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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 Date: SEP 10 2009
LIN 08 008 54394

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)

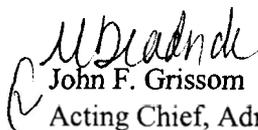
ON BEHALF OF PETITIONER:

[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 (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. Specifically, in reaching this conclusion, the director concluded that the petitioner failed to meet three of the ten regulatory criteria.

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

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

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

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

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

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

(iii) the alien's entry 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, 60898-99 (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 she has sustained national or international acclaim at the very top level.

This petition, filed on August 17, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a violinist.

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

We note that although the record contains evidence of the petitioner's prior approval as an O-1 non-immigrant, the 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 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 (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 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).

As aforementioned, each petition must be adjudicated on its own merits under the statutory provisions and regulations which apply. Thus, the petitioner's eligibility will be evaluated under the regulatory criteria relating to the immigrant classification as claimed by the petitioner. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).

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

To fulfill this criterion, the petitioner initially submitted the following evidence:

1. A First Prize for a solo competition and a Grand Prize in chamber music at the Young Talents of Russia Festival in 1992 (Awards not in record);
2. A Laureate Diploma of the Evgeny Mravinsky Festival "Gifted Youth" in St. Petersburg, Russia in 1996;
3. A Third Prize at the Virtuosi 2000 International Youth Music Competition in St. Petersburg in 1997;
4. A Grand Prize as a soloist and a First Prize in the chamber duo competition at the Coast of Hope Music Competition in Albena-Dobrich, Bulgaria in 1998 (Award partially in English but translation not provided for the document);
5. A Second Prize in Category 3 (18-21 years old) at the International Spohr Competition for Young Violinists in Weimar, Germany in 1998 (accompanied by the rules indicating the competition is open to the public);
6. A First Prize in the Negeve Competition in Israel in 1998; and
7. A Baerenreiter Special Prize in the Young Concert Artist International Auditions in Leipzig, Germany in 1999 (accompanied by a letter from [REDACTED]).

In Response to the Request for Information ("RFE"), the petitioner provided a letter from [REDACTED] Faculty at the Curtis School of Music at the Peabody Conservatory in New Jersey. In her letter, she claimed that, "musical competitions are almost entirely limited to young musicians" and that "winning a prestigious youth competition is a strong sign to the musical community that the performer is a star player." Further, her letter stated that the "only competitions that do not limit the age of the performer are symphony orchestra auditions." She argued that the fact that the petitioner was chosen to be in the Boston and San Francisco Symphonies evidences she is an outstanding violinist. In addition, the petitioner submitted letters inviting the petitioner to audition for the Boston Symphony Orchestra ("BSO") and its auditioning procedures. In addition, a letter from the BSO to the Vermont Service Center regarding her O-1 Visa Application was submitted. This letter stated that the petitioner was chosen among 1,268 competitors for the BSO position. Similarly, the petitioner submitted a letter from the San Francisco Symphony stating that the petitioner was chosen to be a member of the Symphony from 177 musicians who auditioned. Moreover, an internet printout from www.yca.org was provided regarding the competition in item 7.

In his decision, the director found that the petitioner did not meet this criterion, and we concur with the director's finding. Specifically, he indicated that the awards provided were all youth awards, and that although such awards "may be used to discover and develop persons who may have the potential to rise to the top of their field, the awards are not themselves necessarily indicative of a person having already done so." On appeal, the petitioner submitted a sample listing of the first fifteen violin competitions that are members of the World Federation of Music Competitions. Additionally, the petitioner submitted a story from Time's website, dated May 19, 1958, regarding an American musician who won a competition in Moscow at age 23 that made him famous.

The petitioner failed to submit any additional evidence for items 1-5, other than the award, to demonstrate that these awards represent nationally or internationally recognized prizes, such as supporting evidence showing the prestige associated with receiving the awards or some other evidence consistent with national or international acclaim at the very top of the field. The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is her burden to establish every element of this criterion. Moreover, the record even lacks general information about the competitions (such as the award criteria, the area from where participants were drawn, the number of entrants, or the percentage of entrants who earned some type of recognition). With regard to item 1, the award was claimed in the petitioner's briefs, but the actual award was never submitted. Moreover, although the petitioner provided some additional information for items 6, this evidence merely addressed the procedures for competing in the competitions, rather than demonstrating that the award is consistent with national or international awards consistent with excellence in the petitioner's field. Furthermore, the petitioner failed to provide a translation for item 4 as required by 8 C.F.R. § 103.2(b)(3). Without a translation, the actual content of the award cannot be ascertained.

Moreover, the evidence regarding the petitioner's auditions, including item 7 and the various letters discussing the petitioner's selection as a member of the Boston and San Francisco Symphony, cannot be utilized to fulfill this category. We agree with the director, who held that "winning" an audition would not qualify as receipt of an award under this criterion.

In addition, the petitioner's counsel argues that the fact that all the awards relate to youth competitions is irrelevant. The petitioner provided a letter from [REDACTED] as well as a list of various competitions that are limited to youth competitors, in an attempt to indicate that youth competitions are the only available prizes or awards, aside from auditions, to win as a musician. However, [REDACTED], who also wrote a recommendation for the petitioner, is a well known Grammy winner, as he mentioned in his letter, as well as an Avery Fisher Prize winner, which are both awards for musicians that are not limited by age. Additional awards were mentioned by [REDACTED] in another support letter written on the petitioner's behalf. Moreover, even if those arguments were merited, the petitioner still failed to meet her burden to prove that the awards that she won represented prizes or awards for excellence in her field of endeavor, as no additional evidence regarding these competitions was provided. Further, the most recent award was given to the petitioner was in 2000, 7 years prior to her filing this application. As such, these awards would not exemplify *sustained* acclaim as required by Section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i) and 8 C.F.R. § 204.5(h)(3).

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

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

In order to demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to

membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner submitted a letter from the conductor of the Boston Pops, which confirmed her membership in the BSO and which discussed the selection process in order to become a member. In response to the RFE, the petitioner submitted various letters that also confirmed her membership in the BSO and the San Francisco Orchestra, in which the petitioner is also a member. Auditioning Procedures for the BSO were submitted as well. A letter from the BSO Personal Manager provided information regarding the strenuous selection process for open positions in the BSO. The petitioner also provided a letter to evidence her membership on the San Francisco Symphony and the competitiveness of being selected for that symphony. However, the information regarding the selection process for the San Francisco symphony was limited.

The director concluded that the petitioner established that she met this requirement with regard to her membership in the BSO. We agree with the director. As such, the petitioner has satisfied this criterion.

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

In 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 have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication or broadcast, or from a publication printed in a language that the vast majority of the country's population cannot comprehend. 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

The petitioner initially submitted an article entitled "Music for the Ages," dated January 20, 2005 and written by [REDACTED]. The article did not indicate the source, however the name of the source, *The Wellesley Townsman*, was provided in the petitioner's initial brief. The article is about the various ways in which musicians become members of the BSO. The petitioner was interviewed and

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.

her comments regarding the selection process for the BSO were included in the article, along with another musician. No further evidence was provided in response to the RFE or on appeal.

There is no evidence (such as circulation statistics) showing that the preceding article submitted by the petitioner was printed in professional or major trade publications or some other form of major media. This article appears to be a regional paper rather than a nationally or internationally circulated publication. Regional coverage or coverage in a publication read by only a small ethnic segment of a country's total population is not evidence of national or international acclaim. Moreover, the plain language of this regulatory criterion requires that the published material be "about the alien." The article is not primarily about the alien, but rather about the career paths musicians take to become members of the BSO.

The director found that the petitioner failed to satisfy this criterion, and we concur with his decision. As such, the petitioner has not established 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 petitioner argued that this criterion applied to her and offered several letters of recommendation, in an attempt to satisfy this criterion. In response to the RFE, the petitioner resubmitted the reference letters from [REDACTED] and J. [REDACTED] who both support her petition.

The letters provided discuss the petitioner's talent as a violinist, her training, and examples of where she has performed. However, they fail to demonstrate that she has made original contributions of major significance in her field. The letters include no substantive discussion as to which of the petitioner's specific artistic achievements rise to the level of original contributions of major significance in the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner's artistic talent is admired by those offering letters of support, there is no evidence demonstrating that her work has had major significance in the field. For example, the record does not indicate the extent of the petitioner's influence on other performers nationally or internationally, nor does it show that the field has somehow changed as a result of her work.

In his decision, the director cited to Matter of Chawathe (USCIS Adopted Decision, January 11, 2006) insofar as its precedent reaffirmed 8 C.F.R. § 204.5(h)(3), which required "specific objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability." The director then stated that he found "the record lacks documentary evidence establishing what contributions the petitioner has made to the field of endeavor and that those contributions are significant." On appeal, the petitioner's counsel argues that the letters provided serve as sufficient evidence to establish this criterion. However, even if we consider the letters to be independent evidence, the letters fail to provide a specific example of an original contribution of major significance in the petitioner's field. As such, we agree with the director that the petitioner has failed to fulfill 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 letter from the Orchestra Personnel Manager of the BSO, dated July 7, 2007, which stated that the petitioner is employed with the BSO as a violinist with a salary of \$119,080 and that her contract runs through August 26, 2007. This letter was accompanied by an employment contract, dated and signed by the petitioner and the BSO in March of 2004. The petitioner also submitted an agreement between herself and the San Francisco Symphony dated July 6, 2007 for her employment as a Section 1st Violinist for the 2007-2008 Season, which indicated that her salary would be "scale." The petitioner submitted the wage scale for the previous year, 2006-2007, for symphony orchestras which indicated that her salary with the San Francisco Symphony would be \$114,400 annually. In addition, the petitioner submitted a U.S. Department of Labor printout which indicated that musicians' and singers' salary in the Boston area range from \$30,181 to \$91,333 per year.

In response to the RFE, the petitioner submitted the Wage Scales for all the symphony orchestras. Further, the petitioner's brief argued that since all symphonies are bound by a union agreement, all orchestra members receive high salaries in relation to other musicians. The petitioner also submitted another letter from the San Francisco Symphony's Personnel Administrator that stated that its symphony members are "among the highest paid in the country" and that the petitioner is paid \$121,000 (plus media payments) for the 2007-2008 Season.

Upon review, we find such evidence sufficient to establish that the petitioner meets this criterion. We, therefore, withdraw the director's finding on this issue.

On appeal, counsel argues that the reference letters submitted on the petitioner's behalf are comparable evidence of the petitioner's extraordinary ability as a violinist. The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten criteria "do not readily apply to the beneficiary's occupation." The regulatory language precludes the consideration of comparable evidence in this case, as there is no evidence that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to meet three of the regulatory criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

In this case, the petitioner has failed to demonstrate receipt of a major, internationally recognized award, or that she meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review for the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). We acknowledge that the petitioner has submitted letters of praise from internationally recognized experts in her field such as [REDACTED]; however, reputation by association cannot establish that the petitioner herself has sustained national or international acclaim. While the petitioner has attracted the favorable attention of these world-renowned musicians, a comparison of their achievements with those of the petitioner shows that she has not amassed a record of

accomplishment which places her among that small percentage at the very top of her field. We agree with the renowned experts' assertions that the petitioner possesses great talent as a violinist, but the evidence of record does not establish that she has sustained national or international acclaim at this stage in her musical career.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.