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U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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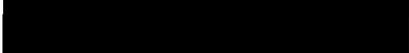


**U.S. Citizenship
and Immigration
Services**

B2



DATE: **APR 04 2012** 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:

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 July 26, 2010, 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 as a principal pharmaceutical scientist. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his 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 “sustained national or international acclaim” and present “extensive documentation” of his or her 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, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific 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, the petitioner claims to meet 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 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.*; 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 ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

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)).

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 this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

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 Criteria²

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

In the director's decision, she determined that the petitioner failed to establish eligibility for this criterion. In the petitioner's brief submitted on appeal, he did not contest the findings of the director for this criterion or offer additional arguments. 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); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

Accordingly, the petitioner failed to establish 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 director determined that the petitioner failed to establish eligibility for this criterion. On appeal, the petitioner states:

[M]y management has asked me to mentor and judge the activities of the NSF Engineering Research Center on Structured Organic Particulate Systems [NSF ERCSOPS) which is funded by America's largest research funding organization. The National Science Foundation. This esteem honor was bestowed upon me only because of my extraordinary skills and international reputation in research.

In support of the petitioner's claims, he submitted a letter from [REDACTED]

[REDACTED] stated that the petitioner's "contribution as a mentor is very noteworthy as we handpicked 5 scientists to mentor the [NSF ERCSOPS] based on their scientific potential and contributions at [REDACTED] stated that the petitioner "is known to me as an industrial mentor to two of the research programs in the [NSF ERCSOPS]" and "[i]n this capacity he reviews and advices [sic] the center's research programs and provides guidelines for the future directions to the program."

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires "[e]vidence 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 [emphasis added]." Neither [REDACTED]

² On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

nor [REDACTED] indicated that the petitioner's role as mentor equated to participation as a judge of the work of others in the field. The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified at 8 C.F.R. § 204.5(h)(3)(iv). The regulation cannot be read to include every informal instance of reviewing work and advising programs. The preceding letters do not specify the nature of the petitioner's activities as a judge or the names and fields of specification of those whose work he evaluated.

For the reasons discussed above, the petitioner failed to demonstrate that he served as a judge of the work of others in the same or an allied field of specification for which classification is sought consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

Accordingly, the petitioner failed to establish 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 director determined that the petitioner failed to establish eligibility for this criterion. 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." Here, the evidence must be reviewed to see whether it rises to the level of original scientific-related contributions "of major significance in the field." The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

A review of the record of proceeding reflects that the petitioner submitted documentary evidence from [REDACTED] reflecting that four of his published articles were cited 34 times with the highest article cited 12 times. While the number of total citations is a factor, it is not the only factor to be considered in determining the petitioner's eligibility for this criterion. Generally, the number of citations is reflective of the petitioner's original findings and that the field has taken some interest to the petitioner's work. However, it is not an automatic indicator that the petitioner's work has been *of major significance in the field*. In this case, the AAO is not persuaded that such moderate citations are reflective that the petitioner's work has been of major significance in the field. Furthermore, the petitioner failed to submit any documentary evidence demonstrating that his articles have been unusually influential, such as articles that discuss in-depth the petitioner's findings or credit the petitioner with influencing or impacting the field. In this case, the petitioner's documentary evidence is not reflective of having a significant impact on the field. Merely submitting documentation reflecting that the petitioner's work has been cited by others in their published material is insufficient to establish eligibility for this criterion without documentary evidence reflecting that the petitioner's work has been of a major significance in the field. The petitioner failed to establish how those findings or citations of his work by others have significantly contributed to his field as a whole.

Similarly, the petitioner submitted documentary evidence reflecting that two of his papers were presented at the [REDACTED] in Banff, Canada. Many

professional fields regularly hold conferences and symposia to present new work, discuss new findings, and to network with other professionals. These conferences are promoted and sponsored by professional associations, businesses, educational institutions, and government agencies. Participation in such events, however, does not equate to an original contribution of major significance in the field. There is no evidence showing that the petitioner's papers have been frequently cited by independent researchers or have otherwise significantly impacted the field. In fact, the petitioner failed to submit any documentary evidence reflecting that his conference papers have been cited by others.

Again, while the presentation of the petitioner's work demonstrates that his work was shared with others and may be acknowledged as original contributions based on the selection of them to be presented, the AAO is not persuaded that presentations of the petitioner's work at a single venue is sufficient evidence establishing that the petitioner's work is of major significance to the field as a whole and not limited to the sole engagement in which it was presented. The petitioner failed to establish, for example, that his work was of major significance so as to establish its impact or influence beyond the audience at the conference.

Moreover, on appeal, the petitioner submitted a document from the World Intellectual Property Organization regarding the petitioner's patent entitled [REDACTED]. A review of the document reflects that the international publication date is September 3, 2009. However, the petitioner filed his employment-based immigrant visa petition on April 13, 2009. 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. Regardless, the AAO 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 Department of Transportation*, 22 I&N Dec. 215, 221 n. 7, (Comm'r 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* A patent recognizes the originality of the idea, but it does not demonstrate that the petitioner made a contribution of major significance in the field through his development of this idea.

The petitioner also submitted several recommendation letters. While the recommendation letters praise the petitioner for his work in pharmaceutical sciences, they fail to indicate that his contributions are of *major significance* in the field. The letters provide only general statements without offering any specific information to establish how the petitioner's work has been of major significance. For example, [REDACTED] who briefly indicated the petitioner's work in the modeling of packing of particles with complex shapes and structures and the petitioner's development of a sound simulation technique, stated that "[t]hese discoveries of [the petitioner] have direct and broad applications, which are currently being placed in practice." However, [REDACTED] failed to provide specific information such as how the petitioner's discoveries are being applied by the field and who has placed them into practice, so as to demonstrate that the petitioner's

work has been of major significance in the field. The lack of detailed information gives the AAO no basis to gauge the significance of the petitioner's work in the field.

Likewise, [REDACTED] briefly discussed the petitioner's research regarding the modeling of complex packing structures and their thermal properties. While [REDACTED] described the petitioner's work as "path breaking as they have opened new methods," [REDACTED] failed to identify any new methods that have been developed as a result of the petitioner's work, so as to reflect original contributions of major significance in the field. In addition, [REDACTED] made general statements, such as the petitioner's "impact has consistently surpassed his peers," without providing specific information to show how the petitioner's contributions have significantly impacted the field.

Furthermore, the letters from [REDACTED] indicated the petitioner's discovery of a new computational method for the discrete element modeling of particles. However, when describing the influence or impact of the petitioner's discovery on the field, [REDACTED] stated that it "*can* change the way simulations are performed [emphasis added]," and "[i]t *may* very well have a direct and potent effect on important issues [emphasis added]." Moreover, [REDACTED] stated that "this method *may* lead to the development of additional novel avenues [emphasis added]" and "this work *may* have a direct and potent effect [emphasis added]." In addition, the recommendation letters from [REDACTED] speculated on the possible implications that the petitioner's work may have on the field. For example, regarding the petitioner's patent indicated above, [REDACTED] stated that the petitioner's "invention *will* help billions of patients around the world ailing from life threatening diseases [emphasis added]."

As indicated above, the recommendation letters reflect that the petitioner has made original contributions based on his research. However, the letters fail to indicate that his contributions are of *major significance* in the field. Moreover, a petitioner cannot file a petition under this classification based on the expectation of future eligibility. Given the descriptions in terms of future applicability and determinations that may occur at a later date, it appears that the petitioner's research, while original, is still ongoing and that the discoveries he has made are not currently being implemented throughout his field. While the AAO does not dispute the originality of the petitioner's research and findings, as well as the fact that the field has taken some notice of his work, the actual present impact of the petitioner's work has not been established. Rather, the petitioner's references appear to speculate about how the petitioner's findings may affect the field at some point in the future. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (2); *Matter of Katigbak*, 14 I&N Dec. at 49. 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. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. at 114, that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Many of the letters proffered do in fact discuss far more persuasively the future promise of the petitioner's research and the impact that may result from his work, rather than how his past research already qualifies as a contribution of major significance in the field. The assertion that the petitioner's research is likely to be influential is not adequate to establish that his findings are already recognized as major contributions in the field. While the experts praise the petitioner's research and

work as both novel and of great potential interest, the fact remains that any measurable impact that results from the petitioner's research will likely occur in the future.

Although those familiar with the petitioner generally describe him as an "extraordinary researcher" and "extraordinary scientist," there is insufficient documentary evidence demonstrating that the petitioner's work is of major significance. This regulatory criterion not only requires the petitioner to make original contributions, the regulatory criterion also requires those contributions to be of major significance. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the petitioner's contributions have already influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *See 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The lack of supporting evidence gives the AAO no basis to gauge the significance of the petitioner's present contributions. In addition, the recommendation letters refer to the petitioner's unique talents and skills. However, merely having unique talents or skills are not contributions of major significance in and of itself. Rather, the record must be supported by evidence that the petitioner has already used those unique skills or talents to impact the field at a significant level in an original way. Moreover, assuming the petitioner's talents and skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment labor certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. at 221.

Further, USCIS may, in its discretion, use as advisory opinion 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 of support from the petitioner's personal contacts 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). 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.

Again, 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* [emphasis added]." Without additional, specific evidence showing that the petitioner's work has been unusually influential, widely applied throughout his field, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that he meets this criterion.

Accordingly, the petitioner failed to establish 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.

In the director's decision, she determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires "[e]vidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media." A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence establishing that he authored eight scholarly articles in professional publications. As such, the petitioner has minimally satisfied the plain language of the regulation for this criterion. Therefore, AAO withdraws the findings of the director for this criterion.

Accordingly, the petitioner established that he meets this criterion.

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

The director determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." The petitioner claims eligibility for this criterion based on his role as a principal pharmaceutical scientist at [REDACTED]. Based on a review of the record of proceeding, including recommendation letters from [REDACTED], [REDACTED] the petitioner submitted sufficient documentation demonstrating that he performed in a critical role for [REDACTED] who has a distinguished reputation.

However, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires a leading or critical role in more than one organization or establishment. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials). In the case here, the petitioner only claimed eligibility for his role at one organization – [REDACTED]

Accordingly, the petitioner failed to establish that he meets this criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

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.

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be 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” 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)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.³ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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.

³ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).