

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B₂

JAN 22 2010

FILE: [REDACTED]
SRC 07 800 22482

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)

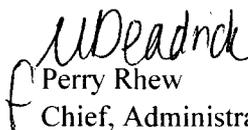
ON BEHALF OF PETITIONER:

[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 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 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 that the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. More specifically, the director found 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).

On appeal, counsel argues that the petitioner 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 he has sustained national or international acclaim at the very top level.

This petition, filed on July 25, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a musician (opera singer). 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). The petitioner has submitted evidence pertaining to 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.

At the time of original filing, counsel claimed that the petitioner was eligible for this criterion based on the petitioner's "standing and leading reputation in this field as well as recognition of his achievements." In addition, the petitioner submitted a document from [REDACTED] thanking the petitioner for his musical contribution. However, the accompanied English translation failed to comply with 8 C.F.R. § 103.2(b)(3), which requires that "[a]ny document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which 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 English translation failed to contain the name of the translator, was not certified as complete and accurate, and failed to indicate that the translator was competent to translate from the foreign language into English.

Because the petitioner failed to comply with 8 C.F.R. § 103.2(b)(3), the AAO cannot determine whether the evidence supports the petitioner's claims. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The petitioner also submitted a letter from [REDACTED] praising the Yonsei University Alumni Chorus Festival and the Yonsei Alumni Association of Southern California in celebration of Chusok (Korean Thanksgiving Day). The letter is not addressed to a specific person, let alone the petitioner, and reflects a letter of appreciation rather than an award or prize. We do not find that this appreciation letter is indicative or consistent with a lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Notwithstanding the above, it is noted that the director requested additional information from the petitioner regarding the above documents. In response, the petitioner did not submit any additional

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

documentation, nor did he continue to claim eligibility for this criterion. The petitioner did not contest the decision of the director for this criterion on appeal.

Accordingly, the petitioner has not established that he 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.

At the time of original filing, counsel claimed that the petitioner was eligible for this criterion based on the following:

1. The petitioner's position as leader of [REDACTED] from 1996-1998;
2. The petitioner's membership in the German Art Song Society; and
3. The petitioner's membership as a soloist in the Yonsei Alumni Chorus of Southern California.

Regarding Items 1 and 2, the petitioner failed to submit English translations that comply with 8 C.F.R. § 103.2(b)(3). In addition to not submitting full English translations of the documents, the translations failed to contain the name of the translators, were not certified as complete and accurate, and failed to indicate that the translators were competent to translate from the foreign language into English.

Regarding Item 3, the petitioner submitted a photograph with a handwritten caption indicating [REDACTED]

In order to demonstrate that membership in an association meets this criterion, a petitioner must show that 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 failed to establish that membership in the Yonsei Alumni Chorus of Southern California requires outstanding achievement as an essential condition for admission to membership.

Notwithstanding the above, it is noted that the director requested additional information from the petitioner regarding this criterion. In response, the petitioner submitted a copy of an e-mail, which indicates that he paid dues to the American Guild of Musical Artists (AGMA) on November 26, 2007. In addition, the petitioner submitted a copy of the petitioner's AGMA membership card for January 1, 2008, to December 31, 2008, along with AGMA's Constitution and By-Laws. However, the petition was filed on July 25, 2007. Since the petitioner's membership occurred after the filing of the petition,

we will not consider the evidence to establish the petitioner's eligibility. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

Regardless, according to AGMA's Constitution and By-Laws, membership is available to "[a]ny person who has performed, now performs or intends to perform within the jurisdiction of the Guild as set forth in the Articles of Agreement, and as defined by its Board of Governors, shall be eligible for membership." The petitioner failed to establish that membership in AGMA requires outstanding achievement as an essential condition for admission to membership.

The petitioner did not contest the decision of the director for this criterion on appeal.

Accordingly, 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 publication 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.²

At the time of original filing, the petitioner submitted seven foreign language articles. Four articles were accompanied by insufficient English translations, while the other three articles were unaccompanied by any translations. In the director's request for additional evidence, the petitioner was informed of the requirement to submit full certified English translations in compliance with the regulation at 8 C.F.R. § 103.2(b)(3). In response, the petitioner submitted two translation certifications, one for the Korean language and one for German language, for all seven documents.

Although the record contains two certified translations, it is unclear which of these documents, if any, to which the certifications pertain. The submission of two translation certifications that do not

² 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.

identify the specific documents they purportedly accompany does not meet the requirements of the regulation at 8 C.F.R. § 103.2(b)(3).

As we can not determine whether the evidence supports the petitioner's claims, the petitioner failed to establish that the submitted material may be considered published material about him in professional or major trade publications or other major media, relating to his work in the field for which classification is sought.

Accordingly, 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 specialization for which classification is sought.

The regulation at 8 C.F.R. § 204.5(h)(3) provides that “a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” Evidence of the petitioner’s participation as a judge must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criterion at 8 C.F.R. § 204.5(h)(3)(iv), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien’s field of endeavor. 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).

At the time of original filing, counsel claimed that the petitioner was eligible for this criterion based on the petitioner’s selection as a judge in the Sports Today & Bethesda Music Corporation. The petitioner submitted a foreign language document that was accompanied by an English translation. However, the accompanied English translation failed to comply with 8 C.F.R. § 103.2(b)(3). The translation failed to contain the name of the translator, was not certified as complete and accurate, and failed to indicate that the translator was competent to translate from the foreign language into English.

It is noted that in response to the director’s request for additional evidence, counsel briefly mentioned at the beginning of her cover letter that the petitioner was eligible under this criterion but did not further elaborate later on in her brief. It is further noted that the petitioner did not contest the decision of the director for this criterion on appeal.

Accordingly, the petitioner has not established that he meets this criterion.

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

Counsel argues on appeal that the submitted recommendation letters praising the petitioner’s talent as a vocalist is evidence of the petitioner’s eligibility for this criterion. As indicated by counsel,

many of the recommendation letters praise the petitioner, noting that “his talent has been recognized as one of the top few in his area,” that he is “exceptionally unique and rare as compared to many musicians out there,” and “[h]as established his fame as a fame top tier vocalist in the world.” However, talent in one’s field is not necessarily indicative of artistic contributions of major significance. The record lacks evidence showing that the petitioner has made original artistic contributions that have significantly influenced or impacted his field. The letters of recommendation do not provide any evidence of the petitioner’s original artistic contribution of major significance in his field.

Counsel also argues:

[The petitioner’s] work has been widely acclaimed and performed in many venues. However, in general, contributions of a vocalist, especially in operatic singing, derive from the music, presence, and the inherent beauty of the voice itself that he or she imparts on the audience through his performances, and not necessarily through a new revolutionary technique of singing or by creating a new musical piece (which is more applicable to composers). A standard of review that requires a “widely adopted” contribution can reasonably be applicable to scientific research, but not to operatic singing.

With regard to the petitioner’s achievements as a vocalist, the letters of recommendation do not specify exactly what his original contributions in opera have been, nor is there an explanation indicating how any such contributions were of major significance in his 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 has earned the admiration of those with whom he has worked and performed, there is no evidence demonstrating that he has made original artistic contributions of major significance in the field. For example, the record does not indicate the extent of the petitioner’s influence on other vocalists nationally or internationally, nor does it show the field has somehow changed as a result of his work.

In this case, the letters of recommendation submitted by the petitioner are not sufficient to meet this criterion. These letters, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. 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 (Commr. 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. Thus, the content of the experts’ statements and how they became aware of the petitioner’s reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of a vocalist who has sustained national or international acclaim. Without extensive documentation showing that the petitioner’s work has been unusually influential,

highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

Accordingly, the petitioner has not established that he 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.

At the time of original filing, counsel claimed that the petitioner was eligible for this criterion based on the petitioner's authorship of an article entitled, "What is a Professional?" for the book *Educlassic*, and another article entitled, "Do You Like Brahms?" for the magazine *Classic Youngsan*.

The petitioner submitted foreign language documents that were accompanied by brief English translations, which only contained the title and date of the articles. The accompanied English translations failed to comply with 8 C.F.R. § 103.2(b)(3).

Nonetheless, the petitioner failed to establish that his articles were scholarly or academic as required by 8 C.F.R. § 204.5(h)(3)(vi) rather than journalistic or informative. The record lacks evidence such as that the petitioner's articles garnered attention from scholars. The petitioner did not contest the decision of the director for this criterion on appeal.

Accordingly, 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.

On appeal, counsel argues that the petitioner is eligible for this criterion based on "his numerous worldwide performances" and his "select[ion] in principal roles for several leading operas." This criterion, however, relates to the visual arts. The petitioner is an opera singer. It is inherent to the field of opera singing to perform on stage. Not every stage performance is an artistic exhibition or showcase.

In the performing arts, acclaim is generally not established by the mere act of appearing in public, but rather by attracting a substantial audience. For this reason, the regulations establish separate criteria, especially for those whose work is in the performing arts. We find that the petitioner's selection in principal roles for several operas is best considered under the leading or critical role criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii) and discussed below. In addition, the petitioner's worldwide performances are far more relevant to the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x) and discussed later.

Accordingly, the petitioner has not established that he meets this criterion.

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

The petitioner never specifically claimed eligibility for this criterion, either at time of original filing or on appeal. However, as cited above, we will consider counsel's claim of the petitioner's selection for principal roles in several leading operas for this criterion. 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).

At issue for this criterion are the position the petitioner was selected to fill and the reputation of the entity that selected him. In other words, the position must be of such significance that the alien's selection to fill the position, in and of itself, is indicative of or consistent with national or international acclaim.

On appeal, counsel states that the petitioner has served in the following principal roles for several leading operas:

- 1.
- 2.
- 3.
- 4.

The petitioner submitted a multitude of event programs. While these programs include photographs of the petitioner, the programs are in various foreign languages without the English translations required by 8 C.F.R. § 103.2(b)(3).

Without the proper translation, we are unable to determine whether these programs establish that the petitioner served in principal roles in leading operas. Further, even if we were to conclude that an opera production equates to an organization or an establishment, which we do not, there is no evidence showing that these venues have a distinguished reputation. There is no documentary evidence showing that his productions had a distinguished national reputation or evidence differentiating his role from that of the other performers. We note that the petitioner's performances for the L.A. Opera refer to the petitioner as a "chorister." The record contains no evidence such as that the petitioner's name frequently received top billing or that the productions' popularity increased when he was known to be performing. Accordingly, the petitioner has not established that he was responsible for the success or standing of the productions in which he participated to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim at the very top of his field.

Accordingly, the petitioner has not established that he 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.

As cited in the previous criterion, the petitioner submitted a multitude of event programs in foreign languages without the English translation required by 8 C.F.R. § 103.2(b)(3).

Notwithstanding the above, counsel argues on appeal that as evidenced by the previously mentioned recommendation letters, the petitioner's "performances have garnered mass audience attendance at various venues." This regulatory criterion requires evidence of commercial successes in the form of "sales" or "receipts;" simply submitting letters indicating that the petitioner participated in various opera productions, recitals, concerts, and workshop performances cannot meet the plain language of this criterion. The record does not include evidence of documented "sales" or "receipts" showing that the petitioner achieved commercial successes in the performing arts in a manner consistent with sustained national or international acclaim at the very top of his field. For example, there is no evidence showing that petitioner's performances consistently drew record crowds, were regular sell-out performances, or resulted in greater audiences than other similar performances that did not feature him. Further, there is no evidence showing, for instance, that the petitioner's musical recordings have generated substantial national or international sales.

Accordingly, the petitioner has not established that he meets this criterion.

In this case, we concur with the director's finding that the petitioner has failed to demonstrate his receipt of a major, internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the national or international acclaim necessary to qualify as an alien of extraordinary ability. 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 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). While the petitioner has earned the respect and admiration of the individuals offering recommendation letters, the petitioner failed to establish that he has amassed a record of accomplishment which places him among that small percentage at the very top of his field. We agree with the experts' assertions that the petitioner possesses great talent as a vocalist, but the evidence of record does not establish that he has sustained national or international acclaim.

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 eligibility pursuant to section 203(b)(1)(A) of the Act, and the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.