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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B2

[redacted]

DATE: APR 19 2012 OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner: [redacted]
Beneficiary:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, on September 1, 2010, 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 as a farrier. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his sustained national or international acclaim.

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

On appeal, counsel claims that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

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

II. ANALYSIS

A. Evidentiary Criteria[2]

> *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 the director's decision, she determined that the petitioner established eligibility for this criterion. However, based on a review of the record of proceeding, the petitioner failed to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). As such, the AAO must withdraw the findings of the director for this criterion.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished 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." 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. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.[3] Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that "[s]uch evidence shall include the title, date, and author of the material, and any necessary translation."

The record of proceeding reflects that the petitioner submitted the following documentation:

1. An uncertified and partial translation of an article entitled, "Conversation with Stephane Tournier The Best of Both Worlds," August 2009, by Monique Craig, *Infor Maréchalerie*;

2. An uncertified and partial translation of an article entitled, "Farrier. The Conquest of the West," April 6, 2009, by Hervé Queillé, *Le Télégramme*;

3. An uncertified and partial translation of an article entitled, "A Native of Besancon on the Other Side of the Globe," February 1, 2009, unidentified author, *Besançon*;

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[2] On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

[3] Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

4. An uncertified and partial translation of an article entitled, "Stephane Tournier Knows Every Horse by Their Name," unidentified date, unidentified author, unidentified publication;

5. An uncertified and partial translation of an article entitled, "An Italian Farrier Visits the North," unidentified date, by Sabine Jobert, unidentified publication;

6. An uncertified and partial translation of an article entitled, "Stephane Tournier: A Young Farrier for an Old Trade," unidentified date, unidentified author, unidentified publication;

7. An advertisement for EponaShoe in *Infor Maréchalerie*; and

8. An article entitled, "Stephane Tournier Takes Balanced Approach to Hoof Care," unidentified date, unidentified author, *Farrier Magazine*.

Regarding items 1 – 6, the regulation at 8 C.F.R. § 103.2(b) provides in pertinent part:

> (3) 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.

As cited above, the regulation at 8 C.F.R. § 103.2(b)(3) specifically requires that any foreign language document that is submitted to USCIS must be accompanied by a *full* and *certified* English language translation. Because the petitioner failed to submit full and certified English language translations, he failed to comply with the regulation at 8 C.F.R. §§ 103.2(b)(3) and 204.5(h)(3)(iii). As such, 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. Moreover, regarding items 3 – 6, the petitioner failed to include the date and/or author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Furthermore, the petitioner failed to submit any documentary evidence establishing that *Infor Maréchalerie*, *Le Télégramme*, and *Besançon* are professional or major trade publications or other major media. In fact, the petitioner failed to indicate where the articles were even published regarding items 4 – 6, let alone if they were published in professional or major trade publications or other major media.

Regarding item 7, an advertisement for a product that simply credits the petitioner in a caption to a photograph is not "published material" consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Further, the advertisement is for EponaShoe rather than independent, journalistic coverage about the petitioner relating to his work.

Regarding item 8, the article reflects published material about the petitioner relating to his work. However, the petitioner failed to include the date and author of the material as required pursuant to

the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, the petitioner failed to submit any documentary evidence demonstrating that *Farrier Magazine* is a professional or major trade publication or other major media. Even if the petitioner were to submit supporting documentary evidence showing that the article in *Farrier Magazine* meets the elements of this criterion, which he has not, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires published material in more than one professional or major trade publication or major medium. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS,* Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff,* 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials). In the case here, the petitioner submitted only one document that reflects published material about the petitioner relating to his work but failed to meet the remaining elements of the regulatory criterion.

The AAO notes at the initial filing of the petition, counsel also claimed the petitioner's eligibility for this criterion based on the petitioner's "select[ion] to be in a documentary describing his successful career. . . . The documentary *will* be broadcast on the TV channel Equidia [emphasis added]." The petitioner submitted a letter from Gérard Pélisson, Y.N. Productions, who stated that the petitioner "has been selected to take part in the shooting of a documentary film named 'French people who succeeded in the USA' which *will* be broadcast in September 2010 on the French network Equidia [emphasis added]." However, the petition was filed on March 22, 2010. 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 (Reg'l Comm'r 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 USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Regardless, documentaries do not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Again, this regulatory criterion requires "published material" in professional or major trade publications or other major media, as well as the "title, date, and author of the material." As television interviews, appearances, and documentaries are not *published* material in professional or major trade publications or other major media, they clearly do not meet the plain language of this regulatory criterion.

The burden is on the petitioner to establish that he meets every element of this criterion. As discussed above, the petitioner failed to demonstrate that his documentary evidence meets the plain

language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Therefore, the AAO withdraws the decision of the director for this criterion.

Accordingly, the petitioner 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 director determined that the petitioner failed to establish eligibility for this criterion. In counsel's brief, he did not contest the findings of the director for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

Accordingly, the petitioner 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.*

In the director's decision, she determined that the petitioner failed to establish eligibility for this criterion. Specifically, the director found that the petitioner did not identify any organization or establishment that the petitioner purportedly performed in a leading or critical role. On appeal, counsel states:

> [The petitioner] previously stated he worked for [redacted] in my correspondence to USCIS. Although this statement is correct in the literal sense because [the petitioner] deals with [redacted]he individual) on a one to one basis so often, the Director totally misinterpret[s] [the petitioner's] relationship to [redacted] business by overemphasizing [the petitioner's] professional relationship with [redacted] the individual. [redacted] and his horse business is registered as an organization [redacted] and as such, any work [the petitioner] has done for [redacted] has legally been for his organization, [redacted] Stables, Incorporated (SPDS).

On appeal, the petitioner submitted a letter from [redacted] demonstrating that the petitioner performed work for SPDS. In addition [redacted] stated that the petitioner "is the exclusive and designated farrier for SPDS . . . and has shoed all of our horses for the last 3 years." [redacted] further stated that the petitioner's "importance to [SPDS] is such that I have him on permanent retainer and call for his assistance at the farm on a near-daily basis. I also require him to be available at all times to service our horses, and if necessary, travel to international competitions with our horses." Finally, [redacted] credited the petitioner with the success of one of SPDS' horses, Ravel, who won several national and international accolades including "Horse of the Year" by the United States Equestrian Federation.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." In other words, the petitioner must demonstrate that his role was leading or critical, was for organizations or establishments, and those organizations or establishments have a distinguished reputation. In the case here, the petitioner established that he performed in a critical role for SPDS that has a distinguished reputation.

However, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires the petitioner to perform in a leading or critical role for more than one organization or establishment. On appeal, counsel claimed the petitioner's eligibility for this criterion based solely on SPDS. As the petitioner demonstrated his role with only a single organization or establishment, the petitioner failed to establish that he meets every element of this criterion.

Accordingly, the petitioner 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 director determined that the petitioner established eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires "[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field." Based on a review of the record of proceeding, the petitioner submitted sufficient documentary evidence demonstrating that he minimally meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix).

Accordingly, the petitioner established that he meets this criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

III. CONCLUSION

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.

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field

of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.[4] Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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.

[4] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).