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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

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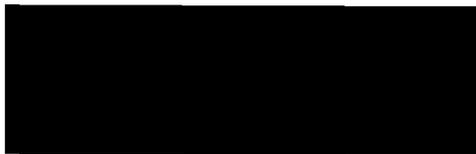
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DATE: **JUN 23 2011** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case 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, with a fee of \$630. 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,

S 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 “alien of extraordinary ability” in the sciences, 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 that the petitioner had not established the requisite extraordinary ability through extensive documentation and sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien’s “sustained national or international acclaim” and present “extensive documentation” of the alien’s achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel argues that the petitioner meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3) and that he submitted comparable evidence of his extraordinary ability pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). For the reasons discussed below, the AAO will uphold the director’s decision.

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 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 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.¹ 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 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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).

II. Analysis

A. Evidentiary Criteria

This petition, filed on December 21, 2009, seeks to classify the petitioner as an alien with extraordinary ability in theoretical physics and the development of algorithms in the web-based services industry. In 2008, the petitioner received his [REDACTED] in Physics from the University of Colorado under the direction of [REDACTED]

[REDACTED] and [REDACTED].² At the time of filing, the petitioner was working in the position of [REDACTED]. The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(h)(3).³

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

The petitioner submitted an August 12, 2003 letter from the Secretary of the Utrecht Scholarship Programme, International Relations Office, Utrecht University, to the petitioner stating:

It is my pleasure to inform you that the selection committee of the Utrecht Scholarship Programme has decided to accept your application for a United Nations University/Van Ginkel scholarship.

The scholarship includes a monthly living allowance . . . for six months and travel costs from and to your country (economy class).

Academic study is not a field of endeavor, but training for a future field of endeavor. As such, academic scholarships do not constitute prizes or awards for excellence in the petitioner's field of endeavor. Moreover, competition for university scholarships is limited to other students. Experienced physicists and researchers employed in the field who have already completed their education do not seek such scholarships. In this instance, there is no documentary evidence demonstrating that the petitioner's scholarship was recognized beyond the presenting university and therefore commensurate with a nationally or internationally recognized prize or award for excellence in the field.

The petitioner submitted a June 11, 2007 letter from the Executive Officer of the American Association of Physics Teachers (AAPT) to the petitioner stating:

² The petitioner also submitted his Master of Science degrees in Physics from the University of Colorado (2008) and the Indian Institute of Technology Kanpur (2001).

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

Congratulations on being selected as an [REDACTED] Assistant for 2007. Your achievements and dedication to excellence are a source of pride among your colleagues and an inspiration to the students whose lives you impact.

* * *

I am pleased to extend a complimentary, one year membership with the American Association of Physics Teachers. You will receive a subscription to the American *Journal of Physics Online* as well as *Physics Today* and our newest publication, *InterActions*. Your membership entitles you to attend meeting at reduced student rates and to receive special discounts on items and publications from our products catalog.

* * *

At the end of your current term, I hope you will maintain your membership at either the graduate student level or as a full member.

The AAO notes that competition for selection as [REDACTED] Assistant was limited to graduate students. Further, the petitioner did not submit evidence of the national or international *recognition* of his particular award, such as national or widespread local coverage of his award in professional or general media. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the 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 petitioner's teaching assistant award is recognized beyond the presenting organization and therefore commensurate with a nationally or internationally recognized prize or award for excellence in the field.

The petitioner submitted evidence of a National Science Foundation (NSF) "Continuing grant" awarded to [REDACTED]. The preceding grant was awarded to Lincoln Carr rather than the petitioner. The plain language of this regulatory criterion, however, requires documentation of "the alien's receipt" of nationally or internationally recognized prizes or awards, not his superior's receipt of the award. In regard to research grants for which the petitioner's research team applied and received funding, the AAO notes that research grants simply fund a scientist's work. Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere. Obviously the past achievements of the principal investigator are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and not to honor or recognize past achievement. Thus, the AAO cannot conclude that the preceding NSF continuing grant received by [REDACTED] constitutes the petitioner's receipt of a nationally or internationally recognized prize or award for excellence in the field of endeavor.

The petitioner submitted a December 4, 2009 letter from [REDACTED], one of the two co-founders of Kosmix Corporation, stating: "As a testimony of his potential, in the last year

that that he has spent here, [the petitioner] has received three company awards at Kosmix for his contributions.” Rather than submitting primary evidence of his three company awards, the petitioner instead submitted a letter from his employer attesting to the petitioner’s receipt of them. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. Where a record does not exist, the petitioner must submit an original written statement on letterhead from the relevant authority indicating the reason the record does not exist and whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii). The December 4, 2009 letter from [REDACTED] does not comply with the preceding regulatory requirements. Nevertheless, the petitioner’s three company awards are internal institutional honors limited to Kosmix employees rather than nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

In light of the above, 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 order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association’s overall reputation.

The petitioner submitted his membership card for the American Physical Society (APS) and general information about the organization, but there is no evidence (such as bylaws or rules of admission) showing that the APS requires outstanding achievements of its members, as judged by recognized national or international experts in the petitioner’s field.

The petitioner submitted documentation indicating that he performed graduate research at the JILA while attending the University of Colorado. The petitioner also submitted general information about the JILA. The record, however, does not include documentary evidence

identifying the petitioner as a “member” of the JILA, its faculty or Active Fellows.⁴ As previously discussed, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner’s work as a graduate student in Dr. Holland’s research group at the JILA does constitute his membership in an association in the field of physics. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires “[d]ocumentation of the alien’s *membership* in associations in the field for which is classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.” [Emphasis added.] Merely submitting documentary evidence reflecting the petitioner’s role as a graduate student without evidence demonstrating that the petitioner is a member of an association that requires outstanding achievements of its members, as judged by recognized national or international experts, is insufficient to meet the plain language of the regulation. Clearly, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires the petitioner to show “membership in associations” and not the petitioner’s temporary work at the JILA as a graduate student. In this instance, based on the submitted reference letters, the petitioner worked at the JILA as part of his graduate studies program and was not nominated or elected to “membership” in the JILA based on his outstanding achievements, as judged by recognized national or international experts in the field.

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

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.

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.⁵

The petitioner submitted citation evidence indicating that his work has been cited by other researchers in their publications. Articles which cite to the petitioner’s work are primarily about

⁴ [REDACTED] accessed on June 6, 2011, copy incorporated into the record of proceedings.

⁵ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual’s reputation outside of that county.

the authors' own work or recent developments in the field in general, and are not about the petitioner or even his work. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about the alien." With regard to this criterion, a footnoted reference to the alien's work without evaluation is of minimal probative value. The submitted documentation does not discuss the merits of the petitioner's work, his standing in the field, any significant impact that his work has had on the field, or any other information so as to be considered published material about the petitioner as required by this criterion. Moreover, the AAO notes that the articles citing to the petitioner's work similarly referenced numerous other authors. The research articles citing to the petitioner's work are more relevant to the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(v) and will be addressed there. Accordingly, the petitioner has not established that he meets this criterion.

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.

The petitioner submitted a May 26, 2009 e-mail from the General Chair of the Optical Engineering and Photonic Technology (OEPT) symposium inviting the petitioner "to consider the possibility of supporting the reviewing process of OEPT 2009. If you accept to support us in the reviewing process, please fill [sic] the electronic form" There is no documentary evidence demonstrating that the petitioner actually participated in the reviewing process for OEPT 2009. The plain language of this criterion requires "[e]vidence of the alien's participation . . . as a judge of the work of others." Receiving an invitation to support the review process is not tantamount to evidence of one's actual "participation" as a reviewer or judge.

The petitioner also submitted documentation from the APS Editorial Office indicating that the petitioner peer reviewed four manuscripts for *Physical Review A* and one manuscript for *Physical Review Letters* in 2008. This documentation meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). However, certain deficiencies pertaining to this evidence will be addressed below in our final merits determination regarding whether the submitted evidence is commensurate with sustained national or international acclaim, or being among that small percentage at the very top of the field of endeavor.

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

The petitioner submitted several letters of support discussing his work.

██████████ is a Nobel Prize recipient, a Senior Scientist at the National Institute of Standards and Technology (NIST), a Professor Adjoint in the Physics Department at the University of Colorado, and a Fellow of the JILA, the NIST and the University of Colorado at Boulder. ██████████ states:

I interacted with [the petitioner] during his graduate studies at the University of Colorado at Boulder. His [redacted] work was on the theory of Bose-Einstein Condensates in rotating optical lattices. I was on his [redacted] defense committee, which allowed me to get a close look at his work.

During his stay here, [the petitioner] worked on strongly correlated quantum mechanics and the appearance of fractional quantum hall physics in cold gases under the supervision [redacted]. He used analytical and numerical techniques to develop models to describe and predict behavior of quantum materials in this exotic regime. One of my groups also does experimental research in the same area. His work has been a significant contribution to this new emerging field and has resulted in the publication of four papers in leading physics journals such as [redacted] and [redacted]. He has also presented his research at several domestic and international conferences.

With regard to the petitioner's published and presented work, the regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). The AAO will not presume that evidence relating to or even meeting the scholarly articles criterion is presumptive evidence that the petitioner also meets this criterion. Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for authorship of scholarly articles and original contributions of major significance, USCIS clearly does not view the two as being interchangeable.⁶ To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria. Thus, there is no presumption that every published article or presentation is a contribution of major significance; rather, the petitioner must document the actual impact of his article or presentation. In this instance, [redacted] does not provide specific examples of how the petitioner's models are being applied by others in the field or that they otherwise equate to original contributions of major significance in the field.

[The petitioner] was a graduate student in my research group in atomic, molecular, and optical Physics and defended his Ph.D. thesis here in 2008. The title of his thesis was "Bosons in rotating optical lattices." [The petitioner] was a truly outstanding student who excelled at every project he was assigned.

* * *

His work has had significant impact. His most well known paper is [redacted] and was published in [redacted]

⁶ Publication and presentations are not sufficient evidence under 8 C.F.R. § 204.5(h)(3)(v) absent evidence that they were of "major significance." *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reaffirmed its holding that the AAO did not abuse its discretion in finding that the alien had not demonstrated contributions of major significance. 596 F.3d at 1122.