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



U.S. Citizenship
and Immigration
Services

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MAY 18 2009

FILE:

[REDACTED]
LIN 07 199 51937

Office: NEBRASKA SERVICE CENTER

Date:

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 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. The director also questioned the petitioner’s intention to continue working in her field.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the petitioner has not overcome the director’s valid concerns. Significantly, the record does not contain evidence of the petitioner’s sustained acclaim in June 2007 when she filed the petition. Rather, any national recognition she may have enjoyed as a child in Thailand ended in the 1990’s. While the petitioner entered the United States as a student of human resources management in 2005,¹ the record contains no evidence of national-level recognition of her musical ability after that date.

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

¹ According to her Form G-325A Biographic Information submitted in support of her Form I-485 Application to Register Permanent Residence or Adjust Status, the petitioner has been working in this field since September 2005.

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 Sor Duang/Sor Au Preng Thai Derm (Thai musical instruments) performer. 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).

In response to the director's request for additional evidence, counsel asserted that the petitioner's performances for the King and Queen of Thailand constitute a one-time achievement. The director concluded that the petitioner had not submitted any evidence of lesser awards, implying a conclusion that the petitioner had also not demonstrated a major internationally recognized award. On appeal, counsel does not affirmatively assert that the petitioner has a one-time achievement, but asserts in his final conclusion that the director erred in concluding that the petitioner had not demonstrated a one-time achievement or met the alternative requirements for eligibility.

Congress' example of a one-time achievement is a Nobel Prize. H.R. Rep. No. 101-723, 59 (Sept. 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 public at large and includes a very 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.

An invitation to perform before the Thai King and Queen is not an award. Rather, the performance appears to fall under the display criterion set forth at 8 C.F.R. § 204.5(h)(3)(vii), which the director concluded that the petitioner meets. The record contains no evidence documenting that performances before the Thai King and Queen are internationally recognized as one of the top awards in the field of traditional music. While we recognize that the petitioner plays traditional Thai instruments, neither the statute nor the regulation suggests that every field has a major internationally recognized award. The petitioner cannot rely on what is claimed to be a nationally recognized performance (which is not an award) to demonstrate a major internationally recognized award simply because there is no such award in her field. Significantly, the regulation at 8 C.F.R. § 204.5(h)(4) only permits the submission of comparable evidence for the alternative 10 regulatory criteria, of which, as will be explained below, an alien must meet at least three.

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.²

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 several foreign language certificates accompanied by the petitioner's own explanation of the content. The petitioner did not provide certified translations as required under 8 C.F.R. § 103.2(b)(3). According to the petitioner's summary of these certificates, the petitioner was selected as one of 12 Thai "juvenile representatives," and the only traditional musician, to attend a Chinese cultural exchange. While the summary of the foreign language document does not provide a date, letters in the record confirm that the cultural exchange took place in 1995. The petitioner was also the second runner up of the National High School Thai traditional music contest for the Royal Highness Princess Sirintorn's Trophy in 1995. She received a certificate at the same competition in 1994, but the certificate appears to recognize the petitioner's participation rather than an award or prize. Finally, the petitioner received a "Certificate of Honor" from the local Wat Buddhavas of Houston, Texas, in recognition of donating her time as a volunteer teacher in Thai language, culture, traditional music and traditional dance for one year in a foreign country.

In response to the director's request for additional evidence, counsel asserts that the petitioner was not merely selected for participation in the cultural exchange, but won an award and was featured in an advertisement based on her award. Responding to the director's concerns that youth awards cannot serve to meet this criterion, counsel asserted that the award was sponsored and advertised by the national Thai government and that the petitioner was selected from over 1,000 competitors. Counsel then notes the submission of letters attesting to the significance of the "award."

representative of the Exchange Program, asserts that the program involves "a very selective process in choosing only 12 students out of [the] entire country to represent Thailand in an exchange program with the Republic of China." explains that in October 1995, the petitioner "won this very prestigious award and was selected to represent the country of Thailand during her visit to the Republic of China." a professor at Chulalongkorn University and one of the exchange program judges, confirms that the petitioner was selected as the best in her field and that the remaining 11 champions were the best in their own fields.

former member of the Thai Parliament and a current Thai minister, asserts that the petitioner "won the contest for the Exchange Culture Program to represent Thailand in the Republic of China." Permanent Secretary of the Thai Ministry of Energy,

² The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

asserts that he invited the petitioner to perform at the ministry in 2002 based on her “national award of Thai Traditional Music in the Exchange Culture Program” from seven years earlier. The petitioner submits a similar letter from the Assistant Director of the Youth Promotion Project at the Thai Ministry of Social Development and Social Security.

The petitioner submitted her own certified translation of an advertisement for the cultural exchange program that features her photograph and identifies her as one of those selected for the exchange.

The director concluded that the cultural exchange, while national, was limited to students and could not serve to meet this criterion. On appeal, counsel asserts that the petitioner submitted five awards and discusses the national sponsors and competitors for the cultural exchange. Counsel further asserts that that the second place finish for the Royal Highness Princess Sirintorn’s Trophy was also the result of a national competition. Counsel continues to assert that the petitioner’s performances constitute awards. Finally, counsel asserts that the “Certificate of Honor” from the Wat Buddhavas of Houston was based on a competition of thousands of individuals in Thailand. Counsel attempts to broaden the actual regulation at 8 C.F.R. § 204.5(h)(3)(i) by referring repeatedly to awards and “distinctions.” The regulation at 8 C.F.R. § 204.5(h)(3)(i), however, references only awards and prizes.

The petitioner submits a letter from [REDACTED] an associate professor at Chulalongkorn University where the petitioner obtained her baccalaureate in education. Professor [REDACTED] explains that each year the university sends volunteer teachers to Thai temples in the United States to teach Thai and that the petitioner was selected to teach in Texas “in the year of 2001-2002.” He concludes that the petitioner “won the first place of selection process of that year which means she was the best outstanding candidate for the year.” [REDACTED] does not suggest that the petitioner was selected from a national pool of candidates as opposed to graduates of the university.

The fact that some of the petitioner’s references characterize the petitioner’s selection for participation in the cultural exchange and a volunteer one-year teaching position as awards cannot transform something that is not an award into an award. An award or prize for excellence is issued to recognize past achievement. Selection for participation in a future event, such as a cultural exchange, or for employment as a teacher, is not an award or prize. Similarly, performing for high level officials or royalty falls under the display criterion at 8 C.F.R. § 204.5(h)(3)(vii) and will not also be considered “awards” or “prizes.” To hold otherwise would render meaningless the statutory requirement for extensive evidence and the regulatory requirement that an alien meet at least three separate criteria.

Even if we accepted that the cultural exchange selection constituted an award, we concur with the director that awards limited to student competitors cannot serve to meet this criterion. While the fact that the petitioner was only 14 when selected for the cultural exchange and as the second runner up for the trophy competition is not determinative, the fact that she only competed against other high school students is problematic. As she did not compete against the most experienced and renowned members of her field, we cannot conclude that the selection for the cultural exchange or as second runner up for the trophy can serve to meet this criterion. Similarly, the petitioner has not established that the most

experienced and renowned musicians compete for volunteer one-year teaching positions at U.S. Thai temples. As stated above, [REDACTED] does not even suggest that the pool of candidates for these positions extended beyond recent graduates of his university.

Finally none of the above evidence postdates 2001. Thus, none of the above evidence demonstrates that the petitioner enjoyed sustained national or international acclaim nearly six years later when the petition was filed.

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

Initially, the petitioner submitted a March 2007 article entitled "Thai Traditional Music Always has its Successor" published in the *Thai Texas News*. While the petitioner submitted a translation for the article, it is not certified as required under 8 C.F.R. § 103.2(b)(3). In response to the director's request for evidence that this publication is major media, counsel refers to a September 12, 2006 memorandum by USCIS Acting Associate Director for Domestic Operations, Michael Aytes, *AFM Update: Chapter 22: Employment-based Petitions (AD03-01)*. The memorandum states: "Regional publications or publications aimed at a particular ethnic or language group generally will be sufficient only if the publications are considered the top publications in the field, or the publications enjoy national or international circulation and reputation beyond that of the publications' intended audience." Counsel asserts that the *Thai Texas News* "is considered the top Thai publication in Texas." The petitioner submits a letter from Anuchit Chareonto, Editor of the *Thai Texas News*, stating that although the newspaper is local to Houston, it is "a center of communication among Thai people" and distributes around 3,000 copies to other large cities in Texas.

The petitioner also submitted an article about the petitioner's teaching in Houston in the *Matichon Newspaper* and a certified translation by the petitioner. The article postdates the filing of the petition and, in fact, the director's request for additional evidence. The petitioner submitted materials about the company that owns *Matichon Newspaper* revealing that it also owns the *Khao-sod Daily*, which ranks third in Thailand in terms of circulation. The record does not establish, however, that the article about the petitioner appeared in the *Khao-sod Daily*. The circulation of *Matichon Newspaper* is not documented in the record.

The director concluded that the petitioner had not established that the *Thai Texas News* was major media and that the article in the *Matichon Newspaper* was a human interest story that was not indicative of national or international acclaim.

On appeal, counsel asserts that the *Thai Texas News* should be considered major media because it reaches 40 percent of the Thai population in Texas. Counsel further asserts that the article in the

Matichon Newspaper focuses on the petitioner's accomplishments and should serve to meet this criterion.

We are not persuaded that a newspaper aimed at the Thai population of a single state published in a language the majority of the population cannot comprehend with a distribution of only 3,000 outside of Houston and no significant circulation outside of Texas can serve to meet this criterion. Counsel's reliance on the memorandum is not persuasive. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (an agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

Regardless, the memorandum does not support counsel's assertion. First, a Houston publication with some distribution in other cities in Texas is more local than "regional." Moreover, the memorandum strongly implies that most regional or ethnic publications cannot serve to meet this criterion. Regardless of its reputation among the Thai population in Texas, the record does not reflect that the *Thai Texas News* is considered the top publication "in the field," the exception provided in the memorandum. "In the field" implies recognition beyond the Thai population of the State of Texas. Significantly, the criteria are designed to demonstrate national or international acclaim. Counsel has never explained how the article in this publication, with its minimal circulation in Texas, is indicative of or consistent with national or international acclaim in the United States or Thailand.

As stated above, the article in the *Matichon Newspaper* postdates the filing of the petition. The petitioner must establish her eligibility as of that 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). Thus, we cannot consider any achievements after that date. Moreover, the petitioner has not established the circulation of this newspaper. Finally, in relation to the evidence in the aggregate, while the article itself is recent, it begins by mentioning two University of Houston medical students studying traditional Thai music under the petitioner and concludes with a retrospective of her accomplishments in the early 1990's. The article does not suggest any recent accomplishments or sustained acclaim in 2007 when the petition was filed.

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

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

The initial submission and the response to the director's request for additional evidence do not address this criterion. The director acknowledged the submission of reference letters but concludes that they do not discuss any original contributions by the petitioner. On appeal, counsel asserts that this conclusion was in error:

Many of the letters came from members of the Thai government detailing events to which the petitioner was invited to perform. Other reference letters came from prominent figures who participated in the selection and judging of the competitions that the petitioner competed in. It is not expected that these reference letters will form the basis and foundation of the petitioner's request for classification as an individual of extraordinary ability, but it is requested that these reference letters at a minimum be considered supporting evidence to the petitioner's filing.

This decision considers the letters insofar as they address the regulatory criteria. Counsel does not, however, identify a specific original contribution attested to in any of these letters and we concur with the director that while the letters praise the petitioner and affirm her performances for the Thai government and royalty, none of the letters affirm any original contributions to traditional Thai music.

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

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The petitioner submitted an article entitled "The Sweet Sounds of Thai Sor" published in June 2007 in the *Buriram News*. In response to the director's request for additional evidence, the petitioner submitted the identical article published in *Pirap News* shortly after the director issued the request. [REDACTED], Editor-in-Chief of the *Buriram News*, asserts that it was established in 2002 and is the main newspaper of Buriram Province. [REDACTED], the editor of *Pirap News* asserts that it is the main newspaper of Roy-Et Province. Significantly, both provinces are in the east and northeast of Thailand.

The article itself, authored by the petitioner, describes the look and make-up of Sor Duang and Sor Au and the petitioner's general approach to teaching students to play these instruments by making the students feel comfortable with the instruments by comparing them to the violin. The article does not provide any scholarly information about the instruments other than the most basic description of them or teaching methods beyond the very broad concept of making students feel comfortable with the instrument.

The director concluded that the publications were not national publications. On appeal, counsel asserts that the publications, while not national, are still major media. Counsel is not persuasive. The statute requires national or international acclaim. Publication in regional publications with no circulation in the center or west of the country, cannot establish that the petitioner has any national recognition.

Regardless, as stated above, the article is not scholarly.

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

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

The director concluded that the petitioner meets this criterion and we will not withdraw that conclusion. We note, however, that the petitioner's performances after 2002 do not appear to be at the national level. Thus, even this evidence is not indicative of sustained national acclaim as of the date of filing in 2007.

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

Initially, the petitioner submitted a letter from _____ President of the Thai Texas Association. _____ asserts that the association participates in several events showcasing Thai culture and that the petitioner "always plays a critical role as a participant and musical artists for the Thai Texas Association during these events," including serving as Master of Ceremonies. In response to the director's request for additional evidence, the petitioner submitted a new letter from Mr. _____ attesting to the association's distinguished reputation in the United States and Thailand, noting that the association hosted the Thai King and Queen during their U.S. visit. _____ further asserts that the petitioner "has played a leading role within our organization by implementing her musical talents with the Sor Duang and Sor Au into our many cultural events," including a Tsunami relief event. The petitioner submits a certificate of participation in the Youth Cultural Exchange Project from the Mayor of Houston, an appointment of the association as a cultural ambassador for Houston from the Mayor, a Certificate of Special Congressional Recognition from a member of congress recognizing the association's relief efforts and a letter of appreciation from former presidents George H. W. Bush and Bill Clinton for tsunami relief funds raised.

The director concluded that the petitioner had not established that the Thai Texas Association enjoys a distinguished reputation nationally. On appeal, counsel once again references the memorandum by Mr. Aytes for the proposition that the association need only have hosted a distinguished production. Counsel asserts that the tsunami relief event and hosting the King and Queen of Thailand were both distinguished productions.

The record contains no evidence that the tsunami relief event was a distinguished production. The fact that the association donated the funds to the efforts coordinated by former Presidents Bush and Clinton

does not suggest that the event itself had a distinguished reputation. The record also lacks evidence that the Thai Texas Association managed the entire U.S. visit for the Thai King and Queen or just the Texas portion of the visit. Moreover, the record does not suggest that the association managed the visit because of its national prestige rather than its ties to the Texas Thai community that would take an interest in the visit.

It remains, we are not persuaded that the petitioner's participation in the Thai Texas Association's cultural events, even as a master of ceremonies, is indicative of or consistent with national or international acclaim as a musician rather than recognition in the Texas Thai community.

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 traditional Thai musician 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, at a young age, showed talent as a traditional Thai musician, but is not persuasive that the petitioner's achievements currently 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.