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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 I Eye Street N.W.
BCIS, AAO, 20 Mass Ave, 3rd Floor
Washington, D.C. 20536

[redacted]

JUN 25 2003

File: WAC 02 100 53406 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now on appeal before the Administrative Appeals Office. 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.

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.

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 Service 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 petitioner seeks to classify the beneficiary as an alien with extraordinary ability in the arts as a tabla player. Counsel states that the beneficiary is a "[t]abla (drums) player of great renown" and that for the past "seven years [the beneficiary] has been sponsored as a music teacher by [the petitioner], a non-profit cultural and educational organization that promotes Indian culture, specifically music of the Indian sub-continent."

Although finding that the beneficiary had met two of the regulatory criteria, the director determined that the petitioner had not shown that the beneficiary has achieved sustained national or international acclaim. The director denied the petition but stated that "to the beneficiary's credit...[he] has had published material written about him in professional or major trade publications or major media and...his work was displayed at artistic exhibitions or showcases in the field of Indian Music."

While we agree with the ultimate decision of the director, we take issue with the findings of the director, as quoted above.

On appeal, counsel asserts that the director "erred by overlooking and failing to consider all evidence submitted in its totality, specifically, the comparable evidence attesting to the beneficiary's extraordinary abilities in his field of endeavor." Counsel's arguments and the new evidence on appeal will be considered alongside the initial submission, below.

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 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. In the initial submission counsel states:

> Recent decisions by the INS' [now Bureau] Administrative Appeals Unit (AAU) provides Seven flexible factors to help determine what is in the national interest. One of those factors in the national interest test is the benefit the applicant offers in improving education and training programs for U.S. residents. Please refer to the attached letters...which mention [the beneficiary's] teaching clinics, that are improving education and training programs at U.S. universities and public schools.

The guidelines referred to by counsel pertain to a separate, lower priority visa classification, and have no effect on the far more restrictive criteria for extraordinary ability. On appeal, counsel continues to refer to the national interest test in the alternative and "reiterates [his request] that the visa petition be considered and approved under the National Interest criteria," should the beneficiary not meet the criteria for an alien of extraordinary ability. The I-140 petition does not allow a petitioner to seek classification under separate and distinct visa categories in the alternative. Despite this evident confusion as to the applicable standards, counsel repeatedly asserts that the petitioner seeks to classify the beneficiary as an alien of extraordinary ability under section 203(b)(1)(A) of the Act, and it is in that context that we will examine the instant petition.

The petitioner has submitted evidence which counsel claims meets the following criteria:

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

The petitioner submits two certificates received by the beneficiary for excellence in tabla music. The first certificate certifies that in the annual examination of the Bangiya Sangeet Parishad, West Bengal, the beneficiary "successfully secur[ed]" second place in the first class. The second certificate from Pracheen Kala Kendra certifies that the beneficiary was examined in tabla and placed second in his division. We note that both awards appear to be local in nature, not nationally or internationally recognized prizes. While counsel asserts that these awards are national awards from India, the record offers no information about the significance or national scope of either award. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The Indian Classical Music Circle of Austin presented a certificate to the beneficiary in appreciation for his tabla performance on March 28, 1998, in Austin, Texas. The petitioner offers no evidence to show that this certificate is a nationally recognized award, rather than simply an acknowledgment of the beneficiary's participation in a local performance.

Counsel also asserts that the beneficiary "shares" a 2001 Grammy award for his collaboration with Bela Fleck on the album *Outbound*. In his request for evidence the director specifically asked for evidence of the beneficiary's receipt of the Grammy award, as well as evidence to show that the beneficiary's contribution to the album was significant. As no further evidence was received, the director's denial questioned whether the beneficiary was actually a recipient of this award. On appeal, counsel acknowledges that the Grammy award was given to Bela Fleck, not the beneficiary. Counsel then counters that as the leader of a musical group, Bela Fleck did not earn the award for his solo work but, instead, shares it with the entire group. Counsel attempts to establish the beneficiary's "significant contribution" to the album by a letter from Bela Fleck contained in the record.

Bela Fleck's letter states:

> [The beneficiary] is an irreplaceable part of my group 'Bela Fleck and the Flecktones.'
>
> [The beneficiary's] tabla playing skill was a significant contribution to the album 'Outbound,' winning the 2001 Grammy award. [His] tabla rhythm continues to be essential part [sic] of our band, that is in the unique genre of Indian and world music.

We note that the beneficiary was one of twelve other musicians invited to perform on *Outbound* as a guest musician. He was not a member of Bela Fleck's group, The Flecktones, at the time *Outbound* was made. Of the fifteen songs on the album, the beneficiary is credited for contributing to five, not even one half of the songs on the entire

album. The album is very clearly the work of Bela Fleck, who is credited not only with producing and engineering the CD, but also arranging the strings and horns and bringing all of the musicians together. While we do not dispute that the beneficiary made a contribution to this album, there is no evidence to support counsel's claim that the beneficiary received a Grammy award for this work.

> *Published materials 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 his request for evidence and in his final decision, the director found that the petitioner had established the beneficiary's eligibility for this criterion. However, as will be discussed below, we find the director's determination unsupported by the evidence in the record. Our determination on this issue does not affect the ultimate decision in this case as the beneficiary was not able to establish at least three of the criteria as required by regulation.

The Bureau notes its authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within the power of the Service to formulate. *Helvering v. Gowran*, 302 U.S. 238 (1937); *Securities Comm'n v. Chenery Corp.*, 318 U.S. 86 (1943); and *Chae-Sik Lee v. Kennedy*, 294 F.2d 231 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 926 (1961).

The petitioner submits numerous fliers and ads announcing upcoming performances at universities, festivals, and other events, as evidence of published materials about the beneficiary. These documents are not considered professional or major trade publications.

In the initial submission, as well as on appeal, the petitioner submits several articles that cannot be accepted as supporting evidence. These articles include those written in a foreign language, without the appropriate English translation, as well as those in which we are unable to discern the date of publication or the newspaper in which the article appeared. Without this information we are unable to determine if each of the articles was written prior to the filing of the petition (as is necessary to establish eligibility at the time of filing) or whether the publication where it appeared can be considered a major trade publication. The regulation requires the title and date of the publications to be submitted as evidence. Certified, full English translations are also required. 8 C.F.R. § 103.2(b)(3).

We note that the article submitted in response to the director's request for further evidence, published in the February 2002 volume of *Modern Drummer*, was published after the filing of the petition. As the article was not published until after the filing of the petition, it cannot establish eligibility as of that date. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Bureau held that beneficiaries seeking employment-based immigrant classifications must possess the necessary qualifications as of the filing date of the visa petition.

The record also contains several articles published in what appear to be local papers. These papers include: *The Sunflower* (Wichita State University's campus paper), *The Wichita Eagle, The Roanoke Times, The Brown Daily Herald, India Abroad,* and *The Fairfield Weekly.* All of the articles contained in these papers are written as a review to highlight the beneficiary's upcoming performance in the local area. Counsel does not claim, and the evidence does not show, that these are major trade publications that circulate beyond the local area covered by the paper.

Of the numerous articles submitted, there is only one article that appears to be from a major national publication. The article, however, which appeared in the *The Chicago Tribune*, was not written about the beneficiary. Instead, although mentioning the beneficiary's name, the article was clearly centered on composer [redacted] and his performance at the Steppenwolf Theater's "Traffic" series. The minute reference to the beneficiary is that "[he] took center stage while [another performer] delved into the sitar and directed an audience clap-a-long." While published in a major publication, this article cannot be said to be about the beneficiary or his work.

Although at first glance the petition may seem to be supported by a number of publications, quantity is not sufficient to establish eligibility for this criterion. The plain wording of the regulation requires that the publications be "major" and "about" the alien. As discussed above, the petitioner has not satisfied either of these requirements.

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought*

As evidence of the beneficiary's participation as a judge, counsel states:

> Indian tabla playing is entirely an art learnt 'at the feet of the master'. The student plays and is judged and corrected by the master. There is no written score that can be reviewed apart from the teacher. Judging the student performance is integral to teaching the art. Evidence of a more formal judging may also be found in [the beneficiary's] status as a visiting faculty member, at many music colleges...where he would formally judge students [sic] performances in order that they pass the class in North Indian Percussion.

Although the record contains letters from various universities thanking the beneficiary for previous workshops, demonstrations, lessons, clinics and performances, not one of the letters refers to the beneficiary serving as a judge of the work of another. While a teacher, or an artist who teaches, does evaluate the work of his or her pupils, this evaluation is inherent in the process of teaching. It does not, however, elevate the teacher or artist above others in the field. The beneficiary's ability to teach tabla classes or lessons does not demonstrate national or international acclaim simply by virtue of the process of teaching.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

Counsel states:

> Music maestro's" [sic] like [the beneficiary] are not always likely to be authors of original written scholarly work. Since their acumen is demonstrated in their playing, rather than in printed material, it would be more appropriate to consider their television and radio performances, CD's and other work equivalent to 'authorship of scholarly articles in their field'. When [the beneficiary] performs, it is clear from his skill and innovation that he has extraordinary mastery over his subject matter, and that, this mastery is no less than if he were an extraordinary academic whose proper medium would be the printed material.

As musical works are not considered to be scholarly articles, counsel's statement is accurate. The work performed by the beneficiary as a musician is not addressed by the above criterion. Instead, the recorded works and performances of the petitioner are covered by another criterion, discussed further below.

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

Counsel states that the beneficiary is "an innovator with significant original contributions...be they novel tabla playing for film music scores or the grand marriages of Jazz and Bluegrass to Indian percussion." While the record contains copies of the beneficiary's itinerary and schedules of his performances, there is no evidence that these performances represent artistic contributions of major significance. The very act of performing does not represent a major original contribution.

The record also contains several witness letters describing the beneficiary's skill in tabla playing. [redacted] the producer of the album, "Odyssey of the Heart" states:

> [The beneficiary] was referred to us by [redacted] executive director of the Indian Music Circle, an organization founded...to promote the appreciation of Indian music in the United States...[the beneficiary] was able to participate in ways that far exceeded our expectations...he was able to explain complex Indian rhythms to the rest of the musicians enabling them to all play together much more creatively.

[redacted] of the Kraft Benjamin Agency states that the beneficiary is:

> [A] musician of notable talent, whose knowledge and experience with instruments of percussion, particularly those of North India, would be a welcome addition to any faculty, ensemble or performance.
>
> [The beneficiary] contributed to the score of Tim Burton's 'Mars Attacks!' (Warner Bros.) by playing drums and tabla. His abilities were exceptional, and I found him to be both proficient and professional; ultimately, a pleasure to work with.

On appeal, the petitioner submits more letters from witnesses who have worked with the beneficiary in the past. In his witness letter, [redacted] lists the names of famous musicians that he has worked with in the past and then states that he has "also worked with [the beneficiary] and will continue to do so because [he] consider[s the beneficiary] to be extremely talented." The former Mexican Ambassador to India, [redacted] recommends the beneficiary "as a very dedicated and distinguished performer of Indian music" and states that she is "planning to invite [the beneficiary] again in December to give concerts and supervise the teaching of tabla at [their] center."

The petitioner also submits witness letters from other musicians who purportedly have been quite successful. [redacted] states:

> I have been in the music business for 35 years, have recorded over 250 CDs for major labels, received a Grammy award in 1996 with [redacted] and the Fleckstones, and personally received two Grammy nominations in 2000 for Best Instrumental Composition and Best Instrumental Arrangement. I am an original member of the groundbreaking group Oregon which formed in 1970 and continues through the present – recording 25 albums and performing in major concert halls and jazz festivals throughout the world.
>
> I had the pleasure of working with [the beneficiary] last year and found him to be an extraordinarily talented tabla player. He's a master of Indian music and a highly motivated performer.

It is evident from the witness letters and the evidence contained in the record that the beneficiary is a gifted musician and that his music, is indeed, original. He has also demonstrated that his work is appreciated by those with whom he has collaborated, some of whom are very well respected in the music industry. Neither we, nor the director, have disputed the beneficiary's talent or abilities. What the petitioner has failed to establish, however, is that outside of those with whom the beneficiary has been involved, the beneficiary's own artistic contribution has been of major significance in the field.

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

In his request for evidence and final decision the director erroneously concluded that the beneficiary had satisfied this criterion. As indicated about the director's previously discussed error in this case, our determination on this issue does not affect the ultimate decision of the director, as the beneficiary was not able to establish at least three of the criteria as required by regulation.

We have consistently found that this particular criterion is more appropriate for the visual arts, not for a performing artist such as the beneficiary, as virtually every musician, actor, and other performing artist "displays" his or her work in the sense of performing in front of an audience. 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 regulation establishes a separate criterion for those whose work is in the performing arts. The criterion is discussed below.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

Counsel states:

> [The beneficiary] receives remuneration for his services from a wide range of sources. Being an artist always performing he does not have a regular income stream. Nevertheless he has significant income in any one year. The attached copies of checks and statements prove that he has a significant income sufficient for a single artist.

While the record does contain copies of checks and money orders, ranging in amount from $500 to $5,550, the petitioner makes no showing that these amounts indicate a significantly high remuneration for the beneficiary's work. The fact that counsel says it is a "significant income" does not make it so. As stated earlier, the assertions of counsel do not constitute evidence.

Moreover, the record does not establish that the beneficiary has actually received those amounts. Most of the checks contained in the record are made out to ADIG/East Meets Jazz, the business management company that provides management services related to the music group "East Meets Jazz". According to other evidence submitted in the record, the beneficiary is one member of the group "East Meets Jazz." We can only assume that the checks would be divided equally among each of the members of the group, resulting in a significant reduction in the total amount received by the beneficiary.

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

Counsel argues that the Bureau must distinguish between success and commercial success and states:

> There is a long history of hugely successful artists and artistic products that have been dismal commercial flops. Under strict interpretation of this criteria the [Bureau] would disqualify [redacted] who was not a 'commercial success' in his time, but approve him one hundred years later when the world of commerce could value his success.

Not only does counsel mistakenly compare the facts of this case, where the beneficiary is a musical performer, to the hypothetical case of [redacted] a painter, he commands the Bureau to make a distinction that goes against the plain language of the regulations. The regulations clearly indicate that evidence of *commercial* success can be demonstrated by box office receipts, or record, cassette, compact disk, or video sales. Such receipts and sales are inapplicable to an artist who is not a performer. [redacted] could never, even posthumously, demonstrate "commercial success" as stipulated in this particular criterion.

The petitioner submits evidence that the beneficiary has performed on CDs. However, such performances are not prima facie evidence of extraordinary ability, because one need not be a top figure in the field in order to release a CD. Further, as discussed previously, there is no evidence that the CD has been sold, much less that the beneficiary has made a profit for this work. The petitioner submits no documentary evidence regarding his commercial success of any of his work. The regulation calls for "record, cassette or compact disk sales;" simply documenting the beneficiary's participation in various projects cannot meet the plain wording of the regulation.

Counsel also asserts that the beneficiary's "many performances to record crowds, the continuous bookings, teaching assignments and international invitations" should be considered as evidence of the beneficiary's success. While the petitioner submits copies of programs from various venues where the beneficiary has performed, the record contains no evidence to substantiate counsel's claims that these performances drew record crowds, were sold-out performances, or resulted in greater audiences than other similar performances that did not feature the beneficiary. The assertions of counsel, without any supporting documentation, are insufficient to establish eligibility.

Counsel's argument on appeal consists of claims that the director failed to consider all of the evidence in its totality. This argument is readily refuted by review of the notice of decision, in which the director describes much of the evidence submitted, and in fact, gives some of the evidence greater weight than we do. Clearly the director did not overlook this evidence.

The documentation submitted in support of a claim of extraordinary ability must demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor, and that the alien's entry into the United States will substantially benefit prospectively the United States.

Upon careful consideration of the record, we concur with the director's finding that, while the beneficiary has enjoyed a measure of success in his work, the evidence does not establish that the beneficiary has consistently sustained a reputation as a top figure either in India or elsewhere. While the beneficiary has attracted a small number of highly-placed admirers, their admiration cannot be substituted for widespread acclaim. The evidence indicates that the beneficiary shows talent in his musical ability, but it is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. Further, the petitioner has failed to establish the significance of many key pieces of evidence. Therefore, the petitioner has not established the beneficiary's 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.