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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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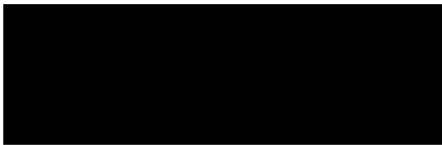
FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
LIN 07 131 51127

Date: OCT 21 2009

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).

Perry Rhew
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.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we uphold the director's finding that the petitioner has not established his eligibility for the exclusive classification sought.

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

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

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

The AAO notes that the petitioner is currently in the United States as a P-3 nonimmigrant, a visa classification that requires the alien to perform as an internationally recognized entertainer. *See* section 214(c)(4)(B) of the Act, 8 U.S.C. § 1184(c)(4)(B). While USCIS 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, if similarly phrased standard. First, the evidentiary standards set forth at 8 C.F.R. § 214.2(p)(iii) are not identical to those set forth at 8 C.F.R. § 204.5(h)(3). Moreover, 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). In light of the above, we will review the evidence under the standards for the immigrant classification sought, set forth at 8 C.F.R. § 204.5(h)(3).

This petition seeks to classify the petitioner as an alien with extraordinary ability as a keyboardist. 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 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 several certificates of participation and appreciation. In response to the director's request for additional evidence and on appeal, the petitioner does not claim that these certificates constitute lesser nationally or internationally recognized prizes or awards and we find that they do not. At issue are the following certificates that, on their face, are awards:

1. Best Keyboardist Award at the 1994 NEPA:POP Contest;
2. Best Performance as a keyboardist at the Music for Peace event in 1998;
3. Best Keyboardist Award at the 1999 Tuborg Music Festival and

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

4. Achievement of "Excellent (keyboardist) position" at Musical Fair 2002 organized by the Educators Group in Nepal.

In response to the director's request for additional evidence relating to the petitioner's awards, the petitioner submitted a letter from [REDACTED] at the radio station Image 97.9. [REDACTED] asserts that the petitioner won Best Keyboardist at the 8th Tuborg Image Award competition. [REDACTED] further asserts that the award "is the most awaited and respected award function in the Nepalese Music Industry organized by the Image Networks as its annual event to recognize and appreciate the popular musical personalities of the country." [REDACTED] of Everest Exhibitions further asserts that the weeklong event is attended by 200,000 people and 400 bands. While [REDACTED] attests that 400 bands attend, he then states that only 50 bands participate and only ten bands are allowed to compete for awards. The petitioner also submitted his nomination certificate for the Tuborg Image Award.

In addition, the petitioner submitted a letter from NEPA's Program Coordinator, [REDACTED]. [REDACTED] explains that NEPA is a cultural exchange forum and that the NEPA:POP Contest was a competition of Newari songs from different groups to promote the language. [REDACTED] does not explain how many musicians in Nepal perform Newari songs or how many artists competed in this competition.

Finally, [REDACTED] of Educators Group, explains that the group is a compilation of different musical professionals involved in teaching music. In 2002, the group organized Musical Fair 2002 in Kathmandu with 40 institutions and music shops displaying their "stalls" and 46 musicians competing in different categories. [REDACTED] concludes that the petitioner was "declared first in the keyboardist category."

The director concluded that the petitioner had not demonstrated the national scope of the above awards and, regardless, they could not establish *sustained* acclaim after 1999. On appeal, counsel asserts that the director erred in characterizing the awards as regional. The petitioner submits a letter from [REDACTED] of the Tuborg Music Festival Organizing Committee advising that the festival has been ongoing "since 1990 A.D. (Write appropriate year here)." The parenthetical statement suggests that while [REDACTED] may have signed the letter, the content was primarily authored by someone else. [REDACTED] further asserts that the competition is national in scope and that 1999 was an especially competitive year.

In addition, the petitioner submits a letter from [REDACTED] of Educators Group. [REDACTED] asserts that the Musical Fair was established in 1991 and is national in scope. [REDACTED] further asserts that there are "stiff and challenging tests and evaluation by experts in the musical field" prior to being invited to compete.

The petitioner did not submit any evidence to support the attestations pertaining to the significance of the above festivals, such as media coverage of the events. The NEPA:POP Contest appears limited to

musicians singing in a specific language. Without additional evidence regarding the scope and recognition of this competition, we cannot conclude that it is nationally or internationally recognized.

We acknowledge the letters attesting to the significance of the Tuborg and Musical Fair 2002 competitions. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 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 from experts supporting the petition 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. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). Without supporting evidence, such as promotional materials for the competitions, official rules or media coverage of the selection of the awardees, the petitioner cannot establish that the above awards are qualifying.

Finally, counsel does not address the director's concern that the most persuasive award is from 1999, eight years before the petition was filed. Such evidence cannot demonstrate that the petitioner enjoyed sustained acclaim in 2007 when the petition was filed.

In light of the above, the petitioner has not established 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.

Initially, the petitioner submitted (1) an article about the petitioner in an undated issue of *The Rising Nepal*; (2) a promotion of "Nepal Fest," which included a performance by the petitioner's band, in a March 2007 issue of *Vishwa Sandesh*; (3) two articles about a tour of Nepali musicians in the United States in the September 20, 2006 issue of *The Rising Nepal* and the August 29, 2006 *CityPost* edition of the *Kathmandu Post*² and (4) an article about a U.S. tour by a Nepali band listing the petitioner as the keyboardist in an undated, unidentified newspaper.

The director's request for additional evidence specified that the petitioner must submit published material primarily about the petitioner and evidence that the material appeared in professional or major trade publications or other major media. In response, the petitioner asserted that he had submitted such evidence and affirmed the significance of the media in which the material appeared. Specifically, the petitioner asserted that *The Rising Nepal* is one of the oldest national daily newspapers of Nepal and is widely circulated and read in Nepal and abroad. In addition, the petitioner asserts that *Kantipur* and the *Kathmandu Post* enjoy a large audience. The petitioner references the website *Wikipedia* in support of

² The publication name and date were only established in response to the director's request for additional evidence.

his assertions. Finally, the petitioner submitted a letter from [REDACTED] of *The Mystic*, asserting that the magazine printed an article about the petitioner in its March/April 2000 edition.

The director concluded that the petitioner had not documented published material about himself appearing in professional or major trade journals or other major media and noted that the petitioner had not provided a copy of the article that purportedly appeared in *The Mystic*.

On appeal, the petitioner provided a November 18, 2008 article about his tour in *The Rising Nepal*, which counsel asserts is Nepal's oldest English-language widely circulated daily newspaper. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The November 18, 2008 article postdates the filing of the petition and cannot be considered evidence of the petitioner's eligibility as of that filing date. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 4 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). The accuracy of the article is also problematic. The article states that the petitioner has won the Tuborg Image Award and the Tuborg Musical Fair Award. The record, however, only documents a Tuborg Image Award and a Musical Fair 2002 award that is not sponsored by Tuborg. In addition, the article indicates that the petitioner won a Police Academy Award. According to the record, however, the petitioner merely received a certificate for his completion of band basic training organized by the National Police Academy in Center Police Band.

The petitioner has not provided any evidence regarding the publications that have carried articles mentioning the petitioner. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.³ *See Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008). Moreover, only one of the articles predating the filing of the petition is "about" the petitioner. A single undated article in a newspaper of undocumented

³ Online content from *Wikipedia* is subject to the following general disclaimer:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . *Wikipedia* cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on October 15, 2009, a copy of which is incorporated into the record of proceeding.

significance cannot be considered indicative of or consistent with national or international acclaim. Thus, the petitioner has not established 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.

The petitioner submitted several certificates recognizing his services as a judge at events such as the 22nd All Nepal Medical Conference, which included intercollegiate dance and cultural competitions; the M³ Festival; an inter-house music competition at the Next Generation Residential Academy and the Jhamsikhel Youth Club's music contest. In response to the director's request for additional evidence, the petitioner submitted a letter from [REDACTED] of Dot Nepal Pvt., Ltd., asserting that the M³ Festival, initiated in 2002, was a two-day event including "Momo" stalls, movies and musical performances. [REDACTED] of ANEMCON's All Nepal Medical Conference, asserts that the competitors of the dance and cultural competitions were medical students.

The director concluded that the events where the petitioner served as judge were not commensurate with extraordinary ability. On appeal, the petitioner submits a letter from [REDACTED] Past President of JCI Kathmandu – Nepal, asserting that the petitioner served as a judge for the Miss Teen Nepal Cultural Talent Show. While [REDACTED] asserts that the contest evaluates contestants based on cultural understanding as well as beauty, [REDACTED] does not state that the contestants were musical performers.

The regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires evidence of judging the work of others in the same or an allied field. Medical students, even if competing in a dance or cultural competition, are not within the petitioner's field. Similarly, it is not clear that judging the Miss Teen competition involved judging the work of other keyboardists or musicians. Moreover, the evidence submitted to meet this criterion, or any criterion, must be indicative of or consistent with national or international acclaim. *Accord Yasar v. DHS*, 2006 WL 778623 *9 (S.D. Tex. March 24, 2006); *All Pro Cleaning Services v. DOL et al.*, 2005 WL 4045866 *11 (S.D. Tex. Aug. 26, 2005). Judging in-house and youth competitions is not indicative of or consistent with national or international acclaim. Without additional information about the M³ Festival, such as promotional material, media coverage or programs listing the petitioner and other judges, we cannot determine the significance of the petitioner's services for this festival.

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

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

While the petitioner has never claimed to meet this criterion, we acknowledge that the record contains evidence that the petitioner, a performing artist, performs at various venues. This criterion, set forth at 8 C.F.R. § 204.5(h)(3)(vii), relates to visual artists. Regardless, the petitioner has not demonstrated that the venues where he has performed are exclusive artistic exhibitions or showcases. Thus, the record 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.

The petitioner submitted a letter from [REDACTED] of Sunshine Music, asserting that his company produced and distributed two albums by [REDACTED] that "enjoyed a huge success and still fetch good demand in the market." The credits for these compact discs list the petitioner as the keyboardist and arranger. In a letter dated December 19, 2004, [REDACTED], Executive Director for Dexo Music Center, asserts that Dexo distributed "Folk Tunes in Piano I and II" in 1999 and 2002. [REDACTED] further asserts that these albums were composed and arranged by the petitioner and have sold more than 8,000 copies. [REDACTED] does not imply that these sales numbers are for each compact disc rather than in the aggregate. The director concluded that the petitioner had not demonstrated his own commercial success in the sales of [REDACTED] albums and questioned whether 8,000 copies are indicative of commercial success.

On appeal, the petitioner submits a new letter from [REDACTED] affirming that 8,000 copies "count as very high sales in our music industry." [REDACTED] does not support this assertion with data regarding the sales of other renowned musicians in Nepal. The petitioner has not submitted evidence supporting the letters from [REDACTED], such as evidence that his albums have been certified gold or platinum or the Nepalese equivalent.

The record contains no specific information regarding the sales of [REDACTED] albums. Moreover, while the petitioner is credited on [REDACTED] albums, they are promoted as [REDACTED] work, not as the arrangements of the petitioner as performed by [REDACTED]. Thus, we are not persuaded that the sales of these albums demonstrate the petitioner's personal commercial success. The letters regarding the sales of Folk Tunes in Piano I and II are insufficient. Without additional data regarding album sales in Nepal, we are not persuaded that 8,000 copies of two compact discs in the aggregate over five years is indicative of or consistent with commercial success or sustained national or international acclaim. Thus, we concur with the director that the petitioner has not established 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 the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a keyboardist 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. The evidence indicates that the petitioner shows talent as a keyboardist, but is not persuasive that the petitioner's achievements set him significantly above almost all others in 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 sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.