-existent or unavailable. 8 C.F.R. § 103.2(b)(2).

Finally, the petitioner submitted an award certificate recognizing her as a "most promising female artist" from the Asia-Pacific Awards Counsel at the 12th Annual Asia-Pacific Excellence Awards in 2005. The petitioner, however, submitted no evidence of the significance of this event.

The petitioner submitted insufficient evidence regarding the AWIT award she allegedly won, which is not even listed among the awards issued at the 19th AWIT Awards on the website materials she submitted. The record also contains insufficient evidence of the Asia-Pacific Excellence award, which appears to be limited, at least in the category the petitioner won, to novice artists. We acknowledge that the WCOPA competition included an international pool of contestants and garnered some attention in the Filipino media. Not every competition that includes competitors from multiple countries, however, is nationally or internationally recognized. We cannot ignore that the competition is limited to "aspiring" performers, awards scholarships (suggesting that contestants are competing for further training opportunities in the field) and includes multiple awards in a single style based on age group.

Given these factors, we are not persuaded that the WCOPA awards are nationally or internationally recognized awards or prizes for excellence in the field rather than recognition of future potential and an opportunity to qualify for additional training.

In light of the above, we withdraw the director's finding that the petitioner 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.

The director concluded that the petitioner meets this criterion. We acknowledge the submission of significant media coverage of the WCOPA awards and events in which the petitioner participated. Some of the materials are more focused on the petitioner herself. Initially, counsel attested to the circulation of the publications covering the petitioner. The unsupported assertions of counsel, however, do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The petitioner failed to provide evidence of the circulation, distribution or other evidence of the significance of the publications in which these articles appeared. It is the petitioner's burden to establish every element of a given criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material appear in professional or major trade journals or other major media. The petitioner's failure to provide any information about the publications in which the published materials appear precludes a finding that she meets this criterion. Thus, we must withdraw the director's finding that the petitioner meets this criterion.

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

While the petitioner submitted evidence of her performances in the Philippines, neither the petitioner nor counsel has ever asserted that the petitioner meets this criterion.[2] We concur with the director's conclusion that the criterion set forth at 8 C.F.R. § 204.5(h)(3)(vii) is applicable to the visual rather than the performing arts.

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

Initially, counsel asserted that the petitioner has been "approached" by the owner of a Las Vegas restaurant that had yet to open "to headline its first-class dinner theatre show." The petitioner

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[2] On appeal, counsel discusses the petitioner's performances that postdate the filing of the petition or have yet to occur under the heading: "Evidence of the display of the alien's work in a leading or critical role for organizations." We presume this discussion relates to the leading or critical role criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii). Regardless, the evidence discussed under this heading postdates the filing of the petition and need not be considered for the reasons discussed below. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

submitted a promotional flier for "Fever: The Musical" at the Melanja restaurant, characterized as the "most awaited real Dinner & Show on the Strip." In response to the director's request for additional evidence, the petitioner submitted a July 1, 2007 contract between Melanja Entertainment and the petitioner for the petitioner to perform as "a SINGER" in "Fever: The Musical" with a "tentative start date" of September 27, 2007, a little more than a month after the petition was filed. The petitioner also submitted a letter from Chief Operating Officer (COO) for Marketing and Entertainment at Melanja advising that the petitioner "will be" performing five nights per week at the venue as well as additional promotional material for the show, including biographical notes about the six performers in the show, including the petitioner. The materials do not confirm that the restaurant and show had actually opened.

The director stated that the petitioner's role in "Fever: The Musical" could not be considered because the show had yet to open as of the priority date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). On appeal, counsel discusses this role without addressing the director's concern that the show had yet to open. Counsel further asserts that the petitioner is the lead singer for the Chaze Band of Las Vegas, which covers the songs of other bands in various genres. The petitioner submits a biography of the band at www.definitivetalents.com, the band's schedule as listed on the same website and a letter from the band manager, . Mr. asserts that the petitioner has been performing with this band since August 2008, after the petition was filed. Counsel does not explain why another role that postdates the filing of the petition will overcome the director's concern that the petitioner has not submitted evidence relating to this criterion that predates the filing of the petition.

The record still lacks evidence that the Melanja restaurant has opened or that "Fever: the Musical" has premiered. While the petitioner may have been hired for a leading or critical role in this show as of the filing date, neither the venue nor the show had opened as of that date. Thus, the promotional materials notwithstanding, the petitioner cannot establish that either enjoys a distinguished reputation as of that date. Specifically, neither the restaurant nor the show had been reviewed or otherwise garnered a reputation consistent with the restaurant's own predictions.

The record contains no evidence that the petitioner was associated with the Chaze Band prior to the date of filing. Moreover, while the band may play at well-known casinos, the record lacks evidence that the casinos promote themselves as the venue of this band. For example, the petitioner submitted the promotional materials for Caesar's Palace boasting that it is the venue that hosts Jerry Seinfeld, Elton John's The Red Piano, Cher and Bette Midler but making no mention of the Chaze Band. Thus, the petitioner has not established that the Chaze Band enjoys a distinguished reputation.

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

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

In response to the director's request for additional evidence, the petitioner submitted the contract for her performance with "Fever: The Musical." The contract provides that the petitioner will be paid $2,500 per month for rehearsals, $5,500 per month for the first six months of the show, $6,500 per month for the second six months of the show, $7,500 for the third six months of the show and $9,000 per month for the final six months. The petitioner did not, however, submit evidence of high-end remuneration in the field nationally for comparison purposes.

The director concluded that the petitioner had not established that her remuneration was high in relation to others in the field. On appeal, the petitioner submits a letter from , President and Chief Executive Officer of Music Management International. advising that as of the summer of 2008, the petitioner was a featured soloist at three of concerts to provide with a "costume change break." The petitioner was paid $3,000 for each concert in addition to travel expenses and room and board. further asserts that when a guest singer from the Philippines is used, pays up to $500 per concert and when a U.S. singer is used, she pays up to $1,000 per concert. This evidence relates to remuneration that postdates the filing of the petition and cannot be considered. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Regardless, while the petitioner may be a higher than usual paid guest performer for that information does not allow us to conclude that the petitioner receives a significantly high remuneration in the field generally. For example, does not advise how much Ms. is paid.

In light of the above, the petitioner has not demonstrated that she 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.

While the petitioner submitted evidence that the petitioner had released an album and has performed at concerts, she did not previously claim to meet this criterion. The director noted the lack of box office receipts or evidence of record, cassette, compact disc or video sales. On appeal, counsel asserts for the first time that the petitioner meets this criterion. Specifically, counsel asserts that the petitioner performs with the Chaze Band at some of Las Vegas' largest casinos and is under a contract to perform in "Fever: The Musical." Counsel then references the letter from .

The regulation at 8 C.F.R. § 204.5(h)(3)(x) requires the submission of very specific evidence: box office receipts or record, compact disc or video sales. Nothing submitted on appeal overcomes the director's conclusion that the record in this matter lacks such evidence. The performances referenced by counsel on appeal all postdate the filing of the petition or have yet to occur. Moreover, while Ms. asserts that the petitioner draws her own fans to concerts, it would appear that any commercial success enjoyed by those concerts would accrue to , the headline act.

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 herself as a singer 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 indicates that the petitioner shows talent as a singer, but is not persuasive that the petitioner's achievements set her significantly above almost all others in her 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.