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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **APR 01 2010**  
LIN 09 098 51268

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:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

**Perry Rhew**  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, 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 in business. The director determined that the petitioner had not established the requisite extraordinary ability through extensive documentation and sustained national or international acclaim.

On appeal, the petitioner argues that he 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. 723 101<sup>st</sup> 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.* and 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that an alien demonstrate his or her sustained acclaim and the recognition of his or her achievements in the field. Such acclaim and achievements must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through meeting at least three of the following ten criteria.

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) 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;
- (iii) 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;
- (iv) 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 specialization for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
- (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

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*, 2010 WL 725317 (9th Cir. March 4, 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's procedure for evaluating evidence submitted to meet a given evidentiary criterion.<sup>1</sup> 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.*

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<sup>1</sup> 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).

The court stated that the AAO's approach 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 \*6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both 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," 8 C.F.R. § 204.5(h)(2), and "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)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

*Id.* at \*3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under three criteria, considered in the context of a final merits determination. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

## II. Analysis

### A. Evidentiary Criteria

This petition, filed on February 25, 2009, seeks to classify the petitioner as an alien with extraordinary ability as a business software developer and contractor. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).<sup>2</sup>

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

In response to the director's request for evidence, the petitioner submitted an April 20, 2005 certificate from the China Enterprise Resource Planning (ERP) Software Association stating that his "Golden Soft-Enterprise Resource Planning System V3.0" received a Number One "Special grant Technology Progress Prize" in the "2005 China ERP Software Grand Prix." The petitioner also submitted an April 20, 2006 certificate from the China ERP Software Association stating that his "Golden Soft-Enterprise Resource Planning System V3.0" received a "Special Award for customer

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<sup>2</sup> The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

satisfaction” in the “2006 Chinese Grand Prix on the ERP software.” Pursuant to 8 C.F.R. § 103.2(b)(3), any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that 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. The English language translations accompanying the preceding certificates were not certified by the translator as required by the regulation. Moreover, the record does not include information from the China ERP Software Association indicating the significance of these awards or their evaluation criteria. The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that petitioner’s awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this instance, there is no documentary evidence demonstrating that the preceding awards are recognized beyond the presenting organization and therefore commensurate with nationally or internationally recognized prizes or awards for excellence in the petitioner’s field. Accordingly, the petitioner has not established that he meets this criterion.

*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 request for evidence, the petitioner submitted an August 15, 2009 letter from the president of the China ERP Software Association stating that the petitioner became a member of the association in 2005. The English language translation accompanying this letter was not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, the record does not include evidence (such as membership rules or bylaws) showing the official admission requirements for this association. There is no evidence showing that the China ERP Software Association requires outstanding achievements of its members, as judged by recognized national or international experts in the petitioner’s field or an allied one. Accordingly, the petitioner has not established 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 petitioner submitted letters of support from a former classmate and a client whose company utilizes the petitioner’s management software. The English language translations accompanying these letters were not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3).

██████████ of the Chinese People’s University Business College in China states that he was a classmate and good friend of the petitioner. ██████████ further states:

I have known [the petitioner] for 23 years since the university, [the petitioner] was a good student acknowledged. He studying hard, a Division of outstanding academic performance; he has leadership, was our class monitor; he helping others in the study and work helped a lot of students.

After graduation, we have always maintained contacts. He founded a computer software company, developed a number of foreign trade and the factory computer management software. We often communicate with the subject of economic management, while he often and I talked about a number of automated management software, he have been two national invention of computer software technology, both software obtained national patent. In addition the publication of several papers. He often to work in factories, the company needs to do customer surveys, analysis and technical transformation. China has a lot of enterprises the use of his software, and thus greatly improves production efficiency, improved management procedures. He is a worthy of my admiration for the inventors and business managers.

[REDACTED] of the Computer Software Department [REDACTED]

[REDACTED], China, states:

Our company has been used of [the petitioner's] "gold soft-commerce V3.0" since 2000 until now. This software, [the petitioner] obtained national patent computer software. Our company use this software for customer management, merchandise coding management, contract management, mail management and shipping, such as document management, to manage the company's entire business flow; this software on our company improve efficiency, management level, has played a significant role.

Our company's factory has been used [the petitioner's] "Golden Soft ERP V3.0" from 2004 until now. This software is [the petitioner's] second time obtained national patent computer software products. This software has seven management features: products and materials management, project management, manufacturing management, distribution management, transportation management, financial management and human resources management. Our company to use the seven management model

The use of [the petitioner's] above two management software, our company has created a huge economic benefits, one of the products and materials management model for our annual cost savings in procurement and storage of about 15 million Yuan RMB, and human resource management model created economic benefits each year over five million Yuan RMB.

With [the petitioner's] co-operation at the same time, our personal relationships are also very friendly. His wisdom, the experience of enterprise management, management skills and entrepreneurial spirit to me is very impressed, we often do things together like dinner, travel, hiking, playing tennis and walking during Holidays, weekend.

The petitioner also submitted documentation of two computer software "copyright" registrations for software he developed. The English language translations accompanying these copyright registrations were not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Although the petitioner and the preceding references refer to these copyright registrations as "patents," the submitted documentation does not support their conclusion. Nevertheless, the grant of a patent or of a copyright demonstrates only that the petitioner's software

product was original. This office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Commr. 1998). Rather, the significance of the work must be determined on a case-by-case basis. *Id.* In this case, there is no evidence showing that the petitioner's software products have been widely utilized throughout his industry or otherwise equate to business-related contributions of major significance in the field.

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner has earned the admiration of a former classmate and a business acquaintance, the submitted documentation does not establish that he has made original contributions of "major significance" in his field commensurate with sustained national or international acclaim. For example, the record does not indicate the extent to which his work has impacted others in his field nationally or internationally, nor does it show that the field has significantly changed as a result of his work.

In evaluating the reference letters, we note that the preceding letters are limited to the petitioner's close acquaintances. Such letters by themselves cannot establish that the petitioner's software products are original contributions of major significance in the field. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of a software developer or a businessman who has sustained national or international acclaim. Without evidence showing that the petitioner's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

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

The petitioner submitted documentation showing that he authored two articles in *Computer Software*. The English language translations accompanying these articles were not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, there is no evidence (such as circulation statistics) showing that *Computer Software* qualifies as a major trade publication or some other form of major media. Moreover, the plain language of this criterion requires authorship of scholarly articles in more than one publication or medium. Accordingly, the petitioner has not established 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.*

In response to the director's request for evidence, the petitioner submitted letters and income sheets from [REDACTED] listing his earnings from 2005 through 2008. The English language translations accompanying these letters were not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Nevertheless, the plain language of this regulatory criterion requires the petitioner to submit evidence of a high salary "in relation to others in the field." The petitioner offers no basis for comparison showing that his compensation was significantly high in relation to others in his particular field.

The petitioner's response to the director's request for evidence included a July 1, 2009 "ENGINEER [sic] CONTRACTOR AGREEMENT" between the petitioner and [REDACTED] for a sum of \$60,000. The petitioner also submitted copies of July 15, 2009 and August 15, 2009 checks in the amount of \$5000.00 written out to the petitioner by [REDACTED] but there is no evidence showing that either payment was processed. Regardless, the preceding contract and paychecks postdate the filing of the petition. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Accordingly, the AAO will not consider the agreement or the paychecks from July and August of 2009 as evidence for this criterion.

In light of the above, the petitioner has not established that he meets this criterion.

In this case, we concur with the director's finding that the petitioner has failed to demonstrate his receipt of a major, internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the national or international acclaim necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3).

### ***B. Final Merits Determination***

In accordance with the *Kazarian* opinion, we must next conduct 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," 8 C.F.R. § 204.5(h)(2); 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." See section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). See also *Kazarian*, 2010 WL 725317 at \*3. In this case, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In this case, the deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The submitted evidence is not commensurate with sustained national or international acclaim and there is

no indication that the petitioner's achievements have been recognized in the field through extensive documentation. For instance, the letters of support are limited to the petitioner's close acquaintances, there is no evidence showing that the petitioner's two copyrighted software products have had a significant impact in the field at large, and there is no evidence that the petitioner's two articles have been frequently cited or otherwise attracted favorable attention from others in his field. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

### ***C. The Regulation at 8 C.F.R. § 204.5(h)(5)***

Beyond the decision of the director, the regulation at 8 C.F.R. § 204.5(h)(5) requires "clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States." As previously discussed, the petitioner's response to the director's request for evidence included a July 1, 2009 "ENGINEER [sic] CONTRACTOR AGREEMENT" between the petitioner and [REDACTED] for a sum of \$60,000. The petitioner also submitted a September 1, 2009 letter from [REDACTED] Inc. stating that the petitioner has a contract to work with the company. The petitioner's response also included copies of July 15, 2009 and August 15, 2009 checks in the amount of \$5000.00 written out to the petitioner by [REDACTED] but there is no evidence showing that either payment was processed. 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). With regard to the unprocessed payments from [REDACTED] 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.* at 591. Accordingly, the unprocessed payments cast doubt on the validity of the employment letter and contract from [REDACTED]. Thus, the evidence submitted is not clear that the petitioner will continue to work in his area of expertise in the United States.

### **III. Conclusion**

Review of the record does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Moreover, the evidence is not clear that the petitioner will continue to work in his area of expertise in the United States. Therefore, the petitioner has not established eligibility pursuant to sections 203(b)(1)(A)(i) and (ii) of the Act and the petition may not be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v.*

*U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.