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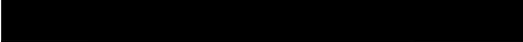


U.S. Citizenship
and Immigration
Services



B2

DATE: APR 27 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:



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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a horse breeding farm. It seeks to classify the beneficiary 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. The director determined that the petitioner had not established the requisite extraordinary ability for the beneficiary 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 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 for the alien under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

In his decision denying the petition, the director found that petitioner failed to demonstrate that the beneficiary meets at least three of the categories of evidence at 8 C.F.R. § 204.5(h)(3). On appeal, counsel does not challenge the director's finding in that regard. Instead, counsel asserts that the petitioner submitted comparable evidence of the beneficiary's eligibility pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). Counsel requests oral argument "so that the AAO views the instant case(s) in a comprehensive light." The regulations provide that the requesting party must adequately explain in writing why oral argument is necessary. Furthermore, U.S. Citizenship and Immigration Services (USCIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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.

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)).

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 Criteria at 8 C.F.R. § 204.5(h)(3)

The petitioner's initial evidence consisted solely of a letter written by counsel unsupported by documentary evidence of the beneficiary's specific achievements and recognition in the field. As previously discussed, the director found that the documentation submitted by the petitioner did not establish that the beneficiary meets any of the regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3). On appeal, the petitioner does not contest the director's finding or offer additional arguments pertaining to the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The AAO, therefore, considers this issue to be abandoned. *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). Thus, the AAO affirms the director's finding that the petitioner has failed to demonstrate that the beneficiary satisfies the antecedent regulatory requirement of three types of evidence.

B. Comparable Evidence Under 8 C.F.R. § 204.5(h)(4)

On appeal, counsel states:

The Service down played Petitioner's letter brief which stated the legal and factual reasons why extraordinary ability was present with the beneficiary. The Service overlooked the fact that the industry itself commands employees who by their nature do not receive credit for their services even though the industry as a whole is glamorous. The Service failed to realize that the industry's world recognition and acclaim would not be possible if it were not for the employees behind the scenes. The Service erred in not considering the uniqueness of the abilities held by the Beneficiaries. While the beneficiaries lack formal education, they perform tasks that would require substantial formal education and in fact is performed by Veterinarians with said formal education and training. The Service overlooked this analysis.

* * *

Title 8, Code of Federal Regulations, Part 204.(5) (4) [sic] (hereinafter, the "Code") states: "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."

In its initial filing, Petitioner submitted evidence in the form a letter of support from [REDACTED] DVM evidencing the fact that beneficiaries gained his confidence in their ability to perform, inter alia, tasks involving rehabilitation of horses. Please the included [sic] attachment in this regard.

In addition, the evidence in the record shows that the position of the beneficiary commands group national/international acclaim rather than individual acclaim. This is

because in the [sic] horse breeding[,] a competition industry, it is the winning race horse and the contributions to the enhancement of horses as a whole that receives acclaim and attention. Petitioner avers that the successful race horse and the advancement of equine orthopedics are products of those professionals behind the scenes who are the engine of success and acclaim. It is the superior knowledge behind the breeding, rehabilitation, and training that yields the result of national/international acclaim. The significance of Beneficiaries' work is readily seen by the obvious success of the Farm and its operations, and also because of the uniqueness of the work they perform.

Moreover, . . . the Beneficiaries are an integral part of the success of the operation, and their skill levels are such that they command the trust of a licensed veterinarian. Although Beneficiaries do not have the formal education of a veterinarian, they can competently perform the important tasks of a veterinarian. As a result, Beneficiaries' skill should be classified as extraordinary.

The AAO notes that the June 8, 2011 letter from [REDACTED] submitted on appeal does not mention the beneficiary or specifically identify his particular achievements in the field. Instead, [REDACTED] discusses the general duties and responsibilities of the horse groomers at the [REDACTED]. The plain language of the statute and regulations, however, require that "the alien" has sustained national or international acclaim and that "his or her achievements" have been recognized in the field through extensive documentation. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). Assuming the beneficiary's skills as a horse groomer 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 certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm'r 1998). Further, with regard to the observations in [REDACTED] letter, 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 795-796; *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").

The petitioner's appellate submission included information about [REDACTED] from *Wikipedia*, an online encyclopedia. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.² *See Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008).

² Online content from *Wikipedia* is subject to the following general disclaimer:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet

Accordingly, the AAO will not assign weight to information for which *Wikipedia* is the source. The petitioner also submitted information about [REDACTED] posted on the websites of the [REDACTED]. None of the preceding online material mentions the beneficiary or demonstrates his specific achievements and recognition in the field of endeavor.

The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of “comparable evidence” only if the ten categories of evidence “do not readily apply to the beneficiary’s occupation.” Thus, it is the petitioner’s burden to demonstrate why the regulatory criteria at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the alien’s occupation and how the evidence submitted is “comparable” to the specific 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 beneficiary’s occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to satisfy the plain language requirements of at least three categories of evidence at 8 C.F.R. § 204.5(h)(3), the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. The petitioner’s appellate submission does not include evidence demonstrating that the regulatory criteria are not readily applicable to the beneficiary’s occupation. For instance, there is no evidence indicating that the published material, leading or critical role for a distinguished organization, and high salary categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(iii), (viii), and (ix) are not readily applicable to horse groomers. Moreover, counsel fails to explain how the documentation submitted by the petitioner is “comparable” to any specific objective evidence required at 8 C.F.R. §§ 204.5(h)(3)(i) – (x).

In this matter, the submitted documentation is simply not comparable to extensive evidence of the beneficiary’s specific achievements and recognition as required by the statute and regulations. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The classification sought requires “extensive documentation” demonstrating that “the alien” has sustained national or international acclaim. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). The commentary for the proposed regulations implementing the statute provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Moreover, the petitioner must show that the alien has demonstrated a “career of acclaimed work.” H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). That page (59) also says that “an

connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . **Wikipedia cannot guarantee the validity of the information found here.** The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on April 20, 2012, copy incorporated into the record of proceeding.

alien must (1) demonstrate sustained national or international acclaim in the sciences, arts, education, business or athletics (as shown through extensive documentation)...” Primary evidence of the beneficiary’s achievements and recognition is of far greater probative value than the unsupported claims made by counsel. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

IV. 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 for the alien under at least three evidentiary categories or comparable evidence of his extraordinary ability, 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 failed to demonstrate that the beneficiary has satisfied the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122. The petitioner also failed to submit comparable evidence of the beneficiary’s extraordinary ability.

The petitioner has not established the beneficiary’s 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).