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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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[REDACTED]

FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: **APR 19 2010**

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).

UDeadnot
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The petitioner filed an appeal with the Administrative Appeals Office (AAO), which remanded the matter to the director for further action and consideration. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed and the petition will be denied.

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 and the AAO determined that the petitioner had not established the requisite extraordinary ability through extensive documentation and sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate his or her "sustained national or international acclaim" and present "extensive documentation" of his or her alien's achievements. *See* section 203(b)(1)(A)(i) of the Act [USC cite removed because we already used it] and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On certification, counsel argues that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and has submitted other comparable evidence of his extraordinary ability pursuant to 8 C.F.R. § 204.5(h)(4).

I. Law

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 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, international recognized award). Barring the alien’s receipt of such an award, the regulation outlines the following 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.

- (i) Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) 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;
- (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) Evidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
- (v) Evidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's procedure for evaluating evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.*

The court stated that the AAO's approach rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at *6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at *3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under three criteria, considered in the context of a final merits determination. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

II. Analysis

A. Evidentiary Criteria

¹ Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

This petition, filed on June 25, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a musician. As the facts and procedural history have been adequately documented in the previous decision of the AAO, which is incorporated here by reference, we will only repeat certain facts as necessary here. The petitioner has submitted additional evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3). Our decision will be limited to the evidence provided on certification and the criterion that are applicable to such evidence.

The director initially denied the petition on April 15, 2008, finding that the petitioner had not submitted clear evidence that he would continue to work in his area of expertise in the United States as required by the regulation at 8 C.F.R. § 204.5(h)(5). In the AAO's April 29, 2009 decision on appeal, the AAO concurred that the record initially lacked clear evidence indicating that the petitioner intended to continue working as a musician in the United States, but that the evidence submitted on appeal was sufficient to satisfy 8 C.F.R. § 204.5(h)(5). As such, the AAO withdrew the director's finding on this issue. Nonetheless, the AAO found that the petition was not approvable as the petitioner failed to establish the his receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The petition was remanded to the director for the issuance of a new, detailed decision. On November 9, 2009, the director again denied the petition, this time finding that the petitioner had failed to demonstrate receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The director certified his decision to the AAO for review and notified the petitioner that he could submit a brief to the AAO within 30 days of service of the director's decision.

On certification, the petitioner through counsel submitted another brief, as well as additional evidence. The brief did not address the criterion for which each additional piece of evidence was submitted. However, we will classify the material as we deem it relevant. The following evidence was submitted for final review:

1. An article from a Nepalese publication entitled, "On the search of value and Art" (previously submitted);
2. An article from a Nepalese publication entitled, "In favor of destitute;"
3. A Letter of Appreciation from the Siddhartha Club, dated January 18, 2008, thanking the petitioner for his organization of an event on October 29, 2005 for humanitarian purposes;
4. A promotional flyer for the benefit concert for the Siddhartha Club, referenced in item 3 (previously submitted);
5. Internet pages from the www.karnadas.com, including its home page and its awards page;
6. An internet printout from www.wikipedia.com regarding "Music of Nepal;"
7. An internet printout from www.wikipedia.com regarding "Karna Das;"
8. An internet printout from www.wikipedia.com regarding "Hits FM;"
9. Internet pages from www.tanneri.com, listing the Winners of the Image Awards for 2060, which names the petitioner as the best male vocal performance of the year;
10. Internet pages listing the award winners for the 10th Annual Image Award, which also indicates that the petitioner won best male vocal performance of the year;

11. Internet pages from www.nepalbsite.com which indicate the petitioner was nominated for, but did not win, best male vocal performance for the 11th Closeup Hits FM Music Award of 2064; and
12. Internet pages from www.movienepal.com, listing the winners for the “Close Up 11th Hits FM Music Awards 2007,” confirming the petitioner as a nominee for best male vocal performance.

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 internet pages from the petitioner's own website (item 5), www.karnadas.com, which listed his awards. The petitioner also submitted internet pages from two other websites (items 9 and 10) which confirmed the petitioner was awarded best male vocal performance of the year for the Image Awards for 2060. Internet pages from www.nepalbsite.com and www.movienepal.com (items 11 and 12) were also provided to confirm that the petitioner was a nominee performance for the best male vocal performance for the “Close Up 11th Hits FM Music Awards 2007.” However, none of these cites gave any background information detailing these awards. The petitioner also provided various pages from www.wikipedia.com (items 6, 7 and 8) regarding the “Music of Nepal,” “Karna Das” (himself), and “Hits FM.”

The director found that the “record lacked documentation that any of the above awards and certificates are nationally or internationally recognized awards or prizes for excellence in the field.” The only evidence provided that gives more context to the awards received by the petitioner and information regarding them comes from *Wikipedia*. *Wikipedia* makes no assurances about the reliability of the content from this open, user-edited internet site.² See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008). Accordingly, we will not assign weight to information for which *Wikipedia* is the only cited source. As such, the petitioner failed to demonstrate that the national or international recognition for the awards.

The plain language of this regulatory criterion also requires documentation of “the alien's receipt” of nationally or internationally recognized prizes or awards. The petitioner provided evidence to

² Online content from *Wikipedia* is subject to the following general disclaimer:

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See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on March 25, 2010, copy incorporated into the record of proceeding.

demonstrate that he was a nominee for the best male vocal performance for the “Close Up 11th Hits FM Music Awards 2007.” However, the petitioner failed to prove his “receipt” of such award. Similarly, without any evidence regarding the date this award may have been received, we cannot determine whether such award was received prior to the filing of the petitioner’s petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, this award would not satisfy this criterion.

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.

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 or regional publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.³

Upon certification to the AAO, the petitioner submitted two articles (items 1 and 2) from Nepalese publications entitled, “On the search of value and Art” and “In favor of destitute.” The translation provided failed to indicate the source of the publications, the date of the articles or the authors. This criterion specifically requires a title, date, and author, as well as a translation where necessary, for the published materials provided as evidence. The petitioner failed to adhere to these requirements as the dates and authors of the articles were omitted. In addition, the translations lack the requisite certifications. Pursuant to 8 C.F.R. § 103.2(b)(3), any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English. The AAO is, therefore, unable to determine whether the evidence supports the petitioner's claims. Accordingly, these articles are not probative and will not be accorded any weight in this proceeding. Further, as the sources of these articles were not translated, the petitioner also failed to demonstrate that the publications qualify as professional or major trade publications or some other form of major media.

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

³ 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.

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

The petitioner provided a letter from the Siddhartha Club, thanking the petitioner for his organization of an event on October 29, 2005 which benefited the poor (item 3). The petitioner also re-submitted a promotional flyer for the same charitable event.

The director, in his most recent decision on November 9, 2009, found that “organizing a one-time event is not commensurate with performing a leading or critical role for an organization or establishment.” Further, the director requested evidence regarding the petitioner’s “role within a specific organization or establishment.” The petitioner failed to provide any additional evidence to address the director’s concerns. In addition, there was no evidence provided to show that the Siddhartha Club enjoys a distinguished reputation.

While the petitioner may have performed admirably in his organization of the charitable event, there is no evidence showing that his role was leading or critical. For instance, there is no organizational chart or other evidence documenting how the petitioner’s position fit within the general hierarchy of the charity event. The reference letter provided also fails to demonstrate how the petitioner’s role within the organization differentiated him from others. The documentation submitted by the petitioner does not establish that he was responsible for the success of the event to a degree consistent with the meaning of “leading or critical role.”

As such, the petitioner has failed to demonstrate that he has satisfied this criterion.

C. Final Merits Determination

In accordance with the *Kazarian* opinion, we must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor,” 8 C.F.R. § 204.5(h)(2); and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. § 204.5(h)(3). *See Kazarian*, 2010 WL 725317 at *3.

In this case, the specific deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion, as well as in the prior decisions by the director and the AAO, of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The submitted documentation relating to the petitioner’s achievements as a musician demonstrates that he had some success as a Nepali musician. The submitted evidence, however, is not indicative of the petitioner’s sustained national or international acclaim as a musician and there is no indication that his individual achievements have been recognized in the field through extensive documentation.

The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of 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).

III. Conclusion

Review of the record does not establish that the petitioner has distinguished himself 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 is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established his eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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).

Upon review, we concur with the director's findings. The relevant evidence as it relates to the statutory and regulatory requirements was discussed in the director's decision and in the previous decision of the AAO. The evidence of record does not establish that the petitioner has distinguished himself 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 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.

ORDER: The director's decision of November 9, 2009 is affirmed. The petition is denied.