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



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: JUL 09 2012

Office: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
Beneficiary:

[Redacted]

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which 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). 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, counsel submits a brief and additional evidence. In the brief and in response to the director’s request for evidence, counsel concedes that the petitioner “does not satisfy the criteria found in 8 C.F.R. § 204.5(h)(3)(i)(ii)(iii)(iv)(vii)(ix) & (x)” and asserts that the petitioner “meets the criteria of 8 C.F.R. § 204.5(h)(3)(v)(vi) & (viii).” (Emphasis in original.) Although counsel claims that the director’s request for evidence (RFE) forced the petitioner “to guess what the officer wanted rather than address specific issues” and that the denial was “no more than the summary, generic analysis railed against in [*Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010)] and prohibited by Agency guidance,” the record does not support counsel’s claims. Nevertheless, the remedy for such an alleged error is for the AAO to consider all the evidence on appeal. Upon review of the entire record, the AAO concurs with the director’s conclusion that the petitioner submitted qualifying evidence under only two of the ten regulatory categories of evidence. Furthermore, as the petitioner did not submit qualifying evidence under at least three of the regulatory categories of evidence, even if the director had committed any errors, they would be considered harmless. For the reasons discussed below, the AAO upholds the director’s ultimate conclusion that the petitioner has not established eligibility for the exclusive classification sought. The AAO conducts appellate review on a *de novo* basis. AAO’s *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

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).

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 antecedent regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

A. Evidentiary Criteria²

The director concluded that the petitioner had made original contributions of major significance pursuant to 8 C.F.R. § 204.5(h)(3)(v) and had authored scholarly articles pursuant to 8 C.F.R. § 204.5(h)(3)(vi), but had not submitted qualifying evidence under any other criterion. On appeal, counsel asserts only that the petitioner did submit qualifying evidence of a leading or critical role for organizations or establishments with a distinguished reputation pursuant to 8 C.F.R. § 204.5(h)(3)(viii). As discussed below, the AAO concurs with the director’s determination that the petitioner has not submitted qualifying evidence under that criterion. On that basis alone, the AAO upholds the director’s decision.

The AAO notes, however, that the evidence submitted pursuant to 8 C.F.R. § 204.5(h)(3)(v) is also insufficient. While the petitioner has authored several articles, 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 While the AAO acknowledges that the petitioner submitted evidence of a significant level of citation in the aggregate, the expert letters in the record fail to put this evidence in the necessary context to reach a conclusion that the petitioner has made original contributions *of major significance*.

In general, the letters focus on the unique and complex skills the petitioner has attained in her education and training research positions and her potential to benefit the United States in the future.

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

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.

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), an alien's contributions must be not only original but of major significance. The AAO must presume that the phrase "major significance" is not superfluous and, thus, that 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). To be considered a contribution of major significance "in the field" of science (rather than to a specific project), it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the petitioner's work. While some of the letters identify the petitioner's research results and conclude they are applicable to other work in the field or even constitute contributions to the field, no expert explains how other independent researchers are already using the petitioner's results. Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010).⁴

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

While the AAO notes that there are numerous reference letters in the record, all such letters were previously considered under the original contributions criterion at 8 C.F.R. § 204.5(h)(3)(v). The regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence of experience "shall" consist of letters from employers. Therefore, the AAO will not consider letters written by anyone other than the petitioner's current and former employers with regard to this criterion.

The AAO finds that the petitioner has submitted sufficient evidence to establish her appointments by organizations that have a distinguished reputation, specifically [REDACTED]

and [REDACTED] and [REDACTED]

At issue is whether or not the petitioner performed in a leading or critical role for these distinguished organizations.

Any organization or establishment that retains the services of an individual requires someone competent to provide those services. Thus, the fact that organizations or establishments have retained the petitioner is insufficient. In the case of a leading role, the petitioner must demonstrate how the role fits within the overall hierarchy of the organization or establishment. In the case of a critical role, the petitioner must have contributed to the success of the establishment or organization beyond merely providing necessary services.

⁴ In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122.

[REDACTED] of [REDACTED] states that "at the end of her current postdoc, she will have acquired a diverse range of technical skills combined with excellent exposure to the exciting field of Alzheimer Disease etiology, prevention and treatment." [REDACTED] also of [REDACTED] states that "[s]he has achieved a great deal in the short time she has been here, and I am confident about her future accomplishments in this critical field." None of these letters demonstrate how the petitioner performed in a critical role for the establishment, but rather only refer to the petitioner's acquisition of unique skills in a training position.

[REDACTED] the petitioner's research co-advisor at [REDACTED] states in his letter submitted with the original filing that the petitioner has made "critical contributions to the study of a protein structure and function central to gene regulation, and she is now poised to leverage this rare and critical expertise." In response to the director's request for evidence, [REDACTED] wrote a second letter which states that "To my knowledge, my lab is the only lab in the world and [the petitioner] is the only scientist in the world to currently study the structure of human Presenilin."

[REDACTED] of the [REDACTED] states that "As a postdoctoral fellow at the [REDACTED] [the petitioner] is playing an essential role in the [REDACTED] she is currently working to solve the structure of the human protein complex called 'gamma-secretase.'" [REDACTED] goes on to state that the petitioner "is playing a leading role in the structural biology of Alzheimer's disease at the [REDACTED] and that "her rare training and skills are essential to our work on Alzheimer's disease towards determining the structure of gamma-secretase." These letters fail to demonstrate how the petitioner performed in a critical or leading role for the establishment, beyond her research efforts which are part of the duties that would normally be performed by someone in her position.

The record does not contain persuasive evidence that serving as a Postdoctoral Research Fellow or Postdoctoral Associate, even for organizations with a distinguished reputation, is performing in a leading or critical role. For example, the record does not establish the number of postdoctoral fellows for any of the petitioner's employers nor provide an organizational chart or other evidence of the hierarchy of any of these institutions. These institutions routinely rely on postdoctoral fellows to further their research.

Moreover, the petitioner's appointments are designed to provide specialized research experience and training in her field of endeavor.⁵ For example, [REDACTED] a professor at the [REDACTED] asserts that while at the [REDACTED] the petitioner "deepened her expertise in X-ray crystallography and mastered skills in basic science research while studying the genetic machinery." [REDACTED] a group leader at [REDACTED] asserts that the petitioner's opportunities at [REDACTED] "ha[ve] provided her with the tools to transition to the position of a research group head in either academia or industry." The petitioner's evidence does not demonstrate how her temporary appointments differentiated her from the other

⁵ "Biological scientists with a Ph.D. often take temporary postdoctoral research positions that provide specialized research experience." See <http://www.bls.gov/oco/pdf/ocos047.pdf>, accessed on June 19, 2012, copy incorporated into the record of proceedings.

research scientists employed by the preceding institutions, let alone their tenured faculty and principal investigators. The documentation submitted by the petitioner does not establish that she held a position within the organizational hierarchy or was responsible for the preceding institutions' success or standing to a degree consistent with the meaning of "leading or critical role." Accordingly, the petitioner has not established that she meets this criterion.

The AAO notes that in response to the director's request for evidence under this criterion, counsel asserts that "contributions made by the beneficiary" are not required to be "original" or "of major significance." While the AAO concurs with counsel, it is clear that the director inadvertently included language from the original contributions criterion.

In light of the above, the petitioner has not established that the beneficiary meets the plain language requirements of this regulatory 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.

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.⁶ The AAO notes, however, that the AAO's conclusion is consistent with the expert letters, which conclude only that the petitioner is within the top of Ph.D. students or postdoctoral researchers. Rather than explain how the petitioner has reached the top of her field or

⁶ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. 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).

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garnered acclaim, the letters focus on the national interest in retaining researchers with the petitioner's unique skills and enthusiasm. While the AAO does not question these opinions, it is not the correct standard for the benefit sought. Ultimately, 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.