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

[redacted]

DATE: DEC 17 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. Concurrently with the appeal, the petitioner also filed a motion to reopen with the director. The director reaffirmed the initial decision on motion. The matter before the AAO is the appeal of the director's initial decision. 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 an environmental scientist. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of her 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.

The petitioner's priority date established by the petition filing date is December 27, 2007. On June 20, 2008, the director served the petitioner with a request for evidence (RFE). After receiving the petitioner's response to the RFE, the director issued his decision on September 15, 2008. On appeal, the petitioner submits a brief with additional documentary evidence. For the reasons discussed below, the AAO upholds the director's ultimate determination that the petitioner has not established her eligibility for the classification sought.

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 Criteria[2]

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.

This criterion requires not only that the petitioner was selected to serve as a judge, but also that the petitioner is able to produce evidence that she actually participated as a judge. 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). Additionally, these duties must have been directly judging the work of others in the same or an allied field in which the petitioner seeks an immigrant classification within the present petition. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director noted shortcomings of a letter from Brian Day, founder of the international journal, Applied Environmental Education and Communication (AEEC) in the RFE and requested that the petitioner provide: "[A] letter directly from the [AEEC] stating the exact type of review work you did, the approximate number of articles you reviewed and the titles and authors of some of them." The petitioner's response to the RFE failed to address the director's concerns or submit new evidence relating to this criterion. On appeal, the petitioner has provided additional evidence relating to this criterion. The purpose of the RFE is to elicit further information that clarifies whether the petitioner has established eligibility for the benefit sought as of the filing date of the petition. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where the director put the petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the director to consider the submitted evidence, she should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO will not consider the sufficiency of the evidence submitted under this criterion on appeal.

Additionally, the evidence the petitioner provides on appeal relating to this criterion postdates the petition filing date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). Therefore, the petitioner's evidence that postdates the petition's filing date will not be considered within this decision.

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

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

The plain language of this regulatory criterion contains multiple evidentiary elements that the petitioner must satisfy. The first is evidence of the petitioner's contributions (in the plural) in her field. These contributions must have already been realized rather than being potential, future contributions. The petitioner must also demonstrate that her contributions are original. The evidence must establish that the contributions are scientific, scholarly, artistic, athletic, or business-related in nature. The final requirement is that the contributions rise to the level of major significance in the field as a whole, rather than to a project or to an organization. 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). Contributions of major significance connotes that the petitioner's work has significantly impacted the field. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

In support of her eligibility claim under this criterion, the petitioner initially asserted that the research projects in which she was involved were sufficient. The director disagreed and requested additional evidence at which time she claimed to have introduced the use of the concept of and the term "social capital" into the field of natural disaster preparedness. The director determined that the petitioner failed to meet the requirements of this criterion. Specifically, the director found that the evidence on record failed to sufficiently demonstrate that the petitioner introduced the term, "social capital" into the lexicon of the disaster preparedness field. The director also determined that considering all of the petitioner's evidence related to her impact within her field was insufficient to satisfy this criterion's requirements.

On appeal, counsel virtually verbatim repeats the positions presented within the initial filing statement and in response to the director's RFE and combined them into a single presentation. The exception relates to whether the petitioner introduced a term in her field. With regard to this issue, counsel provides a discussion on linguistics and the ability of a particular term to better convey concepts in the petitioner's field. Even if the AAO were to conclude that the petitioner introduced a term into the lexicon in her field, this is not an error on the director's part that would warrant a withdrawal of the director's determination as it relates to this criterion. Rather, the record fails to establish that the introduction of the term "social capital" was of significant impact within the petitioner's field.

The more important claim presented on the petitioner's behalf is that she introduced the concept of social capital considerations into her field, as this concept has impacted the field. The petitioner primarily relies on evidence from [redacted] a professor at the University of Florida and the petitioner's advisor during her doctorate program. Professor Monroe claimed: "The North American Association for Environmental Education hosts the largest gathering of environmental educators in the world. [The petitioner] introduced the term 'social capital' and provided explanations for how social capital could be linked to and enhance work in environmental education." The World Bank website materials the petitioner submitted reflect research on the concept of "social capital" as early as 1993. With regard to originating the application of the concept to the specific field of environmental

education, while the petitioner submitted several papers in her field that apply the term, she did not submit the reference pages for those papers. As such, the record contains no evidence that these papers attribute the first application of social capital in environmental education to the petitioner's work.

Only one other expert in the field provided a letter and mentioned a connection between the social capital concept and the petitioner, namely [redacted], Research Forester at the the U.S. Department of Agriculture's Forest Service (USDAFS) and the petitioner's coauthor. [redacted] July 14, 2008, letter asserts that the petitioner led a research team's analysis of social capital and that the petitioner's "contribution was significant in that social capacity [capital] became one of the five building blocks of our foundation for wildfire preparedness." [redacted] did not, however, assert that the petitioner was the individual who introduced the terminology or the concept of applying social capital to the petitioner's field. Additionally, several Internet links supporting [redacted] claims did not lead to any current websites. Regardless, contributions to preparedness plans are not contributions to the field of environmental education absent evidence of the impact of these plans on that field.

Even if the evidence did establish that the petitioner introduced the concept of social capital in her field, this is but a single contribution to the field while the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires evidence of "contributions" in the plural, consistent with the statutory requirement for extensive documentation. *See* section 203(b)(1)(A)(i) of the Act.

Accordingly, the petitioner has not submitted evidence that satisfies the requirements of this criterion.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The director determined that the petitioner's evidence satisfied the regulatory requirements of this criterion. The AAO affirms the director's findings regarding this criterion.

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

Regarding the display of the alien's work criterion at 8 C.F.R. § 204.5(h)(3)(vii), the petitioner does not contest the director's findings or offer additional arguments relating to this criterion. She has therefore abandoned this claim. *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 she failed to raise them on appeal to the AAO).

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

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role's matching duties. A critical role should be apparent from the petitioner's impact on the organization or the establishment's activities. The petitioner's performance in this role should establish whether the role was critical for organizations or establishments as a whole. The petitioner must demonstrate that the organizations or establishments (in

the plural) have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-Webster's online dictionary defines distinguished as, "marked by eminence, distinction, or excellence."[3] Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden,* 149 U.S. 304, 306 (1893). Therefore, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or an equivalent reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner initially, and in response to the RFE asserted eligibility under this criterion based on her roles at: (1) Columbia University in the Lamont-Doherty Earth Observatory (LDEO); (2) the USDAFS; and (3) the NAAEE. While the director conceded that Columbia University enjoyed a distinguished reputation, he also found that the petitioner had not established that her role was sufficiently leading or critical on a scale that can be considered as impacting the university as a whole, and determined that the petitioner failed to meet the requirements of this criterion. On appeal, the petitioner also asserts new eligibility claims based on her roles at Penn State University and the Center for Environment Education.

Regarding the petitioner's roles performed at Penn State University and the Center for Environment Education, where the director put the petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano,* 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena,* 19 I&N Dec. 533 (BIA 1988). If the petitioner wanted the director to consider the submitted evidence, she should have submitted these documents in response to the director's RFE. *Id.* Under the circumstances, the AAO will not consider the sufficiency of the evidence submitted on appeal relating to Penn State University and the Center for Environment Education.

Regarding the petitioner's leading and critical role at Columbia University, as the director noted, this university enjoys a distinguished reputation. As evidence under this criterion the petitioner provided a letter from [redacted] Doherty Senior Research Scientist. [redacted] letter described the petitioner's activities that the petitioner engaged in at LDEO; however, the petitioner must demonstrate eligibility based on her performance for Columbia University as a whole rather than simply for LDEO. Evidence under this criterion must provide specifics relating to how the petitioner's role was performed for the organization as a whole. *See Noroozi v. Napolitano,* 11 CIV. 8333 PAE, 2012 WL 5510934 *8 (S.D.N.Y. Nov. 14, 2012). The petitioner also provided a letter from [redacted] Doherty Senior Research Scientist and Associate Director for Seismology, Geology and Tectonophysics at LDEO. [redacted] described the petitioner's accomplishements but failed to describe how her performance at LDEO was leading or critical for the university. As the record lacks evidence that the petitioner's role was leading or critical for Columbia University, the petitioner may not rely upon this evidence to satisfy the requirements of this criterion.

[3] *See* http://www.merriam-webster.com/dictionary/distinguished, accessed on November 27, 2012, a copy of which is incorporated into the record of proceeding.

The petitioner provided two letters from [redacted], Research Forester for USDAFS. [redacted] first letter described the petitioner's work related to a project, the National Fire Plan, but she did not describe how the petitioner's work relating to this project was leading or critical to the USDAFS as a whole. [redacted] second letter explains that it is unusual for a student to be involved in "all stages of the community preparedness for wildland fire research project." [redacted] described a level of involvement on the petitioner's part sufficient to establish that she performed in a critical role on the community preparedness for wildland fire research project; however, [redacted] did not explain how this project affected the USDAFS as a whole. Additionally, the record lacks evidence to establish that the USDAFS has a distinguished reputation, and the AAO will not presume this entity's reputation from the simple fact that it is part of the U.S. government.

The petitioner also claims eligibility under this criterion based on her work at the NAAEE. As evidence of the petitioner's role performed for the NAAEE, the petitioner proved a letter from [redacted], Executive Director of NAAEE. [redacted] described the petitioner's efforts assisting him with an international environmental journal, *Applied Environmental Education and Communication*. In reference to the NAAEE, [redacted] merely stated that the petitioner "provided some short term consulting to the association I direct, by assisting with a US EPA funded project." [redacted] did not provide examples of the manner in which the petitioner performed in a leding or critical role for NAAEE. The petitioner failed to provide evidence relating to the distinguished reputation of the NAAEE.

In view of the foregoing, the petitioner has not submitted evidence that meets the plain language requirements of 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 have risen to the very top of the field of endeavor.

Had the petitioner 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.[4] 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; *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[4] 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).