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FILE: WAC 03 052 51232 Office: CALIFORNIA 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:



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.

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 before the Administrative Appeals Office 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. 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 asserts that the response to the director's request for additional evidence (RFE) amended the petition to change the petitioner from the beneficiary/self-petitioner to her current employer. Counsel cites no legal authority that would allow a post-filing amendment to change the petitioner. Thus, the director did not err in declining to amend the petition as requested. The classification sought, however, allows an alien to self-petition and does not require a job offer other than evidence that the alien seeks to continue working in her area of expertise. The director's decision denying the petition was based on the petitioner's failure to demonstrate national or international acclaim. Whether we consider the petition to be filed by the alien or her employer is irrelevant to that determination.

Counsel's assertion that the director overlooked the documentation submitted in response to the RFE will be considered below. We note, however, that the director identified several specific deficiencies in the documentation submitted. Counsel makes no attempt to address any of these concerns and the petitioner does not submit any new documentation.

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 regulation at 8 C.F.R.

§ 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that she has sustained national or international acclaim at the very top level.

As stated on the Form I-140 petition, Part 6, this petition seeks to classify the petitioner as an alien with extraordinary ability as a food scientist. The petitioner has subsequently submitted a job offer as a Dietary Service Supervisor. The duties for this position are listed as follows:

Direct activities of chefs, nursing aids and staff in a 127-resident skilled nursing facility. Prepare and establish menus following prescribed guidelines and health standards for approximately 450 meals served per day. Administer menu formulation, food preparation and service following health and safety standards. Assist chefs in testing and preparing nutritious food using alternate ingredients for nursing residents and staff. Order and buy foodstuffs and keep inventory. Establish policies and procedures and trans/supervises dietetic staff of 15 employees. Has authority to promote, reprimand, and terminate dietetic staff.

These duties reveal that the petitioner will be relying on established nutrition guidelines and will not be involved in setting or researching such guidelines. As such, this intended employment appears to be a material change from the initial proposed employment as a "food scientist." A petitioner may not make material changes to a petition that has already been filed. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). While indirectly related to the petitioner's area of expertise, discussed below, the petitioner has not established that the above duties are within her area of expertise. For example, the petitioner appears to have obtained an associate's degree in dietary health care to qualify for this job, suggesting her expertise gained in India and on which this petition is based, is not sufficiently related to her current job.

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. The petitioner has submitted evidence that, she claims, meets 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.

Both prior counsel and counsel assert that the petitioner's academic degrees serve to meet this criterion. The director concluded that academic awards are not nationally or internationally recognized as they are limited to the school or institution issuing the award. The director further concluded that degrees are not awards for excellence, but credentials. Counsel does not contest these conclusions on appeal. We concur with the director's conclusion and analysis. Degrees, even advanced degrees from prestigious institutions, are the expected outcome upon completion of specified coursework. They do not fit the definition of "prizes" or "awards."

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

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

In response to the director's RFE, counsel asserted that the petitioner was a "recognized member" of the National Registry of Food Managers. The petitioner submitted evidence that she passed the National Certified Professional Food Manager examination and that NSF International has certified her as a Food Manager. While the petitioner submitted information that NSF International has an international reputation, the record contains no evidence that designation as a Food Manager requires anything other than passage of the examination.

The director concluded that the petitioner had not established that NSF International had "set rules for membership including rigid standards to join." Once again, counsel does not address this concern on appeal and the petitioner does not submit any additional information about NSF International certification.

The issue is not NSF International's reputation, but whether the petitioner's certification qualifies as a "membership" and whether certification requires outstanding achievements as judged by national or international experts in the field. The record is not persuasive that certification by NSF International is a "membership" in an organization. Rather, it appears more akin to a license. Moreover, passage of a qualifying examination, even a competitive examination, is not an outstanding achievement as judged by national or international experts in the field. Thus, we concur with the director's conclusion regarding this criterion.

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.

Prior counsel did not initially claim that the petitioner meets this criterion, although the petitioner did initially submit a summary of her thesis purportedly published in *The Times of India*, reviews of her cookbooks and a published recipe credited to the petitioner. In response to the director's RFE, counsel asserted that this evidence meets this criterion.

The director concluded that the reviews were not "about" the petitioner. The director also included a lengthy discussion of citations in scientific literature that does not appear to relate to the petitioner's case. On appeal, counsel does not address this concern. The copy of the summary of the petitioner's thesis in the record includes only the article. The publication in which it allegedly appeared, *The Times of India*, is handwritten on the copy. The petitioner has not established that the summary of her thesis appeared in a nationally circulated section of *The Times of India*. The remaining materials did not appear in a nationally circulated newspaper. Thus, we concur with the director that the petitioner does not meet 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 specification for which classification is sought.

In 1995, the petitioner judged the "Paneer Cooking Contests" sponsored by Nandini Milk Products, headquartered in Bangalore. In 1996, the petitioner apparently judged the "Jaycees Recipe Queen Contest" sponsored by NIRLEP in Bangalore. While the petitioner submitted the acceptance of her offer to judge the contest sponsored by Nandini, the only evidence regarding the NIRLEP contest consists of photographs of the petitioner at the competition behind a "judge" placard.

The director concluded that the petitioner had not established that inclusion in the judging process was limited to those with extraordinary ability who had achieved national or international acclaim. The appeal does not address this criterion.

We phrase our concern somewhat differently than the director. At issue is whether the judging responsibilities are indicative of or consistent with national or international acclaim. Such an analysis addresses the court's concern in *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994) that requiring evidence that judges are selected based on extraordinary ability is too circular.²

While the companies for which the petitioner judged competitions appear to have national reputations, they are both based in Bangalore, where the petitioner resides. Thus, we are not persuaded that these judging responsibilities are indicative of any recognition outside of Bangalore. The record lacks evidence that the petitioner served on a panel in Bangalore that included judges from outside Bangalore or on panels in other regions.

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

In response to the director's RFE, counsel asserted that the petitioner's cookbooks, presentation at a scientific conference and "numerous" newspaper articles serve to meet this criterion. The director noted that conference presentations are inherent to the petitioner's field and that all of the reference letters are from the petitioner's immediate circle of colleagues.

The petitioner's thesis and news articles are no doubt of value. Any Ph.D. thesis, however, in order to be accepted for graduation, must offer new and useful information to the pool of knowledge. It does not follow that every Ph.D. candidate who performs original research that adds to the general pool of knowledge has made a contribution of major significance. While we acknowledge that *The Times of India* covered the petitioner's thesis, the record lacks evidence that the petitioner's thesis has impacted the field of nutrition as a whole in India. Specifically, there is no evidence that any governmental or scientific entity in India has adopted the petitioner's work into its nutritional guidelines. Finally, not every health article in a local paper is a contribution of major significance to the field of nutrition as a whole.

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

The record contains the petitioner's thesis, four articles authored by the petitioner and her Ph.D. mentor in the *Deccan Herald*, and nine cookbooks. As stated above, the petitioner's thesis was summarized in an article in *The Times of India*. Prior counsel asserted that the petitioner's thesis was published in *Clinical Nutrition* and the record reflects that the petitioner presented her thesis at the 7th World Congress on Clinical Nutrition in New Delhi and another conference.

² While the Administrative Appeals Office (AAO) is not bound to follow the published decision of a United States district court, see *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993), the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO. *Id.* at 719.

The director concluded that authorship of articles in furtherance of a degree program is not indicative of national or international acclaim and that the record lacked evidence that the petitioner's national impact exceeded that of others in the field.

The evidence submitted to meet a criterion must be evaluated as to whether it is indicative of or consistent with national acclaim. Authorship of original work is expected of Ph.D. students. The record lacks evidence that the petitioner's thesis was published as claimed, although the petitioner presented this work at two conferences. As stated above, the record lacks evidence that the petitioner's thesis has proven influential. The petitioner's newspaper articles appeared in a local publication. The materials about the *Deccan Herald* do not indicate that it has a national circulation.

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

Prior counsel and counsel have both asserted that the petitioner's cookbooks, presentation of her thesis and newspaper articles serve to meet this criterion. The director noted the lack of evidence that the books were widely distributed or sold well in comparison to other cookbooks. On appeal, the petitioner does not submit evidence regarding the sales of her books.

This criterion is applicable to visual artists. We cannot conclude that a nutritionist or cook is a visual artist. Moreover, scientific conferences, cookbooks, and newspapers are not artistic exhibitions or showcases. Thus, the evidence purportedly relating to this criterion does not actually apply to it. Nor do we find these presentations and publications to be comparable evidence to meet this criterion pursuant to 8 C.F.R. § 204.5(h)(4). The regulations include a scholarly articles criterion, set forth at 8 C.F.R. § 204.5(h)(3)(vi) and discussed above. It is not persuasive that evidence relating to that criterion but insufficient to meet that criterion would be comparable evidence sufficient to meet this criterion. While the cookbooks are not "scholarly," we do not find that publication of books of undocumented popularity is comparable to the type of display at exclusive artistic showcases contemplated by this criterion. Moreover, even if the record did contain evidence that the petitioner enjoyed commercial success through the sale of her cookbooks, such evidence would be comparable evidence for the commercial success as a performing artist criterion set forth at 8 C.F.R. § 204.5(h)(3)(x) and discussed below. Thus, we find that the petitioner has not established that she meets this criterion.

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

In response to the director's RFE, counsel asserted that in 1983 the petitioner founded the Sangeeta Niketan Cookery School, which she has managed and operated ever since. In addition to the 30 culinary classes offered, the school presented a workshop on the development of baby foods. The director failed to discuss this claim.

The record adequately establishes that the petitioner has played a leading role for the school. Local news coverage, however, is not evidence of the school's distinguished reputation nationally. The record lacks evidence in support of prior counsel's assertion that the school attracts students internationally other than the petitioner's self-serving assertion at the beginning of one of her own cookbooks. Without additional evidence of the school's national reputation, we cannot conclude that the petitioner 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.

Admittedly, this criterion is not applicable to authors. We would accept, however, evidence of the commercial success of the petitioner's books as comparable evidence for this criterion under 204.5(h)(4). While prior counsel asserts that the petitioner's cookbooks are bestsellers, the record contains no evidence to support that claim. The evidence that one or two of her cookbooks have been reprinted is not evidence that they were bestsellers. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). While the director specifically noted that the record lacked evidence that the petitioner's cookbooks are bestsellers, the petitioner does not submit any evidence to address this deficiency on appeal. Thus, the petitioner has not submitted comparable evidence to meet this criterion.

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 the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished herself as a food scientist to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence indicates that the petitioner shows talent as a food scientist, but is not persuasive that the petitioner's achievements set her significantly above almost all others in her 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.