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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]

B2

DATE: JUL 05 2012

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
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 Knew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially denied the employment-based immigrant visa petition on November 18, 2008, reopened the matter on U.S. Citizenship and Immigration Services (USCIS) motion on April 23, 2009, and ultimately denied the petition in a final decision dated March 31, 2011. The matter 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 arts, 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. For the reasons discussed below, upon review of the entire record, the AAO upholds the director’s conclusion that the petitioner has not established the beneficiary’s eligibility for the exclusive 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 antecedent regulatory requirement of three types of evidence. *Id.*

¹ Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

II. ANALYSIS

A. Evidentiary Criteria²

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

The petitioner submitted a number of award certificates received between 1991 and 2002. In the most recent denial dated March 31, 2011, the director stated the petitioner failed to “submit evidence to support her statements that the above-mentioned awards are lesser nationally or internationally recognized prizes or awards for excellence in the field.” The director went on to state that “[t]here is no evidence provided from the presenting institutions explaining the significance of the award, the evaluation criteria, or the impact receiving this award had outside the particular institution.” On appeal, the petitioner asserts that the “relative/friend in Nepal” she had asked “to visit those institutions and request the confirming letters/news about the significance of the award, the evaluation criteria, or the impact [of] receiving the award” was unsuccessful in obtaining such documentation for this criterion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). The AAO notes that the documentation which the relative/friend was able to obtain is discussed later in this decision. The petitioner also failed to submit alternative evidence that the field, nationally or internationally, recognizes any of her awards. It remains the petitioner’s burden to submit evidence addressing every element of a given criterion, including that a prize or award is nationally or internationally recognized.

The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. Where a record does not exist, the petitioner must submit an original written statement on letterhead from the relevant authority indicating the reason the record does not exist and whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii). The petitioner has not established that the above-mentioned evidence relating to the awards does not exist or cannot be obtained. Further, her self-serving statements do not equate to secondary evidence or affidavits.

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

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

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.

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish that the evidence was qualifying. On appeal, counsel does not contest the director's findings for this criterion and states that petitioner does not claim to satisfy this criterion. Therefore, the AAO considers this issue to be abandoned. *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); see also *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *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.

In order for published material to meet this criterion, it must be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.³

The petitioner submitted two articles with the original filing and two additional articles on appeal. Regarding the two articles submitted with the original filing, one is missing the first page of the translation and neither article is accompanied by a certification from the translator. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "any necessary translation." The regulation at 8 C.F.R. § 103.2(b)(3) provides:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

As the translations of the publications are uncertified and incomplete and, thus, did not comply with the terms of the regulations at 8 C.F.R. § 103.2(b)(3) and 8 C.F.R. § 204.5(h)(3)(iii), they cannot be considered here. Although these articles cannot be considered for the reason above, the AAO notes the petitioner supplemented the record in January 2009 with letters from the Chief Editor of *Chalphal* and the Chief Editor of *Prjatantra*. Although a "Certificate of Translation" was provided for the letters, only the English translation was submitted, and not the original foreign language

³ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

documents. The AAO also simply notes for the record that the petitioner, without explanation, submitted two copies of each letter, one signed by the Chief Editor and one with the signature whited out.

Finally, with regard to the two articles submitted on appeal, although certified translations were included, the petitioner failed to submit any evidence to demonstrate that either publication qualifies as major media, such as distribution and circulation data.

In light of the above, the petitioner has not established that she meets this criterion.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The director found that the petitioner established that the beneficiary satisfies the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) and the AAO concurs with that finding.

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

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish that the evidence was qualifying. On appeal, counsel simply asserts "Petitioner believes that Petitioner has made artistic or business related contribution[s] of major significance in Nepalese music field. [The] Petitioner requests you [] take a look [at] all submitted evidence[] while adjudicating this claim." The petitioner repeats this assertion on appeal. The petitioner did not provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director's analysis. Therefore, as neither counsel nor the petitioner fully briefed this issue, the AAO considers this issue abandoned. *See Desravines v. United States Attorney General*, No. 08-14861, 343 F. App'x 433, 435 (11th Cir. 2009) (finding that issues not briefed on appeal are deemed abandoned). The AAO notes, however, that the letters in the record fail to identify specific contributions by the petitioner or explain her impact in the field.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The petitioner submitted two letters from a chartered accountant in Nepal, one with the original petition and one in January 2009 regarding the petitioner's income. The second letter is not signed and therefore has no evidentiary value and cannot be considered here. In the letter submitted with the original petition, the accountant claims that the petitioner's earnings are "higher than the other singers who do the same job in Nepal," stating that the average monthly income for the petitioner for the 2006-2007 fiscal year was \$2,400 and that \$1,000 is the average monthly income for singers "except their sale of the albums" in Nepal. The accountant asserts "Records show that she is a good taxpayer of the nation" but does not attach any tax forms confirming the petitioner's income.

Neither the petitioner, nor the accountant provided any explanation as to how the \$1,000 month figure was calculated other than that the figure did not include album sales. The Board of Immigration Appeals has held that testimony should not be disregarded simply because it is “self-serving.” See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: “We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available.” *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

Furthermore, the petitioner states in her response to the director’s notice of intent to deny that her average monthly income of \$2,400 was based not only upon “royalties paid by the entertainment companies and media station,” but also from her “regular salary as a teacher/instructor.” The petitioner failed to submit any additional information as to what portion of her income was derived from her salary as a teacher, the occupation listed in her passport. The record also fails to demonstrate that all of the petitioner’s royalties were exclusive of any album sale income, which the accountant excluded from his determination of the average income of Nepalese singers. The record is void of reliable earnings evidence showing that the petitioner has received a “high salary” or “significantly high remuneration” in comparison with others in the petitioner’s field. See *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm’r 1994) (considering professional golfer’s earnings versus other PGA Tour golfers); see also *Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer’s salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). In the present matter, the documentary evidence submitted by the petitioner does not establish that she has received significantly high remuneration for services in relation to others in the field.

In light of the above, the petitioner has not established that she meets this criterion.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires “evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.” The petitioner submitted a copy of the front and back cover for one cassette and one compact disc. However, as the petitioner did not include an English translation as required by 8 C.F.R. § 103.2(b)(3), these items cannot be considered here. In addition, the petitioner submitted a letter from the Managing Director of Music Nepal PVT LTD which states that, according to the registered record of Music Nepal, the petitioner’s album [REDACTED] sold 156,000 copies in 2004 and an additional 300,000 albums between 2005 and 2007 and that the petitioner received \$21,333.33 in royalties. However, the article the petitioner submitted on appeal from the *Samaj Weekly Newspaper*, states that “[t]he [REDACTED] first [a]lbum [REDACTED]

It is incumbent upon the petitioner to resolve any inconsistencies in the record by

independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The petitioner has not resolved why Music Nepal PVT LTD is confirming the sales of an album released by the [REDACTED] Academy. Regardless, the letter does not constitute primary evidence of the album sales, and as previously mentioned, the nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Moreover, the letter does not meet the requirements of an affidavit as required where primary and secondary evidence are documented to be nonexistent or unavailable. *Id.*

In light of the above, the petitioner has not established that she 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. INTENT TO CONTINUE TO WORK IN THE AREA OF EXPERTISE

The AAO notes that although required by 8 C.F.R. § 103.2(a)(1), the beneficiary failed to complete any portion of Part 6 of the Form I-140, which requires the petitioner to list “Basic information about the proposed employment.” *See also* Instructions for I-140, Immigrant Petition for Alien Worker, (rev. July 30, 2007), *General Instructions, Step 1, line 3*. The concurrently filed Form G-325A states that the petitioner has been unemployed since June 2007.

This is an employment-based classification that requires that the alien seek to enter the United States to continue working in her area of expertise. Section 203(b)(1)(A)(ii) of the Act. It is “by virtue of such work” that aliens under this classification will substantially benefit prospectively the United States as envisioned under section 203(b)(1)(A)(iii) of the Act. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). Congress did not intend for aliens of extraordinary ability to immigrate to the United States and remain idle. 56 Fed. Reg. 30703, 30704 (July 5, 1991). While neither the statute nor the regulations specify that the employment must be full-time, minimal hours of employment as a hobby or incidental to the alien’s primary source of income does not substantially benefit prospectively the United States.

The regulation at 8 C.F.R. § 204.5(h)(5) provides:

No offer of employment required. Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement

from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

While the petitioner states in her affidavit that she has an offer of employment, the referenced letter fails to confirm this. The letter states that Sagarmatha Television “ha[s] [a] number of events scheduled for [the] upcoming season...which will require someone of [the petitioner]’s abilities, and we would be very grateful for her service to our community.” The letter from Sagarmatha does not state that it will employ the petitioner, but only that, at an unknown point in the future, they will require someone like the petitioner. Furthermore, based upon the phrase “we would be very grateful for her service,” it is unclear whether, if the petitioner’s services were to be required in the future, it would be on anything more than a voluntary basis. On appeal, the petitioner states she “ha[s] been working on [her] solo CD” and submitted two signed contracts with Music Nepal Pvt. Ltd. dated April 7, 2011, almost three years after the initial filing. The petitioner did not submit any additional evidence to demonstrate how these two contracts with a company based in Nepal would prospectively benefit the United States.

The petitioner has not provided sufficient detail or evidence regarding her intentions to continue to work in the United States. This is an employment-based visa classification. Beyond a few singing performances between 2007 and 2010, the petitioner has not offered any evidence that her singing career will continue on anything more than an incidental basis.

For these reasons, the AAO concurs with the director’s finding that the petitioner has not submitted *qualifying evidence* under 8 C.F.R. § 204.5(h)(5).

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.

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

⁴ 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

antecedent regulatory requirement of three types of evidence. *Id.* at 1122. The petitioner has also failed to demonstrate her intent to work in her claimed field of expertise and ability to prospectively benefit the United States.

For the above stated reasons, considered both in sum and as separate grounds for denial, 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.

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).