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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 0 5 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially approved the employment-based immigrant visa petition on January 29, 2009 for a different classification. Upon further review of the record, the director determined that the beneficiary was not eligible for the benefit sought and denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision on procedural grounds; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner seeks classification for the beneficiary as an "alien of exceptional ability," as a Senior Project Analyst/People Soft Financials, pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). As required by statute, the petition was accompanied by an Application for Permanent Employment Certification, ETA Form 9089, which was filed with the U.S. Department of Labor (DOL) on March 3, 2008, and certified by the DOL on April 29, 2008.

The director found that the petitioner failed to demonstrate "that the job opportunity portion of the ETA Form 9089 requires an alien of exceptional ability. See 8 C.F.R. § 204.5(k)(4)."

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner filed the petition on August 18, 2009. The petitioner checked the box in Part 2 indicating that it was filing the petition under section 203(b)(2) of the Act. The filing included letters from both counsel and the petitioner indicating that the petitioner was seeking to classify the beneficiary as an alien of exceptional ability pursuant to section 203(b)(2) of the Act. The director, however, approved the petition on January 29, 2009 under section 203(b)(3) of the Act, a lesser classification. Upon further review of the record, the director determined that the beneficiary was not eligible for classification as an alien of exceptional ability and on May 7, 2012, issued a request for additional evidence relating to that classification. The petitioner responded. On September 5, 2012, the director issued a notice of intent to dismiss, to which the petitioner responded. Contrary to counsel's statement on appeal, neither the request for evidence nor the notice of intent to deny acknowledge the prior approval or reflect that the director reopened the matter. On November 27, 2012, the director denied the petition and the petitioner filed the instant appeal on December 28, 2012.

On appeal, counsel submits a brief and the Employment and Training Administration Prevailing Wage Determination Policy Guidance dated May 9, 2005. Counsel notes that the director made no finding in his decision that the beneficiary fails to meet the standard of an alien of exceptional ability. Nevertheless, counsel reiterates his case that the beneficiary does meet the standard by satisfying three criteria under 8 C.F.R. § 204.5(k)(3)(ii) – the minimum required to qualify as an alien of exceptional ability. Counsel did not raise any procedural concerns relating to the director's denial of the approved petition. Nevertheless, the AAO will not uphold a denial of an approved petition for the reasons discussed below.

II. ANALYSIS

The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Matter of Ho,* 19 I&N Dec. 582, 589 (BIA 1988). The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* At issue, however, is whether the director properly denied the approved petition.

While counsel states that the director reopened the matter before issuing the request for evidence and notice of intent to deny, neither of the director's notices either acknowledge the approval or state that the director is reopening the matter. Moreover, the director cites no provision of law or regulation that allows the director to deny a petition the director approved in error. Instead, section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Matter of Ho,* 19 I&N Dec. at 590.

The regulation at 8 C.F.R. § 205.2 states, in pertinent part:

> Revocation on Notice.
>
> (b) *Notice of intent.* Revocation of the approval of a petition or self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.
>
> (c) *Notification of revocation.* If, upon reconsideration, the approval previously granted is revoked, the director shall provide the petitioner or the self-petitioner with a written notification of the decision that explains the specific reasons for the revocation. . . .

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. at 590 (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

In this matter, the director ultimately denied the approved petition, rather than issuing a notice of intent to revoke and subsequently revoking the petition on those grounds. Thus, the matter must be remanded to the director for the purpose of issuing a notice of intent to revoke advising the petitioner of the specific inconsistencies in the evidence discussed below in addition to the grounds previously raised in the post-approval notices. If the director concludes that the petitioner's response does not overcome the deficiencies in the record, the director shall issue a decision that specifically addresses the petitioner's evidence and that applies the pertinent statutory and regulatory requirements in the analysis of the evidence.

III. ADDITIONAL ISSUE ON REMAND

A. Law

Section 203(b) of the Immigration and Nationality Act (the Act) states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.--
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought
>
> (C) A license to practice the profession or certification for a particular profession or occupation

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

(E) Evidence of membership in professional associations

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

Where the petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 596 F.3d 1115, 1122 (9th Cir. March 4, 2010). If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2); *see also Kazarian,* 596 F.3d at 1119-20. Only aliens whose achievements have garnered "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2); *see also Kazarian,* 596 F.3d at 119-22.

While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning in *Kazarian* persuasive to the classification sought in this matter. Specifically, the regulations state a regulatory standard and provide a list of suggested types of evidence, of which the petitioner must submit a certain number. Significantly, USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008). Thus, if the regulatory standard is to have any meaning, USCIS must be able to evaluate the quality of the evidence in a final merits determination.

The *Kazarian* 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.

B. Evidence

While addressed by the director in the request for evidence and notice of intent to deny, but not specifically addressed in the director's decision, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the above six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business.

On remand, the director shall consider the inconsistencies regarding the beneficiary's employment record. The record contains six letters from previous employers documenting the beneficiary's experience from March 1998 until March 30, 2006. The letter of support signed by Director of Employment and Compliance for the petitioner, states that the beneficiary began working for the petitioner on April 3, 2006.

However, the petitioner also submitted a copy of the beneficiary's resume which is not consistent with the employment claimed on the ETA Form 9089 and the employment letters. For example, the beneficiary's resume states that he has been employed by the petitioner since October 2005. However, the ETA Form 9089 and the letter from Ms. states that he did not begin working for the petitioner until April 3, 2006. In addition, all of the employment listed on the beneficiary's resume prior to August 2001 conflicts with the submitted letters and ETA Form 9089. The discrepancies follow:

Resume		ETA Form 9089 and employment verification letters	
Employer/Location	Dates	Employer/Location	Dates
	05/98-03/99		
	05/99-08/99		03/98-09/99
	08/99-07/00		10/99-05/00
	08/00-05/01		06/00-08/01

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Thus, on remand the director shall consider whether the record resolves the above discrepancies.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable. Because the petition is not approvable, the petition is remanded to the director for

issuance of a new, detailed notice of intent to revoke and decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.