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

(b)(6)

[redacted]

DATE: JAN 0 2 2014 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

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

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification for the beneficiary as an "alien of exceptional ability," as a choreographer pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). The petitioner further asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group II.

The director found that the petitioner had not established that the beneficiary is "an individual of exceptional ability," and that the offered job as listed on the ETA Form 9089, Application for Permanent Employment Certification, "does not support the classification sought." The director also found that the petitioner had not established that the beneficiary qualifies for Schedule A designation. Finally, the director found that the petitioner had not established the ability to pay the proffered wage at the time the priority date was established.

On appeal, counsel submits a brief and additional evidence, including sufficient evidence to establish the petitioner's ability to pay the proffered wage. For the reasons discussed below, upon review of the entire record, the AAO upholds the director's conclusion that the petitioner has not established the beneficiary's eligibility for the classification sought.

I. LAW

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

> (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)(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; or

(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 at 8 C.F.R. §§ 204.5(h)(2), (3) (relevant to the extraordinary ability classification at issue in *Kazarian*) and 8 C.F.R. §§ 204.5(k)(2), (3)(ii) 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 in that case 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 on behalf of the beneficiary under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

A. Comparable Evidence

As stated in the director's decision and request for evidence (RFE), the regulation at 8 C.F.R. § 204.5(k)(3)(iii) allows for the submission of "comparable evidence" only if the above standards "do not readily apply to the beneficiary's occupation." Thus, it is the petitioner's burden to demonstrate why the standards at 8 C.F.R. § 204.5(k)(3)(ii) are not readily applicable to the alien's occupation and how the evidence submitted is "comparable" to the specific objective evidence required at 8 C.F.R. §§ 204.5(k)(3)(ii)(A) – (F).

Although counsel asserts that a letter from [redacted] regarding the applicability of certain categories of evidence was overlooked, the regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that the standards specified by the regulation at 8 C.F.R. § 204.5(k)(3)(ii) are not readily applicable to the beneficiary's occupation. In fact, the petitioner submitted evidence with the original Form I-140 that specifically addresses three of the six categories of evidence set forth in the regulation at 8 C.F.R. § 204.5(k)(3)(ii), and an additional criterion in response to the director's RFE. Furthermore, the letter from [redacted] submitted in response to the director's RFE and the letter from the petitioner submitted on appeal do not state that the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (D) and (E) do not apply to choreographers at all, rather the letters state that they are not indicative of exceptional ability. The letters only clarify that that the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) is not applicable to the field of choreography. The six criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

Where an alien is simply unable to satisfy the plain language requirements of at least three categories of evidence at 8 C.F.R. § 204.5(k)(3)(ii), the regulation at 8 C.F.R. § 204.5(k)(3)(iii) does not allow for the submission of comparable evidence.

B. Evidentiary Criteria[1]

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

Upon review of the entire record, the director's finding for this criterion must be withdrawn. As stated by the director in his RFE, the plain language of the regulation requires "ten years of full-time experience in the occupation for which he or she is being sought." In the instant petition, the petitioner has specified on the Form I-140 petition, part 6, and the Form ETA 9089, Part H, line 3, that it is offering the relevant occupation is choreographer. The petitioner lists "dancer" as an "alternate occupation" for acceptable experience on the Form ETA 9089, Part H, line 10-B. In response to the director's RFE, counsel concedes that the beneficiary "did not work exclusively as a choreographer for the last 10 years," but urges consideration of comparable evidence. As stated above, the consideration of comparable evidence is not allowed in the instant petition. In addition, the petitioner submitted new letters detailing the beneficiary's work over the last ten years as a dancer, choreographer and instructor. Based upon the employment letters, the beneficiary cannot be found to have ten years of full-time experience as a choreographer, the occupation for which he is being sought. Moreover, the petitioner has not explained how experience in a related but distinct occupation is "comparable" to ten years of experience in the occupation. *See Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002) (upholding a finding that athletics and coaching are not the same occupation). Thus, the petitioner has not submitted evidence that meets the plain language requirements of the criterion.

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

The director discussed the submitted evidence and found that the petitioner failed to establish that the evidence was qualifying. In response to the director's RFE, counsel asserts that the beneficiary meets this criterion because he "is the highest paid employee in the petitioning company" and that the "wage offered to the [b]eneficiary (ie, $56,000) is at the very top end of the DOL's prevailing wage survey." The record contains a copy of the beneficiary's 2012 W-2, which indicates that the beneficiary was paid $47,510, and a 2012 Form 1099, which indicates an additional $2,725, for a total of $50,235, which is approximately ten percent less than the prevailing wage of $55,661. The plain language of the regulation requires that "the alien has commanded a salary…which demonstrates exceptional ability." The submitted evidence does not establish that the beneficiary received the referenced remuneration, prior to the June 26, 2012 filing date. 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). In addition, being the petitioner's highest paid employee is not demonstrative evidence of exceptional ability. Furthermore, the petitioner has not demonstrated how a salary below the prevailing wage is evidence of exceptional ability. Thus, the petitioner has not submitted evidence that meets the plain language requirements of the criterion.

[1] The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

Evidence of membership in professional associations

The director's RFE requested the petitioner to provide evidence that the beneficiary is a member of more than one professional association, as required by the plain language of the regulation. Significantly, not all of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (C) and (D) only require one academic record, a single license and 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.[2]

In response to the director's RFE, the petitioner submitted a letter from Executive Director of which states that "it is not the standard practice that all exceptional choreographers participate in industry associations…and membership is not determined on merit or artistic quality." On appeal, the petitioner submitted a letter which states that "membership is in no way an indication of exceptional skill as a choreographer." However, the plain language of the regulation only requires membership in professional associations, not that it be demonstrative of exceptional ability. As previously stated, *Kazarian*, 596 F.3d at 1122, sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination, where it would be determined whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered."

In light of the above, as the petitioner only submitted evidence of one qualifying membership, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the criterion.

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

The director found that the petitioner submitted sufficient evidence to satisfy this criterion and the AAO affirms the director's finding.

In summary, the petitioner has not submitted the initial required evidence under at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii).

Had the petitioner 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 that the

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[2] *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).

beneficiary has a degree of expertise significantly above that ordinary encountered. 8 C.F.R. §§ 204.5(k)(2) and (3); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of such expertise, the AAO need not explain that conclusion in a final merits determination.[3] Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

Therefore, the documentation submitted has not shown that the beneficiary has a degree of expertise significantly above that ordinarily encountered and the petitioner failed to establish the beneficiary is qualified for classification as an alien of exceptional ability under section 203(b)(2) of the Act. Thus, the petitioner has not established that the beneficiary is qualified for the benefit sought. On that basis alone the petition cannot be approved.

C. The Offered Position

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation for classification as aliens who are members of the professions holding advanced degrees or aliens of exceptional ability:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. *The job offer portion of* the individual labor certification, *Schedule A application*, or Pilot Program application *must demonstrate that the job requires* a professional holding an advanced degree or the equivalent or *an alien of exceptional ability*.

(Emphasis added.) As required by statute, an uncertified ETA Form 9089, Application for Permanent Employment Certification, in duplicate accompanied the petition. The job offer portion of the ETA 9089 in this matter indicates that the proffered position requires either 120 months of experience in the job offered or 120 months of experience as a professional dancer/choreographer. No other requirements are listed.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*,

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[3] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. 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).

19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added).

The director's decision states that "[a]t issue is whether the job requirements indicate that the position itself requires an alien of exceptional ability" and found that the position did not require an individual of exceptional ability. Counsel does not address this finding on appeal. As counsel does not specifically explain how the director erred in his conclusion, counsel has abandoned this claim. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *see also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

D. Prior O-1

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different classification. 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).

III. CONCLUSION

The documentation submitted has not established that the beneficiary is qualified for classification as an alien of exceptional ability under section 203(b)(2) of the Act. In addition, the job offer portion of the ETA Form 9089 does not demonstrate that the job requires an individual of exceptional ability as required by the regulation at 8 C.F.R. § 204.5(k)(4). As a result the determination as to whether the beneficiary qualifies for Schedule A, Group II classification under 20 C.F.R. § 656.15(d)(2) is moot.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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 appeal is dismissed.