

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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
and Immigration
Services

PUBLIC COPY



B2

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **MAY 04 2009**
SRC 06 239 52578

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 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.

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

(1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. – An alien is described in this subparagraph if –

- (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
- (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- (iii) the alien’s entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term “extraordinary ability” means a level of expertise indicating that the individual is one of that small percentage who 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. 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 an actress/publicist. 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 petitioner did not claim that she meets any particular criterion. However, she submitted documentation that presumably is relevant to the following criteria:

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

In his December 28, 2006 letter accompanying the petitioner's response to the director's October 3, 2006 request for evidence, counsel acknowledged that the petitioner had not received any internationally recognized awards. The petitioner submitted documentation that she had received an award from the Univision Television Network for winning the 2004 "Miss Curvilinea" contest for "the best body of women appearing on" the television program "Sabado Gigante." The petitioner submitted a copy of a page from the website of CBS News, accessed on December 28, 2006, which reports that Sabado Gigante (Giant Saturday), in its 44th year "is the longest running weekly entertainment program on television, in any country, any language." The article reports that "the variety show reaches more than 40 countries and 100 million viewers." However, the petitioner submitted no documentation that this award is a nationally recognized award for excellence in the field of acting or as a publicist.

The petitioner also submitted documentation indicating that she had received two awards from Montclair State University in 2004 and 2006. The documentation indicates that the first award was from the Spanish-Italian Department for visiting the school and answering questions from students. The second was for appearing in a play presented by the Hispanic Theater Guild and Belen Jesuit Preparatory School. The documentation does not establish that either is a nationally recognized award for excellence in the petitioner's field of endeavor.

In his August 2, 2006 letter forwarding the petition, counsel stated that the petitioner was submitting a certificate from the theatrical group "Thalia," recognizing her as the Best Young Actress of the Year 2001. However, the record does not contain a copy of this certificate. Additionally, in his December 28, 2006 letter, counsel stated that the petitioner had received "an award from the NBC/Telemundo network [from] the program 'Nitido' because of her figure." In a November 14, 2006 letter, Gabriel Samra, the producer of the Nitido Show, stated that the petitioner was picked by the show's audience as one of the "sexiest FIGURAS NITADAS of our show." Photographs show the petitioner holding a statue with a plaque reading "Sabado Gigante Internacional 'Miss Curvilinea' 2004." However, the record contains no evidence indicating how many potential recipients there were or whether the award is a weekly, monthly or yearly award. Additionally, nothing in the record indicates that either the Best Young Actress of the Year award or any award from the Nitido Show is nationally or internationally recognized as an award of excellence in the petitioner's field of acting or as a publicist.

The record does not establish that the petitioner meets this criterion.

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

In order to meet this criterion, published materials 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 copies of numerous articles from various publications. However, while most are accompanied by translations, the translations do not meet the requirements of the regulation at 8 C.F.R. § 103.2(b)(3) in that the translator is not identified, did not certify that the translations were complete and accurate, and did not certify that he or she is competent to translate from Spanish into English. Additionally, some of the articles appear to be partial translations. The regulation requires that documents submitted in a foreign language must be accompanied by a full English translation. Because the petitioner failed to submit certified and translations of the documents, the AAO cannot determine whether they support the petitioner's claims. Accordingly, the documents are not probative and will not be accorded any weight in this proceeding.

The petitioner submitted a copy of an article from the April 27, 2005 edition of *The Miami Herald* about "Moon Over Buffalo," a play in which she appeared. However, the article discusses the play and is not primarily about the petitioner or her work.

On appeal, counsel asserts that the director "failed to adequately review the fact that the beneficiary appears in a multitude of national and international magazines," and that "[w]ith the advent of the Internet she also is found on various websites, including that of NBC Telemundo." The petitioner submits several articles reprinted on the Internet that have been translated by using the Google translation services. However, these translations do not comply with the provisions of the regulation, which require that documents submitted in a foreign language must identify the translator, the translator must certify that the translation is complete and accurate, and that he or she is competent to translate from the foreign language into English. *Id.*

The petitioner also submits copies of pages from the website YouTube, showing a list of videos about the petitioner that appears on the website, a copy of the petitioner's "MySpace" page, and copies of pages from the websites of wireimage and mhpixs. The latter pages contain photographs of the petitioner and are not articles about the petitioner or her work. The petitioner also submits documentation including copies of website pages, including one from her own site. However, none of these documents are accompanied by an English translation as required by the regulation at 8 C.F.R. § 103.2(b)(3).

Further, the fact that some of the petitioner's videos or other information is available on the websites YouTube and Myspace is not persuasive. The Internet in general, and YouTube and MySpace in particular, are arenas available for posting by any user with access to a computer regardless of notoriety or recognition of the persons portrayed in the online postings. To ignore this reality would be to render the "major media" requirement in the regulation at 8 C.F.R. § 204.5(h)(3)(iii) meaningless. We are not persuaded that international accessibility on the Internet by itself is a realistic indicator of whether a given website constitutes "major media" published material. Moreover, the underlying purpose of this criterion is to demonstrate that major media distributors consider the alien and his work worthy of coverage. Accessibility on a site that allows anyone to upload their own videos, including amateur videos, does not carry the evidentiary weight of independent journalistic coverage in the major media.

The petitioner has not demonstrated that YouTube or MySpace, undeniably popular websites but ultimately ones where anyone with a computer can upload their videos,¹ constitutes major media coverage about an individual artist whose work appears on the site.

The evidence submitted by the petitioner does not establish that the petitioner meets this criterion.

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

Counsel asserts that the petitioner meets this criterion based on her appearances in soap operas "aired throughout Latin America." The petitioner submitted no documentation to establish that her appearances in these programs constituted a contribution of major significance to the field of acting. The evidence does not establish that the petitioner meets this criterion.

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

Counsel asserts that the petitioner meets this criterion based on her appearances in the soap operas previously mentioned. The plain language of this criterion indicates it is intended for those in the visual arts such as sculptors and painters. The petitioner submitted no documentation to indicate that her work as an actress was the primary focus of any exhibition or showcased in any forum that specifically featured her work.

The evidence does not establish that the petitioner meets this criterion.

¹ YouTube was founded in 2005 as an Internet site where "people can easily upload and share video clips." See www.youtube.com/t/about, accessed on March 17, 2009 and incorporated into the record. MySpace is a popular social networking site, where members post information about themselves that they wish to share with others. See www.myspace.com/Modules?Common?Pages?TermsConditions.aspx, accessed on March 17, 2009, a copy of which is incorporated into the record.

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 she performed a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

Counsel asserts that the petitioner's appearances in the aforementioned soap operas, which appeared on the Univision and NBC/Telemundo networks, also show that she meets this criterion. However, the petitioner submitted no documentation to establish that the soap operas in which she appeared were organizations or establishments with distinguished reputations or that her roles in these soap operas were in leading or critical roles.

The evidence submitted 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 a copy of an October 27, 2006 letter between herself and Telemundo-RTI Productions, LLC, for her appearance in the "telenovela 'Dame Chocolate.'" The letter indicated that she was to be compensated at the rate of \$3,000 per month. The petitioner also submitted a copy of a contract between herself and Angel Talent & Entertainment, Inc., authorizing the company to act as the petitioner's representative, and copies of three invoices billed by the agency on her behalf for appearances. Two of the invoices, dated June 20, 2006 and September 20, 2006, indicate that the petitioner was to be paid \$1,500 for her appearance on the show "Decisiones." The third showed that the company billed Fonovideo Productions \$2,100 for seven appearances (\$300 per appearance) on Las Dos Caras de Ana. The petitioner, however, submitted no documentation to establish that this compensation was high relative to others in acting.

On appeal, counsel asserts:

The mere fact that [the petitioner] makes \$3000 for one soap opera is not indicative of her not demanding a high salary. She is under contract by the NBC Telemundo network for this soap opera, but she works on other projects for the same network. Evidence of this has been submitted and this evidence establishes that the beneficiary can make anywhere from \$6000-\$10000 per month between her work on the soap opera and appearances on a program called "Decisiones" ("Decision") as well as other appearances.

Nonetheless, the petitioner failed to submit documentation to establish that her salary is high compared to other actors. Further, the mere speculation of how much she can earn is not evidence that she actually earns or has earned this compensation in the past. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary

becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The evidence does not establish that the petitioner 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.

Counsel states on appeal:

Evidence of commercial success of [the petitioner's] endeavors has previously been submitted. Soap operas in which she has appeared have been seen throughout the world, this is an indication of the success of the projects which she has undertaken. It is important to note, that soap operas in the Latin market usually run 6 to 9 months while in the Anglo market they run for 20 to 30 years. This is a very important distinction to make. But, as a total review of the evidence submitted demonstrates, she has been in various soap operas which have all run between six to nine months on a consistent basis. This is therefore indicative that projects which [the] beneficiary undertakes are in fact a commercial success. Were this not the case she would not be called back for different roles.

We note first that nothing in the record support counsel's assertions about the length of time that the soap operas in which the petitioner appeared ran for six to nine months. 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). Second, the petitioner submitted no documentation that she was the primary star on the shows rather than appearing in supporting or recurring roles. Third, the petitioner submitted no documentation, such as comparative TV ratings or similar evidence, to establish that the shows were commercial successes. A statement as to the number of viewers is of no probative value if not accompanied by how this viewership rates in the commercial market.

The evidence does not establish that the petitioner meets this criterion.

Other comparable evidence.

The regulation at 8 C.F.R. § 204.5(h)(4) states: "*If the above standards do not readily apply to the beneficiary's occupation*, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." [emphasis added]. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation. However, we will briefly address other evidence the petitioner submitted that may be considered under this provision.

The petitioner submits letters of recommendation from several individuals who attest to her extraordinary ability as an actress. Counsel cites *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill 1995) and asserts that the director “failed to give any weight to this factor.” The letters submitted by the petitioner indicate that she is an “excellent actress” who was “capable of working in many different areas.” On appeal, the petitioner submitted letters from several individuals who attest to the petitioner’s extraordinary ability. However, those writing letters on the petitioner’s behalf provide insufficient information to support their opinions of the petitioner’s extraordinary ability and the evidence of record does not support their conclusions. The *Muni* court did not state that the determination of visa preference rested solely on the opinions of the petitioner’s peers. Citizenship and Immigration Services (USCIS) must look at the totality of the record to determine if the petitioner qualifies for visa preference.

The record reflects that the petitioner has a previously approved petition as an alien with extraordinary ability under section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i). While USCIS has approved an O-1 nonimmigrant visa petition filed on behalf of the beneficiary, that prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased 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 the beneficiary’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 (Comm. 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), *cert. denied*, 485 U.S. 1008 (1988).

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 has approved a nonimmigrant petition 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).

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 her field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished herself as an actress 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 is a talented performer, but is not persuasive that the petitioner's achievements set her significantly above almost all others in her field. The petitioner submitted no documentation that she has worked as a publicist and thus no evidence that she has achieved sustained acclaim as a publicist. 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.