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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **NOV 18 2010**

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 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 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 as an “alien of extraordinary ability” in the performing arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined 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.¹ For the reasons discussed below, the petitioner has not established her eligibility for the exclusive classification sought. Specifically, the petitioner has submitted qualifying evidence under only one of the ten regulatory criteria of which an alien must satisfy at least three.

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

¹ The petitioner has retained new counsel on appeal. We note that the petitioner’s previous attorney, [REDACTED] was suspended from practicing before the Board of Immigration Appeals, immigration courts and the Department of Homeland Security on March 11, 2009. [REDACTED] For clarity, however, we will refer to [REDACTED] as “prior counsel” in this decision.

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 following ten categories of evidence.

- (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*, 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.² 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)). 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 1119-20.

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 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 8 C.F.R. § 103.3(a)(1)(iv); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (recognizing the AAO's *de novo* authority).

² 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 Criteria³

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

The record contains no assertion that the petitioner has submitted qualifying evidence that meets the requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(i). Nevertheless, we will address the evidence of record that relates to that criterion.

The petitioner submitted a Certificate of Recognition from the Thin Gyan Burmese Arts and Culture Association and an Award of Appreciation from the Cyclone Nargis Relief Committee. The petitioner also submitted a letter from [REDACTED] asserting that the station awarded the petitioner second prize as most sold music album in 2005.

The petitioner did not submit any evidence to establish that the certificate of recognition and award of appreciation are nationally recognized prizes or awards for excellence. Regarding [REDACTED] letter, the petitioner relies on this letter as evidence of her award for record sales rather than the award itself. The regulation at 8 C.F.R. § 103.2(b)(2)(i) requires the submission of primary evidence unless the petitioner is able to document that primary evidence is either unavailable or does not exist. Even where primary and secondary evidence does not exist, the petitioner must submit affidavits rather than letters. 8 C.F.R. § 103.2(b)(2)(i). The petitioner has not documented that her original award is unavailable or does not exist or that secondary evidence of the award, such as media coverage, is also unavailable or nonexistent pursuant to 8 C.F.R. § 103.2(b)(2)(ii). Thus, we need not rely on [REDACTED] letter in lieu of the award itself.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(i).

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.

The petitioner submitted the following news article:

1. An August 2007 article in the *Mandalay Gazette* naming the petitioner's performance as the "significant part" of the New York Summer Burmese Water Festival and a lengthy interview with the petitioner in the same issue. The

³ The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

circulation is listed on the front page as 12,000. The paper has a California address.

2. A September 2007 article in the same publication about the petitioner's performance for a Buddhist Temple fundraiser in San Francisco.
3. A translation of a British Broadcasting Corporation (BBC) interview about a Fundraising concert for Burmese patients with HIV/AIDS at the University of Maryland, Shady Grove Campus and confirmation of the interview from the [REDACTED]
4. A letter from the Chief of the Burmese Service of Voice of America (VOA) confirming that the VOA interviewed the petitioner in June 2007.
5. An April 2000 interview of the petitioner in *Fashion Image Monthly Magazine*.
6. A 1996 article about the petitioner in a Japanese "newsletter."

In response to the director's request for additional evidence, the petitioner submitted letters from the editor of *Shwe Amyutae Magazine* confirming that the magazine has interviewed the beneficiary. The director questioned the availability of VOA and BBC in Burma. On appeal, the petitioner submitted materials from the BBC's website confirming that it enjoys 7.1 million listeners in Burma. The petitioner also submitted materials confirming that VOA reaches 32 percent of Burmese annually. We are satisfied that they constitute major media in Burma.

In light of the above, the petitioner has submitted qualifying evidence that meets the plain language requirements of 8 C.F.R. § 204.5(h)(3)(iii).

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 specification for which classification is sought.

In response to the director's request for additional evidence, the petitioner submitted an October 2009 issue of the *Mandalay Gazette* reporting on the petitioner's duties as a judge at a September 2009 Burmese American Medical Association event. The petitioner also submitted a letter from the president of the association confirming that the beneficiary served as a judge at this event. The director concluded that the beneficiary's service as a judge at a local event was insufficient. On appeal, counsel asserts that the director misinterpreted the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

The petitioner filed the petition on September 22, 3008. The only evidence of the petitioner's service as a judge is from September 2009, after the petition's filing date. The petitioner must establish her eligibility as of the filing date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). Thus, we cannot consider the petitioner's service as a judge.

In light of the above, the petitioner has not submitted qualifying evidence under the regulation at 8 C.F.R. § 204.5(h)(3)(iv) that predates the filing of the petition.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

Prior counsel initially asserted that the petitioner's contributions consist of singing original songs (claimed to be uncommon in Burma), "contributing" songs to the Burmese film industry and a unique and elegant style "studied by younger aspiring performers." Prior counsel referenced the August 2007 *Mandalay Gazette* interview for the question as to why the petitioner, unlike most female artists, sings original songs. That question, however, does not appear in the *Mandalay Gazette*. Rather, it appears in the VOA interview. In fact, in the *Mandalay Gazette* the petitioner acknowledges that she does not write her own songs. Thus, it appears that she sings original songs other songwriters have written for her. Prior counsel also referenced several letters that praise the petitioner's talent. Prior counsel did not address the regulation at 8 C.F.R. § 204.5(h)(3)(v) in response to the director's request for additional evidence.

On appeal, counsel reiterates prior counsel's assertion regarding the question in the *Mandalay Gazette* about singing original songs. As stated above, however, prior counsel mischaracterized where the question occurred and the petitioner acknowledged in the *Mandalay Gazette* that she does not write her own songs. Counsel asserts that the evidence establishes that the petitioner stands apart from her peers.

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be both original and of major significance. We must presume that the words "original" and "major significance" are not superfluous and, thus, that they have some meaning. To be considered a contribution of major significance in the field of music, it can be expected that the petitioner would have some demonstrable influence in the field.

While the fact that the petitioner does not write her own songs does not preclude a finding that she has made original contributions unrelated to songwriting, it is the petitioner's burden to demonstrate what those original contributions might be. The record contains no evidence as to how the petitioner's music constitutes her own original contribution.

The opinions of experts in the field are not without weight and have been considered above. 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 (Comm'r. 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; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less

weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters provided simply attest broadly to the petitioner's talent and standing in the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.⁴ The petitioner also did not submit corroborating evidence of original contributions in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

Prior counsel initially asserted that the petitioner's performances at fundraising events serves as qualifying evidence under 8 C.F.R. § 204.5(h)(3)(vii). The director concluded that 8 C.F.R. § 204.5(h)(3)(vii) is not relevant to performing artists. On appeal, counsel relies on a dictionary definition for "exhibition" to conclude that this criterion does apply to performing artists. Counsel also states that there is no case law to support the director's conclusion.

We agree with the director that performing is not synonymous with displaying one's work. If we were to accept counsel's argument that a performance artist like the petitioner meets this criterion, it would render the regulatory requirement that a beneficiary meet at least three criteria meaningless as this criterion would effectively be collapsed into the criterion at 8 C.F.R. § 204.5(h)(3)(viii). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. This interpretation has been upheld by at least one district court. *See Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 8-9 (D. Nev. Sept. 8, 2008) (finding that the AAO did not abuse its discretion in finding that a performance artist should not be considered under the display criterion). While we acknowledge that a district court's decision is not binding, the court's reasoning indicates that the AAO's interpretation of the regulation is reasonable.

Therefore, while the petitioner's performances have evidentiary value for other criteria, they cannot serve to meet this criterion. Instead, as the petitioner's performances are far more relevant to the aforementioned "leading or critical role" criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii) and the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x), they will be discussed separately within the context of those criteria. We will also consider these performances as part of our final merits determination.

⁴ *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(vii).

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

In response to the director's request for additional evidence, prior counsel asserted that the petitioner performed in a leading or critical role for a Burmese Chinese Buddhist Temple fundraising event, the New York Summer Burmese Water Festival and the University of Maryland HIV/AIDS Burmese fundraising event. As stated above, the petitioner submitted published material covering her performance at these events. The petitioner also submitted a letter from [REDACTED] confirming that he has attended concerts where the petitioner was the "featured singer."

We are not persuaded that every artist who performs at a benefit concert performs a leading or critical role for the organization or establishment that organized the concert. While the *Mandalay Gazette* asserts that the petitioner performed in a significant role at the New York Summer Burmese Water Festival, the petitioner has not demonstrated that this festival enjoys a distinguished reputation nationally that sets it apart from the myriad of cultural events that take place across the country. Moreover, the record does not establish that the concerts where the petitioner was the "featured signer" enjoy a distinguished reputation.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(viii).

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The petitioner initially submitted a letter from [REDACTED] of [REDACTED] stating that the petitioner's greatest hits album in 2002 sold "up to" 250,000 cassettes, compact discs and video compact discs. In response to the director's request for additional evidence, the petitioner submitted a letter from [REDACTED] of [REDACTED] stating that the beneficiary's albums "are very successful for high popularity and very famous among music lovers" and "in top sale list." In addition, [REDACTED] a coowner of [REDACTED] states: "Hundreds of thousands of her tapes and CDs have been sold, if not millions." The petitioner also submitted what purport to be payments to the petitioner. The evidence does not establish the source of these payments. As discussed above, the petitioner further submitted the letter from [REDACTED] asserting City FM Radio awarded the petitioner second prize as most sold music album in 2005. The director concluded that the petitioner had not submitted contracts or sufficient evidence of payments to support the assertions in the above letters.

On appeal, counsel asserts that the petitioner provided letters from independent sources and relies on Board of Immigration Appeals (BIA) cases that involve family based petitions. The BIA has held that

testimony should not be disregarded. *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: “We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available.” *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The letters submitted lack specificity and do not provide the actual sales data. They are also inconsistent, with [REDACTED] attesting to “up to” 250,000 in album sales and [REDACTED] attesting to the possibility of sales in the millions. As stated above, the petitioner relies on [REDACTED] letter as evidence of her award for record sales rather than the award itself. We reiterate that the regulation at 8 C.F.R. § 103.2(b)(2)(i) requires the submission of primary evidence unless the petitioner is able to document that primary evidence is either unavailable or does not exist. As the petitioner has not demonstrated that the award is unavailable, we need not rely on [REDACTED] letter in lieu of the award itself.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements of 8 C.F.R. § 204.5(h)(3)(x).

Summary

In light of the above, the petitioner has not submitted the requisite evidence under at least three of the evidentiary categories for which evidence must be submitted to meet the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. Nevertheless, we will review the evidence in the aggregate as part of our final merits determination.

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.” 8 C.F.R. § 204.5(h)(3). *See Kazarian*, 596 F.3d at 1119-20.

Ultimately, the evidence in the aggregate does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The petitioner, a singer, relies on a small number of radio interviews, media coverage in a U.S. newspaper printed in a language the majority of Americans cannot comprehend, radio airplay, appearances at fundraisers, inconsistent and ambiguous attestations of album sales and vague letters praising her talent. Performing and radio play are inherent to the petitioner’s occupation as a singer. The petitioner has not established that the venues where she has performed are consistent with national or international acclaim. The media coverage in the record is minimal. The remaining evidence is ambiguous or conclusory. Thus, the petitioner’s

evidence is not consistent with sustained national or international acclaim in the United States or Burma.

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.

Review of the record, however, does not establish that the petitioner has distinguished herself as a singer to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence indicates that the petitioner shows talent as a singer, but is not persuasive that the petitioner's achievements set her significantly above almost all others in her field. Therefore, 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.