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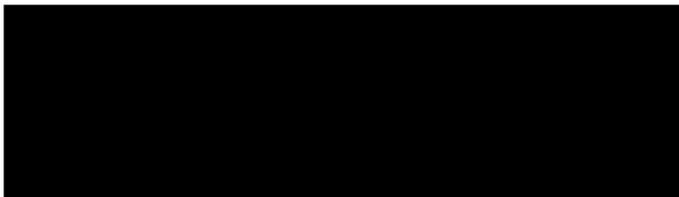
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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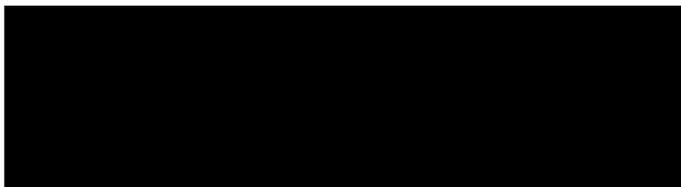
MAR 23 2010

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date:
SRC 08 097 53305

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.

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).

7 Perry Rhew
Chief, Administrative Appeals Office

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

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. While the director accepted the significance of the petitioner's contributions and scholarly articles, he ultimately determined that 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 submits a brief and additional evidence. For the reasons discussed below, our merits evaluation of the evidence submitted, which addresses the significance of the evidence submitted under the necessary three criteria, leads us to conclude that the petitioner has demonstrated the necessary national or international acclaim.

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* 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991).

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 the following

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.

- (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.¹ With respect to the

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).

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.*

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

The director in this matter concluded that the petitioner has made contributions of major significance and has authored scholarly articles pursuant to the criteria set forth at 8 C.F.R. §§ 204.5(h)(3)(v) and (vi). The record also contains evidence that the petitioner served as a peer reviewer and, more significantly, on the editorial board of *Express Polymer Letters*. The petitioner has submitted sufficient evidence to establish that the petitioner served as the judge of the work of others pursuant to the criterion set forth at 8 C.F.R. § 204.5(h)(3)(iv).

In light of the above, the petitioner has submitted evidence that qualifies under three of the evidentiary criteria.

B. Final Merits Determination

Thus, 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.” 8 C.F.R. § 204.5(h)(3). *See Kazarian*, 2010 WL 725317 at *3.

The petitioner received his Ph.D. in 1999 and has demonstrated a “career of acclaimed work in the field” as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). His previous employers include the renowned Max-Planck Institute for Polymer Research in Germany. He currently works for the Sandia National Laboratory at the University of New Mexico. His publication record not only meets the criterion at 8 C.F.R. § 204.5(h)(3)(vi), his articles are consistently well cited, with one article having been cited over 100 times as of the date of filing. *See Kazarian*, 2010 WL 725317 at *5 (citations may be relevant to the final merits determination of whether an alien is at the very top of his field). This citation record is also consistent with a determination that his contributions of major significance, discussed in detail in the reference letters, are consistent with national or international acclaim.

The petitioner submitted reference letters from experts in the field, detailing the petitioner’s specific contributions and explaining how those contributions have influenced the field. For example, [REDACTED], a senior specialist in the Central Research and Development Department of Dupont, asserts that the petitioner’s discoveries in conductive polymers, polymer nanocomposites and electrospinning of polymer materials provided a possible route to produce polyaniline on a large scale. More significantly, [REDACTED] then states: “Based on [the petitioner’s results], a company invested in his home institute and built a line to produce tons of polyaniline annually.” [REDACTED] confirms that this company has been providing polyaniline to Dupont.

Finally, while we withdraw the director’s concern that the petitioner did not submit evidence of judging the work of others, we must now review that judging experience in the context of our final merits determination. Analysis of this evidence is relevant to a final merits determination. *Id.*

We cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field and, by itself, is not indicative of or consistent with sustained national or international acclaim. Without evidence that sets the petitioner apart from others in his field, such as evidence that he has reviewed manuscripts for a journal that credits a small, elite group of referees, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, we cannot conclude that the evidence is consistent with either 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,” or “sustained national or international acclaim.” As stated above, not only has the petitioner participated in the widespread peer-review process, he has also served on the editorial board of an international journal based in Budapest, contributing to the journal’s editorial corner. Thus, we are satisfied that this experience as a judge is consistent with the relevant regulatory and statutory definitions of extraordinary ability.

III. Conclusion

In review, while not all of the petitioner's evidence carries the weight imputed to it by counsel, the petitioner has submitted evidence qualifying under three of the evidentiary criteria and established 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 "sustained national or international acclaim." His achievements have been recognized in his field of expertise. The petitioner has established that he seeks to continue working in the same field in the United States. The petitioner has established that his entry into the United States will substantially benefit prospectively the United States. Therefore, the petitioner has established eligibility for the benefit sought under section 203 of the Act.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.