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FILE: [REDACTED]
SRC 08 054 50308

Office: TEXAS SERVICE CENTER Date: JUN 25 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).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petition 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.

On appeal, counsel submits a brief.

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 to the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and the 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 has 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 record reflects that the petitioner has previously been approved as an alien with extraordinary ability under section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i). While USCIS has approved an O-1 nonimmigrant visa petition filed on behalf of the beneficiary, that 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).

Although the words “extraordinary ability” are used in the Act for both the nonimmigrant O-1 classification and the first preference employment-based immigrant classification, the applicable regulations define the terms differently for each classification. The O-1 statute and regulation explicitly state that extraordinary ability in the field of arts means “distinction.” Section 101(a)(46) of the Act, 8 U.S.C. § 1101(a)(46), 8 C.F.R. § 214.2(o)(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines 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 evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the beneficiary’s receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a sound engineer for recordings of Christian music. 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 is relevant to the following criteria.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’s curriculum vitae indicates that he is a three-time Latin Grammy nominee for best Christian album in the Portuguese language: in 2004 with Igreja Batista Nova Jerusalém for “Discipulos Teus,” and in 2005 with Eyshila for “Terremoto” and Aline Barros for “Som de adoradores.”

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

The petitioner submitted what he stated were pages extracted from the Grammy website for the 8th Latin Grammy Awards presented by the Latin Academy of Recording Arts and Sciences (LARAS) in 2007. The pages indicate that they are entry lists for the awards and pertain to the album “Razão do Meu Viver” by Ministério Seara Harvest Ministries of Orlando on which the petitioner stated he served as engineer. The album is listed as number 316 on a page for “Album of the Year” and number 33 on a page for “Best Christian Album (Portuguese Language).” Both pages show the artist of the album, presumably as the nominee. A page showing “Best Engineered Album” shows the album at number 200 and identifies the petitioner as the engineer and mastering engineer. The petitioner is listed at number 23 for “Producer of the Year” for the album. The petitioner did not indicate that the album was actually nominated for or actually won a Latin Grammy award.

In a March 25, 2008 request for evidence (RFE), the director instructed the petitioner to submit evidence, if any, of his receipt of a Grammy award or any other nationally or internationally recognized prize or award. In response, the petitioner submitted a page from the Grammy.com website indicating that an album, “Aline Barros & Cia,” won the Latin Grammy for Best Christian Album (Portuguese Language) in 2006. The document indicates that the engineer of the album was Edinho and the producer was Rogerio Vierra. The petitioner submitted no documentation to indicate that he was involved with Aline Barros on this album.

The petitioner also submitted what counsel indicated was a “list of albums detailing the number sold and dollar amount of sales” and indicated that the petitioner was “the sound engineer who put them together.” The list indicates that the Aline Barros album “Som de adoradores” and the Eyshila album “Terremoto” sold over 1,250,000 units. The petitioner again stated that these albums were nominated for Grammy awards. The petitioner did not include the source of the information on which he relied to compile the list nor did he explain how these sales were indicative of nationally or internationally recognized awards. Furthermore, he provided no documentation to indicate that these albums were nominated for Grammy awards. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel asserted in her letter accompanying the petitioner’s response to the RFE that “[s]imply being nominated for a Grammy award is in itself a distinction and honor.” However, while it may be an honor and a distinction to be nominated, a nomination alone is not an award or prize as contemplated by the regulation.

In denying the petition, the director stated that a review of the Grammy website for the 8th Latin Grammy Award revealed that the full list of “nominees” was actually a list of final entries for the award. On appeal, counsel asserts that the director “erred in [the] assessment of the website depicting the Grammy nominations” and that a full examination of the site would reveal that the “few hundred nominees . . . are but a fraction of the thousands who are eligible for the nomination.”

The director's analysis of the documentation submitted by the petitioner was in error and counsel continues this error on appeal. The petitioner, while providing a list of entries for the 8th Latin American Grammy Awards, did not indicate that he had been nominated for an award in 2007. The petitioner submitted no documentation to confirm that he had been nominated for a Grammy in 2004 or 2005 or that a nomination for a Grammy is recognized nationally or internationally as an award or prize in his field.

The petitioner indicated in his curriculum vitae that he was the recipient of the service award from the Institute of Arts and Techniques in Communication (IATEC) in Brazil. In his RFE, the director requested more information regarding this award. In response, the petitioner submitted an "automatically translated" letter from [REDACTED], dated May 2, 2006. The petitioner did not submit the original document.

The regulation at 8 C.F.R. § 103.2(b)(3) provides:

Translations. Any 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 translation provided by the petitioner does not identify the translator, and the translator did not certify that the translation was complete and accurate, and did not certify that he or she is competent to translate from the foreign language into English. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Moreover, assuming that the letter is probative, nothing in the letter describes the nature and significance of the award and it provides no evidence that it is nationally or internationally recognized as an award of excellence in the petitioner's field of endeavor.

The petitioner has failed to establish 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.

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 work 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. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

The petitioner submitted a copy of his membership card in the Latin Recording Academy and the Audio Engineering Society (AES).

The petitioner submitted no documentation regarding membership requirements for the Latin Recording Academy. According to information provided by the petitioner from the AES website, “anyone active in audio engineering or acoustics who has an academic degree or the equivalent in scientific or professional experience in audio engineering and its allied arts and is familiar with the application of engineering principles in data in that field” can become a member of AES. The organization also recognizes lesser requirements for associate members and student members. The petitioner submitted no documentation to establish that the AES requires outstanding achievements of its members.

The petitioner has failed to establish 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 order to meet this criterion, published material must be primarily about the petitioner and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

With the petition, the petitioner submitted several documents that he stated were from the newspaper *Imigrante Cristão* and which were apparently reprinted from the paper’s website. The petitioner failed to provide certified translations of these documents as required by 8 C.F.R. § 103.2(b)(3). Additionally, the petitioner submitted no documentation to establish that *Imigrante Cristão* is a professional or major trade publication or another form of major media. In response to the RFE, the petitioner also submitted a copy of an article from the November 1, 1999 edition of *Audio Música & Tecnologia*, which features an interview with the petitioner.² The translation accompanying the document does not comply with the provisions of 8 C.F.R. § 103.2(b)(3) in that the translator is not identified, and the translation contains no certification it is complete and accurate and that the translator is competent to translate from Portuguese into English. The petitioner also submitted a copy of a March 2004 article about the petitioner which was also published in *Audio Música & Tecnologia*. While counsel stated that *Audio Música & Tecnologia* “is the leading magazine for the professional recording and sound production technology industry,” the record contains no evidence to corroborate counsel’s statement. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the

² Counsel alleged that the article was published on May 9, 2006; however, this is the date the website was accessed.

petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, even if the record established that *Audio Música & Tecnología* is a professional or major trade publication or another form of major media, a publication record of just two articles, five years apart, is not consistent with the sustained acclaim necessary for qualification under this immigrant classification.

The petitioner has failed to establish 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.

The petitioner initially claimed to meet this criterion. As evidence, he submitted a document entitled "CDs Recorded by [the petitioner] and sold by owners." The document apparently is a calculation of the petitioner's cost in producing compact discs for two artists and the total sales of those units. Although the petitioner submitted copies of two invoices to establish the cost of producing the compact discs, he provided no evidence of the sales of the units. Further, he submitted no documentation to establish that the sales of these compact discs constituted contributions of major significance to his field of endeavor.

The petitioner did not pursue this issue in response to the RFE or on appeal. The petitioner has failed to establish 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.

To meet this criterion, the petitioner must show that he performed a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

As evidence that he meets this criterion, the petitioner relied upon the May 2, 2006 letter from [REDACTED]. As previously discussed, the petitioner did not submit the original letter from [REDACTED] and the translation does not identify the translator or contain a certification regarding the translator's qualifications. *See* 8 C.F.R. § 103.2(b)(3). Furthermore, the petitioner submitted no documentation that the IATEC is an organization with a distinguished reputation.

The petitioner has failed to establish that he meets 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 did not initially allege that he meets this criterion. In response to the RFE, counsel provided a website address and stated that current sales of recordings engineered by the

petitioner could be obtained from the site. The petitioner submitted no documentation or information regarding sales from the site. We note that it is the petitioner's responsibility to provide evidence to support his claim and that he must establish eligibility for the visa petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A dynamic website cannot establish eligibility for the visa petition months or years after the petition was filed. *Id.*

Counsel stated in her April 21, 2008 letter that the petitioner had submitted with his petition “[n]umerous pay/salary invoices . . . showing [the petitioner’s] salary in addition to the information regarding the wages in Brazil.” However, the record does not contain such documentation, which was not included by counsel as an exhibit with the initial submission or discussed as an issue prior to the RFE. The petitioner submitted no additional documentation in support of this criterion on appeal.

The petitioner has failed to establish 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.

The petitioner did not specifically claim to meet this criterion. However, counsel referred repeatedly to the sales success of the albums on which the petitioner had worked. In her April 21, 2008 letter accompanying the petitioner’s response to the RFE, counsel alleged that the albums had achieved gold, platinum and diamond sales status. As previously discussed, the petitioner submitted what counsel indicated was a “list of albums detailing the number sold and dollar amount of sales.” The petitioner did not include the source of the information on which he relied to compile the list. Additionally, the petitioner submitted no documentation to indicate that he received a percentage of the sales as compared to a salary as producer or engineer.

The petitioner has failed to establish that he meets this criterion.

On appeal, counsel alleges that the petitioner submitted “[n]umerous letters of attestation . . . describing [the petitioner’s] extraordinary abilities” and that these letters should be considered as other comparable evidence.

The regulation at 8 C.F.R. § 204.5(h)(4) states: “*If the above standards do not readily apply to the beneficiary’s occupation*, the petitioner may submit comparable evidence to establish the beneficiary’s eligibility.” [Emphasis added]. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner’s occupation cannot be established by the ten criteria specified by the regulation. However, we will briefly address the letters submitted by the petitioner.

The petitioner provided support letters from three individuals. As discussed, the letter from Mr. [REDACTED] is not probative as the petitioner submitted only an uncertified translation of the document.

██████████, president of Ground Control Professional Audio, Inc., stated in a May 2, 2006 letter, that he had known the petitioner for the past 15 years and that the petitioner “has always been at the top of his league, always competent, hard working and an immensely well-natured human being.” In an April 26, 2006 letter, ██████████, an associate professor of music at Cornish College of the Arts in Seattle, stated that he has known the petitioner since the mid-1980s. He stated that he almost immediately recognized the petitioner’s “talent as the most prominent and talented recording engineer we could ever find and a one of a kind specialist in sound design and production.” ██████████ also stated that the petitioner “is definitely a uniquely gifted individual.” ██████████ did not state that the petitioner possessed extraordinary ability, only that he was “competent.” Similarly, while ██████████ described the petitioner as “uniquely gifted” and “one of a kind,” he does not indicate how the petitioner’s abilities make him stand out from other sound engineers such that he may be considered to have extraordinary ability.

Furthermore, opinions from witnesses whom the petitioner has selected do not represent extensive documentation. Independent evidence that already existed prior to the preparation of the visa petition package carries greater weight than new materials prepared especially for submission with the petition.

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 his field of endeavor. 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. 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.