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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUN 29 2009
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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).


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 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 that the petitioner had not established the sustained national or international acclaim required for classification as an alien of extraordinary ability.

On appeal, counsel submits a brief and additional evidence asserting that the petitioner meets at least three criterion under 8 C.F.R. § 204.5(h)(3).

Section 203(b) of the Act states, in pertinent part:

(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. 60897-99 (Nov. 29, 1991). Specific supporting evidence must accompany the petition to document the "sustained national or international acclaim" that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international acclaim through evidence of a "one-time achievement (that is, a major, international recognized award)." *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.* However, the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), or under 8 C.F.R. § 204.5(h)(4), must depend 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).

We note that the petitioner is the beneficiary of a nonimmigrant visa in a similar classification. While USCIS has approved at least one P-3 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval

does not preclude USCIS from denying an immigrant visa petition based on a different standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See e.g. Matter of Church Scientology International*, 19 I. & N. Dec. 593, 597 (BIA 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

This petition, filed on March 16, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a singer. Initially, the petitioner submitted supporting evidence including award certificates, news articles, evidence of performances given, evidence of judging activities, information about Nepali newspapers, copies of album covers, and letters of recommendation. In response to a Request for Evidence ("RFE") dated February 25, 2008, the petitioner submitted additional letters of recommendation, additional news articles, top 10 playlists, information about album sales, his record contracts, and information about additional performances given. We address the evidence submitted in the following discussion of the regulatory criteria relevant to the petitioner's case. The petitioner does not claim eligibility under any criteria not addressed below.

On May 23, 2008, the director denied the petition, finding that the petitioner met only one of the regulatory criteria for establishing sustained national or international acclaim at 8 C.F.R. § 204.5(h)(3). On appeal, counsel argues that the petitioner meets the criteria at 8 C.F.R. § 204.5(h)(3)(i), (iii), (iv), (vii), and (viii). Counsel also argues that the director imposed an improper standard upon the petitioner by requiring him to show international acclaim instead of national acclaim within Nepal. We acknowledge that national acclaim would qualify an alien under this criterion, however, the petitioner in this case failed to demonstrate *sustained* national acclaim as required by the regulation.

(i) 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 evidence that he won first place in the 1992 Rara Nepali Pop Competition, best vocal award in the 1995 Sajjan Smriti Musical Competition, and best lead guitarist at the 1997 Sunshine Music Awards. The letter from [REDACTED] principal in the AIMS Academy, states that the Rara Pop Music Awards are open to all of Nepal and that nominees go through a rigorous audition process. [REDACTED] states that the

petitioner won his award in the second installment of the awards. No information was submitted to show that the Rara Nepali Pop Competition awards are nationally or internationally recognized such as through news articles. The letter from ██████████ managing director for Santana Records, states that the Sajjan Smriti Musical Competition was organized by Santana Records and that the company and its awards were begun in 1995. The petitioner submitted a news article entitled “Sajjan Memory Musical Program held” which was published on February 12, 1995 by *Kantipur*. The letter submitted from ██████████, president of Sunshine Music Pvt, states that the Sunshine Music Awards were begun in 1995 to recognize “outstanding performers who have been involved in the Nepalese Music for minimum of 7 years.” The petitioner also submitted an article entitled “Sunshine Music Award 1997 takes place” that appeared in the December 23, 1997 edition of *The Kathmandu Post*. Although some recognition of winners of these awards appears in the Nepali press, the two brief articles are insufficient to show that the awards are nationally recognized for excellence in the field. In addition, all of these articles predate the filing of this petition by several years so could not evidence *sustained* acclaim. The information submitted about *Kantipur* and *The Kathmandu Post* does not indicate the distribution of these publications to show that they are distributed throughout Nepal or that they otherwise demonstrate that these awards are recognized nationally in Nepal.

The petitioner also submitted evidence of his band’s nomination for Best Performance by a group or Duo with Vocal at the 2001 Hits FM Music Awards, his certificate of appreciation awarded by Motherland Nepal for his promotion of Nepali music and culture abroad, and showed that he was named the October 2006 artist of the month by nepalisite.com. The letter submitted from ██████████ executive director of Hits Nepal, states that the Hits FM Music Awards were begun in 1998 and is the radio station’s “attempt to promote and recognize the recording artists and the industry on a nationwide basis.” That information does not indicate that any of the awards are nationally recognized for excellence or that a nominee instead of a winner of the award would share in any such recognition. The regulation at 8 C.F.R. § 204.5(h)(3)(i) requires evidence of the alien’s receipt of a qualifying award or prize, not merely a nomination. Similarly, the petitioner submitted no evidence showing that a certificate of appreciation amounts to an award or that any such award is nationally or internationally recognized for excellence in the field. The petitioner submitted no information about nepalisite.com or the artist of the month recognition. Further, as the award seems to be given monthly to different artists, selection for recognition is not indicative of a national award or consistent with this highly restrictive classification.

Accordingly, the petitioner failed to establish that he meets this criterion

(iii) 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 generally 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.¹

¹ 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.

The petitioner submitted articles that mentioned him as part of a group or otherwise focused on something other than him, but were not specifically about the petitioner or relating to his work. The articles include: “Harish Mathema & group on US tour” published in the August 11, 2005 edition of *The Kathmandu Post*; and “Tour for goodwill & new horizons” published in the August 23, 2005 edition of *The Kathmandu Post*. These articles are not primarily about the petitioner as required by 8 C.F.R. § 204.5(h)(3)(iii) as opposed to being about a tour or show including multiple music groups.

Although the petitioner did submit a number of articles that were primarily about him, the petitioner failed to establish that the articles were published in professional or major media. These articles include: “Angels in the Background,” published in *Kantipur* on June 11, 2005; “Angels in US” published in the September 11, 2006 edition of *The Himalayan Times*; “[The petitioner’s] Angels tour the US” published in the September 30, 2006 *Nepali-Aawaz*; “What kind of this ‘Maun Jeevan (Silent Life)’ of ‘the Angels’” published in *Gorkhapatra* on January 26, 1993; “The Angels” published in the January 3, 1993 *Gorkhapatra*; “The Angels: Playing Music in Shikhar” published in the June 11, 2005 *Nepal Samacharpatra*; “Ther [sic] Angels Concert in Practise [sic]” published in the June 11, 2005 *Annapurna Post*; “[The Petitioner] – The Angels in USA tour” published in the October 1, 2006 *Vishwa Sandesh*; “Guff Gaff with [the petitioner]” published in the February 27, 2006 *City Post*; “Know Your Band: The Angels” which appeared in *WAVE Magazine* in 1995; and “The Angels of Kathmandu, published in *City Post* on June 11, 2005.

The information submitted about these publications is insufficient to establish that they are professional or major trade publications or other major media. The information submitted about *Nepali Aawaz* indicates that it “is an international fortnightly published in New York, USA, every alternate Wednesday” by a Nepali record label and that it is available in eleven U.S. states, one Canadian province and four areas of Nepal. The information submitted from the *Kantipur* website states that it is a “market leader.” The petitioner submitted evidence that the Library of Congress is a *Kathmandu Post* subscriber. The letter from Shito Rajbhandari, desk editor of *WAVE Magazine*, states that the petitioner has been “regularly featured” in *WAVE Magazine* and that *WAVE Magazine* “reaches out monthly to the increasingly significant English-reading young adults that now make up a significant proportion of the urban youth.” A statement provided from Angur Joshi, audit bureau circulation officer of the Press Council of Nepal, states that *Kantipur* is rated number one, *Gorkhapatra* is ranked number two, *Nepal Samacharpatra* is ranked number four, *The Kathmandu Post* is ranked number five, *The Himalayan Times* is rated sixth, and the *Annapurna Post* is rated seven; all of these papers have an “A” categorization. The printout from Pioneer Private Media of Nepal states that *Kantipur Daily* has a daily circulation figure of 210,000, which it claims to be the “largest readership in Nepal.” The printout states that the daily circulation for *The Kathmandu Post* is 40,000 copies. Although circulation statistics are helpful in determining whether a publication is major media, the printout was generated by the company publishing the newspapers and no evidence was submitted to show what other papers’ circulation numbers are or to confirm that the 210,000 number is actually the highest daily circulation. None of this evidence, mostly provided by the publications themselves, is sufficient to establish that any of these publications amount to major media as contemplated by this criterion.

In the original submission and again on appeal, counsel claimed that the petitioner meets this criterion through his appearance on television. The petitioner submitted a letter from [REDACTED], producer on Image Channel Television stating that the petitioner appeared on the television program “Yatra” on an unspecified date in 1999. Even assuming that a television show could be considered as “published material” under this regulation, which we do not, the plain language of this criterion requires that the petitioner submit a

copy of the published material that contains the author's name, the title, and the date of the material. The petitioner submitted none of this information. In addition, the petitioner submitted no information either to show that the television show was about him as contemplated by this criterion or information about Image Channel Television to show that it is a professional or major trade publication or other major media. As such, we are unable to conclude that this appearance qualifies him under this criterion.

Accordingly, the petitioner failed to establish that he meets this criterion.

(iv) 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.

The petitioner submitted evidence that he judged the 2000 Shikhar Bit (also referred to as "Shikhar Beat") contest; the 2004 Inter-College Musical Competition; a musical competition organized by the "BBA department" of the Tribhuvan University, Shanker Dev Campus; the 2005 music contest sponsored by Shree Bal Sewa Secondary School; and the 2001 music contest hosted by Swayamhu English Boarding School. 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 is of far greater probative value than judging a regional, youth, or student competition. With the exception of the Shikhar Bit contest, the evidence indicates that the petitioner judged local, student competitions so this claimed evidence of his judging the work of others is not indicative of the national or international acclaim required by this highly restrictive classification. In addition to the invitation letter to serve as a judge in the Shikhar Bit contest, the petitioner submitted one article that appeared in *Saptahik* on December 15, 2000 naming him as a judge. Even if this one article evidenced national acclaim, a finding we do not make, it occurred in 2000, over six years prior to filing the petition and thus cannot evidence *sustained* acclaim in the field.

Consequently the petitioner has failed to establish that he meets this criterion.

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

We acknowledge the petitioner's submission of many reference letters praising his talent as an artist. Certain letters submitted contain very little, if any, information about the petitioner's original contributions to the area of Nepali pop music. These letters were written by:

The remaining letters of recommendation submitted on the petitioner's behalf are also insufficient to meet this criterion. The letter from ██████████ states that the petitioner "is one of the renowned and establish[ed] singer[s] of Nepal" and that the petitioner and his band "has to their credit many massively popular albums and singles." ██████████, Managing Director of Superstar Media, states that the petitioner's band "has set new trend in Nepali pop music field." The letter from ██████████, Managing Director for Samjhana Audio & Video, states that the petitioner's albums are popular. These letters, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I. & N. Dec. 791, 795 (Comm. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of an artist who has sustained national or international acclaim at the very top of the field. These letters contain no specifics as to how the popularity of the petitioner's work set trends or otherwise made an original contribution of major significance to the field.

We also cannot ignore two letters, from ██████████ director of the program division of Radio Nepal and from ██████████ senior executive producer for Kantipur FM, which both state that the petitioner worked as a back-up band member for more popular artists. The petitioner's performance as a backup band member does not preclude him from meeting this criterion with documented original contributions of major significance while performing in his own band. In the absence of such documentation, however, these letters suggest that the petitioner has not had the same impact as the artists for whom he has performed in a backup role.

Accordingly, the petitioner has not established that he meets this criterion.

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

This criterion generally applies to the visual, not performing, arts, however because the petitioner presented evidence of his participation in numerous high profile events, we agree with the director's finding that the petitioner demonstrated eligibility under this criterion.

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

In order to meet this criterion, a petitioner must establish the nature of his role within the entire organization or establishment and the national or international reputation of the organization or establishment. Counsel asserts that the petitioner qualifies under this criterion through his role with the 2003 Sundar Shanta Nepal Traveling Peace Concert and his participation with charity shows including the WHIM SICAL show to aid cancer patients.

The information submitted about the Traveling Peace Concert indicates that a great number of musicians participated, not to mention supporting personnel behind the scenes and artistic management. The petitioner presented no evidence distinguishing his role with the Traveling Peace Concert from that of anyone else involved in the performances so that we are unable to conclude that his role was leading or critical. As to his philanthropic endeavors, the petitioner presented no evidence showing how participation in fundraising events amounts to leading or critical roles for the organization as a whole. In addition, the petitioner presented no evidence about any of these organizations regarding their reputations. We also note that the petitioner's performance at these various concerts have been addressed in the preceding criterion.

For all of the above stated reasons, the petitioner failed to establish that he meets this criterion.

(ix) 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 RFE, counsel stated that the petitioner demonstrates eligibility under this criterion by virtue of the sale of his six albums. The letter from [REDACTED], president of Moonlight Records, states that the petitioner "has released six albums. . . . The sale of his albums is instant and there is always more and more demand for his songs and music." [REDACTED] also stated that the petitioner's songs "are requested over and over again, on all of the most popular Radio Channels." The petitioner submitted a copy of the contract for his band's third album which states that the petitioner was paid 560,000 Nepali rupees for the rights to that album. A letter from [REDACTED] states that he paid 70,000 Nepali rupees for the rights to "[REDACTED]" to be included in a 2002 Top Hits album. A letter from [REDACTED], president of Sunshine Music, states that he paid 51,000 Nepali rupees for the rights to [REDACTED] to be included in a 2000 compilation album. Although the contract sets forth the remuneration to be received by the petitioner, 8 C.F.R. § 204.5(h)(3)(ix) requires evidence to show that this remuneration is significantly higher than others in the field. The petitioner submitted no evidence comparing his remuneration to the amount received by others in the field for their songs or albums to demonstrate that he has commanded a high salary in relation to others in his field.

As such, the petitioner failed to establish that he meets this criterion.

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his or her field. The evidence in this case indicates that the petitioner is a singer who enjoyed some degree of success in his home country of Nepal. During the past three years, the beneficiary has been in the United States, and any acclaim that the beneficiary enjoyed in Nepal has not been sustained during that time. The record does not establish that the petitioner has achieved sustained national or international acclaim so as to place him at the very top of his field. He is thus ineligible for classification as an alien with extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), and his 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. The petitioner here has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.