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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B2

DATE: OFFICE: NEBRASKA SERVICE CENTER

FILE: 

OCT 27 2011

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:

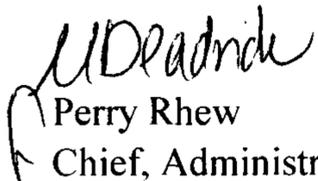
SELF-REPRESENTED

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,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, on April 15, 2010, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily 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 as an artist. At the time of the original filing of the petition, the petitioner submitted documentation but failed to specifically identify the criteria under the regulation at 8 C.F.R. § 204.5(h)(3) which he purportedly met. It was not apparent from the review of the evidence to which criteria the evidence pertained. The burden is on the petitioner to establish eligibility and not on the director to infer or second-guess the intended criteria. As such, the director issued a request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) describing each of the ten criteria under the regulation at 8 C.F.R. § 204.5(h)(3). In response to the director's request for evidence, the petitioner submitted additional documentation but again failed to identify the intended criteria, as well as identifying which documents, if any, pertained to the specific criteria. Based on the petitioner's submitted documentation, the director determined in his decision that the petitioner failed to establish eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), and the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v).

On appeal, the petitioner generally disputes the director's findings without explaining how the conclusions of the director were incorrect as a matter of law or statement of fact. The regulation at 8 C.F.R. § 103.3(a)(1)(v) provides that "[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." In this case, the petitioner has not identified as a proper basis for the appeal an erroneous conclusion of law or a statement of fact in the director's decision. Instead, the petitioner briefly asserts that the documentary evidence demonstrates his eligibility for the membership criterion, the published material criterion, and the original contributions criterion. Again, the petitioner offers no specific argument that demonstrates error on the part of the director based upon the record that was before him.

The AAOs notes that the petitioner did not address or contest the decision of the director or offer additional arguments for the awards criterion. The AAO, therefore, considers this issue to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005).

Regarding the membership criterion, the petitioner argued:

Isn't it contrary that the decision acknowledged my membership in an association in my field which requires outstanding achievements; yet it states "evidence already in existence prior to submission of the petition is given much greater weight than evidence generated after the petition has been submitted". I already

provided that evidence in the form of my membership in the Artists Union of

Contrary to the petitioner's assertions on appeal, the director did not acknowledge that the petitioner was a member of the [REDACTED] and that it was an association that required outstanding achievements of its members. In fact, the director indicated that the petitioner submitted a self-serving statement asserting that he was a member and specifically determined that "the record shows no such evidence of the petitioner's membership in associations in the field which require outstanding achievements of their members." The petitioner failed to demonstrate that the director made any erroneous conclusion of law or statement of fact regarding the membership criterion.

Regarding the published material criterion, the director sufficiently discussed the petitioner's documentary evidence and determined that the material submitted by the petitioner related to other artists and did not even mention the petitioner. On appeal, the petitioner claimed that he has "been in contact with [REDACTED] and [REDACTED] about articles on my unique style." Again, the petitioner failed to address any of the director's specific findings and offered no argument establishing that the director's determination for this criterion was in error. Moreover, eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. The speculative assertion of possible material is not sufficient to demonstrate that there has already been published material about him relating to his work pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

Regarding the original contributions criterion, the petitioner argues that his "contributions are original and recognized as outstanding." Once again, the petitioner failed to explain how the director's decision for this criterion was incorrect based on the record that was before him. Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." Simply making contributions, even significant contributions, do not satisfy the plain language of this regulatory criterion unless the petitioner demonstrates that his contributions have been "of major significance in the field."

Finally, the petitioner argues:

The decision contained a description of requirements and stated to include 10 standards as governed by the regulation. It stated that 3 of the 10 should be required. However, it went on to state that if the "standards do not readily apply . . . the petitioner may submit comparable evidence to establish . . . eligibility".

I have done that in the original submission and also when Additional Evidence was requested.

A review of the record of proceeding fails to reflect that the petitioner claimed eligibility for comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4) at the time of the original filing of the petition or in response to the director's request for additional evidence. As such, the director could not have erred in his decision as the petitioner is only claiming eligibility for the first time on appeal. Furthermore, the regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. The AAO further acknowledges that the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish the [petitioner's] eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation as an artist cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner mentioned evidence that related to four of the ten criteria at the regulation at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Moreover, although the petitioner failed to claim these additional criteria, the AAO finds that an artist could serve as a judge of the work of others pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv) and that an artist could command a high salary or high remuneration pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). The petitioner provided no documentation as to why this provision of the regulation would not be appropriate to the profession of a textile artist. Furthermore, the petitioner failed to indicate what evidence should be comparatively analyzed and how the evidence is comparable to any of the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

As stated in the regulation at 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. As the petitioner did not contest any of the other findings of the director and offers no substantive basis for the filing of the appeal for any of the criteria, the regulations mandate the summary dismissal of the appeal.

ORDER: The appeal is dismissed.