

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:

DEC 21 2012

Office: TEXAS 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 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 Director, Texas Service Center, initially denied the employment-based immigrant visa petition on January 4, 2012, due to abandonment. On January 19, 2012, the petitioner filed a motion to reopen. The director subsequently granted the motion to reopen and, in a separate decision, denied the underlying petition on the merits. The visa petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an “alien of extraordinary ability” in the sciences, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), specifically in the area of cancer research. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

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

On appeal, the petitioner submits a statement and additional evidence. The petitioner asserts that he submitted sufficient qualifying evidence under five of the ten regulatory categories. Considering the evidence in the aggregate, the petitioner has not established eligibility for the benefit sought by a preponderance of the evidence.

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 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. 8 C.F.R. § 204.5(h)(3)(ii).

Along with the initial visa petition application, the petitioner submitted evidence of membership in associations in the field. The director denied the petitioner's claim regarding this criterion and the petitioner does not identify any factual or legal error in this conclusion on appeal. Consequently, the petitioner abandoned this claim. See *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005) citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at *9 (E.D. N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

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. 8 C.F.R. § 204.5(h)(3)(iii).

This criterion contains three evidentiary requirements the petitioner must satisfy. First, the published material must be about the petitioner and the contents must relate to the petitioner's work in the field under which he seeks classification as an immigrant. The published material must also appear in professional or major trade publications or other major media (in the plural). Professional or major trade publications are intended for experts in the field or in the industry. To qualify as major media, the publication should have significant national or international distribution and be published in a predominant national language. The final requirement is that the petitioner provide each published item's title, date, and author and if the published item is in a foreign language, the petitioner must provide a translation that complies with the requirements found at 8 C.F.R. § 103.2(b)(3). The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director, after considering the various forms of evidence that the petitioner submitted in support of this criterion, determined that the petitioner failed to meet the requirements of this criterion. Before the director, in support of this criterion, the petitioner submitted:

1. Information on the meaning of "impact factor" from *Wikipedia*.
2. Eight co-authored abstracts.
3. A list of citations from Thomson ISI's Web of Science and Google scholar.

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

4. Articles citing the petitioner's co-authored work.

The self-authored material under item number 2 falls under 8 C.F.R. § 204.5(h)(3)(vi), evidence of authorship of scholarly articles in the field. This decision will consider the petitioner's articles under that criterion below, ultimately concluding that the petitioner met the criterion for scholarly articles. Meeting one criterion does not create a presumption that the petitioner meets a second criterion. To hold otherwise would render the statutory requirement for extensive evidence and the regulatory requirement that the petitioner meet at least three criteria meaningless.

Items 3 and 4, document that other researchers have cited the petitioner's articles. These citing articles are primarily about the authors' own work, not the petitioner. As such, they do not meet the plain language requirements of 8 C.F.R. § 204.5(h)(3)(iii), which requires evidence of published material about the petitioner. Item 1 relates to the reputation of the journals in which the citations appear, and has little probative value as to whether the citing articles are about the petitioner.

On appeal, in support of this criterion, the petitioner submits his own publications, medical news websites with links to his work, review articles where petitioner's work is reviewed, information about the individual journals that published the review articles, and support letters from current and former employers. As noted earlier, the AAO will consider the petitioner's own publications under the criterion for scholarly articles. The news sites linking to the petitioner's work, like the citing articles mentioned above, are not published material about the petitioner relating to his work. Similarly, the topic review articles, which cite between 35 and 278 research articles, are about recent trends in the petitioner's field and are not about the petitioner relating to his work. The information regarding the journals is background information and does not constitute published material about the petitioner. Support letters are individual communications and are not publications in major media.

Accordingly, the petitioner has failed to satisfy the requirements of 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. 8 C.F.R. § 204.5(h)(3)(iv).

The director determined the petitioner established this criterion and the documentary evidence supports the finding that the petitioner satisfied the regulatory requirements.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field. 8 C.F.R. § 204.5(h)(3)(v).

The director found that the petitioner failed to satisfy the requirements set forth at 8 C.F.R. § 204.5(h)(3)(v). The plain language of the regulation requires both that the petitioner's contributions be original and of major significance in the field. USCIS must presume that the word "original" and the phrase "major significance" are not superfluous and, thus, that they have 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).

On appeal, in support of this criterion, the petitioner again references much of the same documentary evidence he presents for several other criteria outlined in 8 C.F.R. § 204.5(h)(3) including: articles he authored, articles citing his work, requests for reprints of presentations and publications, background information about meetings he attended and background information on his research topics, and various support letters supplementing other letters that are already in the record. Much of the evidence that the petitioner submits on appeal is not probative or relevant under this criterion and has been or will be considered under alternate regulatory criteria. The regulations contain a separate criterion regarding the authorship of published articles. 8 C.F.R. § 204.5(h)(3)(vi). If the regulations are to be interpreted with any logic, it must be presumed that the regulation views contributions as a separate evidentiary requirement from scholarly articles.³ Regarding the impact factor of the publications, the AAO will not presume the significance of an individual article from the journal in which it appears. Rather, the petitioner must demonstrate the actual impact of the article upon dissemination in the field. While the petitioner did submit evidence that his individual articles have garnered some citations, as of the date of filing he had one moderately cited article and his remaining articles had garnered few or no citations.

The various letters of support do directly discuss the petitioner's contributions and therefore are relative, probative evidence under this criterion. As an initial matter, [REDACTED] who was the petitioner's mentor and thesis advisor at the University of Annan in Chennai, India, writes a letter of support that provides detailed biographical information and confirms the contents of the petitioner's curriculum vitae about the petitioner's educational background, training, and the petitioner's research interests at the various stages of his education and training. [REDACTED] letter indicates that the petitioner, following the completion of his Ph.D. in 2003 from Annan University in Chennai, India, worked at Annan University as a Lecturer in the Center for Biotechnology until 2004. The petitioner subsequently completed his first Postdoctoral Research Fellowship at the Institute of Cellular and Organismic Biology in Taipei, Taiwan. The petitioner then worked as a Postdoctoral Research Associate at the University of Illinois's College of Medicine at Peoria prior to joining M.D. Anderson Cancer Center in Houston, Texas, as a Postdoctoral Research Fellow in 2009, and now continues his work in cancer research as a senior researcher. And while in his letter [REDACTED] makes broad conclusory statements about the quality of the petitioner's research and the impact it could have toward the cure for cancer, there is no specific information about the importance and details of the petitioner's research or why the results of the research should be considered as a contribution of major significance in the field. USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990). In evaluating support

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

letters, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review. Ultimately, evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submissions with the petition.

.It appears from the record that [REDACTED] at the University of Utah and coauthor of [REDACTED], one of the petitioner's coauthors, provided his letter in response to an invitation to provide an opinion based upon a review of the petitioner's curriculum vitae and his work rather than affirming the petitioner's impact on their own work. Accordingly, [REDACTED] letter carries minimal weight as a document evincing the petitioner's original scientific contribution of major significance in the field of cancer research. The letter from [REDACTED] an associate professor at The Ohio State University who previously worked at the M.D. Anderson Cancer Center, devotes much of his letter discussing the great impact of the petitioner's research that formed the basis of a manuscript, which the petitioner ultimately co-authored. [REDACTED] discusses how the manuscript has been submitted to the most prestigious journal in the field, *Cancer Cell*. However, as the manuscript has not actually been published or has been accepted for publication, neither the manuscript nor the underlying research suffices as probative evidence of a contribution of a major significance in the field.

The regulatory requirement for contributions of major significance indicates that the mere potential to impact the field in the future is insufficient. Rather, a petitioner must have sufficient documentation demonstrating that the contributions have been already achieved. The following colleagues and scientists in the field submitted support letters on behalf of the petitioner: [REDACTED], Assistant Professor in the Department of Radiation Oncology at M.D. Anderson Cancer, who knows the petitioner as a senior researcher in his department; [REDACTED], Professor of Pathology at M.D. Anderson, who has a laboratory that has produced work in which the petitioner directly collaborated; [REDACTED] at Peoria, the program where the petitioner worked as a research associate; [REDACTED], Professor of Pharmacology and Medicine at the University of Illinois College of Medicine at Peoria, who also held an appointment in the Cancer Biology Department where the petitioner worked; and [REDACTED] Associate Professor of Urology and Biochemistry at New York Medical College, who appears to know of the petitioner solely through his familiarity with the petitioner's research. While the letters are complimentary of the petitioner's research and his abilities, they also discuss the potential future impact that the petitioner and his research endeavors could have in the field. Furthermore, some of the letters suggest that the writers are impressed with how the petitioner compares with other scientists in the early stages of their career. For instance, [REDACTED] writes:

These are highly competitive awards and reflect the exceptional achievements of [the petitioner] made at such a young age. He was also recipient of the AMGEN Award Poster Finalists and Postgraduate Basic Science Research at the Trainee Research Day training program at MD Anderson. He has six peer-reviewed publications in prestigious

journals, and twenty-one scientific presentations at major conference, and scientific workshops. All of these are extremely rare achievements for a scientist of his age.

writes:

In a relatively short amount of time, [the petitioner] has published a significant amount of work Overall, it is very rare to accomplish as much as [the petitioner] has in the past two years indicating his extraordinary capability and accumulated knowledge and ideas about glioma biology and brain cancers.

Similarly, states that the petitioner is in the “top 1% of all the cancer researchers I have trained,” observes that his career “has developed at pace,” and that he “has evolved into one of the most outstanding young cancer researchers.” These authors do not explain how ranking highly among young researchers is a contribution of major significance in the field. The implementing regulatory subsection for this specific criterion requires that the contribution must be of major significance “in the field.” Neither the statute nor the regulation provides for a further qualification based on an alien’s age and limited experience or otherwise suggests that the potential for future distinction, as predicted by current work or output, is sufficient.

The petitioner’s field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), and as noted above, an alien’s contributions must be not only original but of major significance. To be considered a contribution of major significance in the field of science, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. The remaining letters discussing the petitioner’s contributions are from: in the Department of Pathology at Yonsei University College of Medicine in Seoul, Korea, who met the petitioner in 2009 while he was completing a part of his training at the M.D. Anderson Cancer Center; in the grant based on some of the petitioner’s research findings; and who knows the petitioner solely through her familiarity with his research.

and while they maintain that the petitioner’s research has had a great impact, do not state that other experts have reproduced or confirmed the petitioner’s research or otherwise applied the research in their work. observes that one of the petitioner’s areas of interest, Matrix Metalloproteinase-9 (MMP), is a focus of many research labs, suggesting it is a popular area of cancer research, but does not state that any of the petitioner’s developments have been influencing other labs. suggests that the petitioner’s work with MMPs has resulted in the development of drugs that inhibit MMP. However, he has failed to specifically identify the novel discoveries that the petitioner’s research yielded that resulted in drug development, and USCIS need not accept conclusory assertions in this regard. *See 1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. at 15.

Similarly, while [REDACTED] broadly asserts in her letter that her lab and other labs have implemented the petitioner's research achievements into their own work, she fails to provide any meaningful details in this regard. Moreover, while [REDACTED] maintains that she has cited the petitioner's work, the record does not contain [REDACTED] article(s) citing the petitioner's research or publications. Without further documentation, USCIS can only consider [REDACTED] assertion that the petitioner's research achievements have been incorporated into her own research. Moreover, producing useful research that has been incorporated into one laboratory is not indicative of contributions of major significance in the field. While the evidence demonstrates that the petitioner is a talented researcher with potential, it falls short of establishing that the petitioner had already made contributions of major significance.

For all of the above reasons, the petitioner failed to establish his eligibility under this criterion.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media. 8 C.F.R. § 204.5(h)(3)(vi).

The director determined the petitioner established this criterion and the documentary evidence supports the finding that the petitioner satisfied the regulatory requirements.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases. 8 C.F.R. § 204.5(h)(3)(vii).

The petitioner submitted evidence with regard to this criterion along with the initial visa petition. The director, however, denied the petitioner's claim and the petitioner does not identify any factual or legal error in this conclusion on appeal. Consequently, the petitioner abandoned this claim. See *Sepulveda*, 401 F.3d at 1228 n. 2 citing *Cunningham*, 161 F.3d at 1344; *Hristov*, 2011 WL 4711885 at *9.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii).

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."⁴ 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. at 306. Therefore, it is the petitioner's burden to demonstrate that

⁴ See <http://www.merriam-webster.com/dictionary/distinguished>, accessed on December 12, 2012.

the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or a similar reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director determined that the petitioner failed to satisfy the requirements of this criterion. On appeal, the petitioner asserts that there is sufficient evidence establishing that he has performed in a leading or critical role for organizations or establishments that have a distinguished reputation and submitted documentary evidence along with his statement accompanying the appeal. Not all of the documents that the petitioner submits are relevant or probative evidence under this criterion. For instance, the petitioner references the same articles, newsletters, and abstracts that he identified as documentary evidence under other criteria.⁵ The petitioner, however, has submitted other evidence, such as support letters from current and former employers describing his role in various settings. For instance,

Anderson, states: "As a senior researcher in my department his role is critical and he plays a leading role in a team of cancer researchers who are unraveling one of the nation's most lethal cancers (typographical errors omitted)." The petitioner also submitted evidence demonstrating that the M.D. Anderson Cancer Center, the institution currently employing him, has a distinguished reputation for cancer research and patient care. However, the letters discussing the petitioner's role at MD Anderson Cancer Center do not sufficiently provide information on his standing in the institutional hierarchy or how his position as a senior researcher within one department is critical to the entire organization.

Regardless, the petitioner still fails to meet the plain meaning requirements under the regulation. While the petitioner has submitted support letters from other institutions, he only submitted documentation evincing the distinguished reputation of the M.D. Anderson Cancer Center. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence of leading or critical role for "organizations" and "establishments" in the plural, which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A) of the Act. 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)." Therefore, the inference is that the plural in the remaining regulatory criteria 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.⁶

⁵ Previous sections in the decision have already discussed how meeting one criterion cannot lead to the presumption that the petitioner has met another criterion.

⁶ 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).

Accordingly, the petitioner failed to meet this criterion.

B. Summary

The petitioner has submitted sufficient relevant, probative evidence to only satisfy the regulatory requirements for two 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.

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.⁷ Rather, the proper conclusion is that the petitioner has failed to satisfy the 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.

⁷ 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).