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



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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUL 29 2009
SRC 07 137 52403

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The director also denied a subsequent motion to reopen and reconsider. 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. More specifically, the director found that the petitioner had failed to demonstrate 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).

On appeal, counsel for the petitioner argues that the petitioner meets the statutory requirements and at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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.

U.S. Citizenship and Immigration Services (USCIS) and the 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 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.

On appeal, counsel asserts that “at the top of the field” is not the applicable “standard” for this immigrant visa petition and that the petitioner must only show “sustained national or international acclaim.” The regulation at 8 C.F.R. § 204.5(h)(2), however, clearly defines “extraordinary ability” as “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.” It should be reiterated, therefore, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition, filed on March 28, 2007, seeks to classify the petitioner as an alien with extraordinary ability as singer-performer/artist impersonator. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien’s receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three of the criteria outlined in 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2).

The petitioner has submitted evidence that, he claims, meets the following criteria under 8 C.F.R. § 204.5(h)(3).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 a December 12, 2006 “certification” from the Elvis Presley Friendship Club of the Philippines, International, certifying that the petitioner won First Place in the “Be Elvis” contest and was the current “Elvis Presley of the Philippines.” The “Be Elvis” contest, in which the petitioner was also dubbed the “Elvis Presley of the New Millennium,” was held in Manila in August 2002 and was sponsored by the Discovery Travel and Adventure Channel. The results of the contest were announced in a brief article that appeared in the August 20, 2002 edition of *The Daily Tribune*.

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

In his August 15, 2007 letter to the petitioner requesting additional evidence (RFE), the director concluded that the petitioner had submitted sufficient evidence to meet this criterion. In his May 29, 2008 decision denying the petition, the director determined that “there is evidence that would lend support to claims of national prizes and published material about the alien in major media.” We do not concur with the director’s decision, however. The petitioner’s eligibility under 8 C.F.R. § 204.5(h)(3)(iii) will be discussed further below. Regarding the petitioner’s eligibility under this criterion, the evidence submitted by the petitioner does not establish that winning the “Be Elvis” contest is nationally or internationally recognized as an award for excellence in his field of endeavor. Evidence of the media coverage of the contest consists of only a brief mention of the results of the contest reported in *The Daily Tribune*. The evidence submitted does not establish that first place in the “Be Elvis” contest is nationally or internationally recognized as an award of excellence in the petitioner’s field. The petitioner submitted no documentation to establish that the titles of “Elvis Presley of the New Millennium” or “Elvis Presley of the Philippines” are awards or prizes within the meaning of this regulation.

Additionally, the petitioner won the contest in 2002, five years prior to filing the visa petition. A one-time award is not consistent with the sustained acclaim required by section 203(b)(1)(A)(i) of the act.

We withdraw the determination by the director and find that the petitioner has failed to establish 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 order to meet this criterion, published material 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.

The petitioner submitted a copy of an article about him that appeared in the March 21, 2004 edition of the *Manila Bulletin* and a reprint showing that the article was also published online on the paper’s electronic version. The petitioner submitted a copy of another article about him; however, the media in which it appeared, the date and the author are not identified. Other documents submitted by the petitioner are about his appearance at various venues. The documents report his appearance and are not primarily about the petitioner or his work. The petitioner also submitted a copy of a July 31, 2007 e-mail from Erin Feinberg to several individuals, including the petitioner, advising the recipients that they would be featured in her book *King for a Day* and announcing a book release party on August 15. First, it is unclear as to the extent of any information about the petitioner that appears in the book. Second, the

publication of the book is after the filing date of the petition. Therefore, it is not evidence of the petitioner's eligibility for this immigrant visa petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

As discussed above, the director determined that "there is evidence that would lend support [to the petitioner's] claims of . . . published material about the alien in major media." However, the petitioner submitted only one 2004 article about himself. A single article about the petitioner during his extended career is not evidence consistent with sustained acclaim. We withdraw the director's determination and find that the petitioner has failed to establish that he meets 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.

In response to the RFE, the petitioner claimed that he was invited to judge in the "Battle of the Bands contest sponsored by the Philippine Amusement and Gaming Corporation." On appeal, the petitioner submitted a copy of the 2005 "Certificate of Appreciation" from the organization for his participation in the event. The petitioner submitted no other information about the contest. The regulation at 8 C.F.R. § 204.5(h)(3) provides that "a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." Evidence of the petitioner's participation as a judge must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criterion at 8 C.F.R. § 204.5(h)(3)(iv), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). For example, judging a national competition or a competition for top artists or performers is of far greater probative value than judging a local or regional competition or a youth, student, or amateur competition. Counsel alleges on appeal that the contest featured "the top band performers of the country." However, nothing in the record supports counsel's assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, a single act of acting as a judge is not consistent with sustained national or international acclaim.

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.

In his letter accompanying the petitioner's response to the RFE, counsel alleges that the petitioner meets this criterion because he "not only look[s] like Elvis Presley, he sings, sounds and moves like the real Elvis Presley" and that:

[T]hese facets of petitioner's personality set[] him apart from other Elvis Presley impersonators in that his performances are not just about mimicking and copying what Elvis used to do, but is the actual embodiment of what the real Elvis Presley stood for – energy, style and Rock and Roll.

Clearly, his on-stage presence and remarkable unique style has contributed significantly not only to the Elvis Presley impersonation sphere but to the field of performing arts as a whole.

The record contains no documentation to support counsel's assertions about the uniqueness of the petitioner's abilities or that he has made a contribution of significance to his field of endeavor. The unsupported assertions of counsel are not evidence. *Id.*

The petitioner has submitted no evidence that he meets his criterion.

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

The petitioner claims to meet this criterion through his performances. This criterion, however, relates to the visual arts. The petitioner is a performing artist. It is inherent to the performing arts to perform. Therefore, not every production is a showcase or exhibition of the work of every performer. Without evidence that the petitioner's performances were comparable to the exclusive artistic showcases that might serve to meet this criterion for a visual artist, we cannot conclude that the petitioner meets this criterion. We do not find that the petitioner's performances have no evidentiary value. The regulations establish separate criteria, especially for those whose work is in the performing arts. We find the petitioner's performances are far more relevant to the "leading or critical role" criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii) and will be discussed separately within the context of that criterion.

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 initially claimed this criterion but did not pursue the issue in his response to the RFE or on appeal. As discussed above, however, we will consider the petitioner's performances under this criterion.

The petitioner submitted a list of his performances from August 16, 1997 to March 2006. The petitioner submitted no documentation to establish that any of the forums at which he appeared are organizations or establishments with distinguished reputations. Additionally, the petitioner submitted no documentation to establish that his performances at the various venues were in a leading or critical role for the organization or establishment.

The evidence does not establish that the petitioner 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 copies of two checks made payable to him in the amount of \$500, which counsel stated is the amount he received for two "recent" performances. These checks are dated September 15, 2007 and November 3, 2007, both subsequent to the filing date of the petition on March 28, 2007. Therefore, they cannot establish that the petitioner's eligibility for this immigrant petition. The petitioner must establish eligibility for the benefit sought at the time the petition was filed. *See* 8 C.F.R. §§ 103.2(b)(1) and (12); *Matter of Katigbak*, 14 I&N Dec. at 49.

The petitioner submitted no documentation of any compensation that he received prior to the filing date of the petition or any documentation that would establish that his salary or remuneration was significantly high relative to others in his field.

The petitioner 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 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. 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 met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.