identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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: JUL 3 1 2012 Office: NEBRASKA 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner 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) as an instrumental musician and teacher.[1] 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.

On appeal, the petitioner asserts that she meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i), (vii), and (ix). For the reasons discussed below, the AAO will uphold the director's decision.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

[1] According to information on the Form I-140, Immigrant Petition for Alien Worker, the petitioner was last admitted to the United States on June 22, 2010 as an F-1 nonimmigrant student.

> (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.[2] 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.*

---

[2] 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[3]

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

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. The petitioner submitted the following:

1. A February 7, 2007 "Certificate of Merit" stating: "This is to certify that [the petitioner] has participated the program and has the honor to receive
2. An August 2007 certificate stating: "This is hereby to certify that [the petitioner] has the honor to receive
3. A May 2006 "Certificate of Honor" stating: "This is hereby to certify that [the petitioner] has won
4. An August 2006 "Certificate of Honor" stating: "This is to certify that [the petitioner] has participated the program of and has the honor to receive 3rd Grade prize"; and
5. An August 10, 2008 "Certificate of Merit" stating: "This is hereby to certify that [the petitioner] has participated the program of and has the honor to receive Top Prize."

The English language translations accompanying the above certificates did not include a statement from translator indicating that he was competent to translate from Chinese to English as required by the regulation at 8 C.F.R. § 103.2(b)(3). Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that 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. *Id.* Further, the petitioner did not submit evidence of the national or international *recognition* of her particular prizes. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's prizes be nationally or internationally *recognized* in the field of endeavor and it is her burden to establish every element of this criterion. A music competition may be open to entries from throughout a particular country or countries, but this factor alone is not adequate to establish that a specific prize from the competition is "nationally or internationally

[3] On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

recognized." With regard to items 1 – 5, there is no documentary evidence demonstrating that the petitioner's prizes were recognized beyond the presenting organizations and therefore commensurate with nationally or internationally recognized prizes for excellence in the field. Accordingly, the petitioner has not established that she meets this regulatory criterion.

> *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 her eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not established that she meets this regulatory criterion.

> *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.*

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish her eligibility. The AAO notes that none of the articles submitted by the petitioner meet all of the requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). For example, the articles were deficient in that they did not include a date or an author, they were not about the petitioner, they lacked a full English language translation, or they lacked evidence that they were published in professional or major trade publications or other major media. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. [redacted]

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

The director's February 7, 2011 decision did not specifically address this regulatory criterion. On appeal, counsel points out that the director's October 28, 2010 request for evidence stated that the petitioner's evidence had met this criterion. The AAO withdraws the director's finding on this issue. Neither the petitioner nor counsel has explained how music competitions equate to visual art exhibits. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at artistic exhibitions or showcases." The petitioner is a musician. When she is performing on stage or in a competition, she is not displaying her music in the same sense that a painter or sculptor displays his or her work in a gallery or

museum. The petitioner is performing her work, she is not displaying her work. In addition, to the extent that the petitioner is a performing artist, it is inherent to her occupation to perform. The AAO notes that the ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Accordingly, the petitioner has not established that she meets this regulatory criterion.

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

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. The petitioner submitted a "Work and Income Statement" from Horizon Real Estate Company, Ltd. stating:

> This is to certify that [the petitioner], Female, . . . has been working in our corporation as Ad Art Director since July 2007 to July 2009. Mainly responsible for planning management company advertising performance project. [The petitioner] has been entitled to a monthly salary RMB 5,000, with a year-end bonus RMB 20,000. Therefore, his [sic] total income in a year be RMB 80,000.
>
> His [sic] personal income tax has been deducted by the company.

The petitioner also submitted a "Work and Income Statement" from Guizhou Dance of Earth Culture Company, Ltd. stating:

> This is to certify that [the petitioner], Female, . . . has been working in our corporation as Ad Art Director since July 2007 to July 2009. Mainly responsible for planning management company advertising performance project. [The petitioner] has been entitled to a monthly salary RMB 5,000. Therefore, his [sic] total income (with a year-end bonus) in a year be RMB 100,000.
>
> His [sic] personal income tax has been deducted by the company.

The AAO notes that the documentation submitted by the petitioner indicates that her field of expertise is music performance and teaching, not Ad Art Direction. For example, the petitioner submitted a July 1, 2009 certificate stating that she received a bachelor's degree in Music Performance from Guizhou University and a July 1, 2009 Certificate of Teacher Qualification for senior high school music from the Education Bureau of Guiyang. The record contains no

documentary evidence of the petitioner's achievements or recognition as an "Ad Art Director." The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires evidence that the petitioner "has commanded a high salary or other significantly high remuneration for services, *in relation to others in the field*" (emphasis added). Neither the petitioner nor counsel has explained how working as an Ad Art Director relates to the occupation of instrumental musician or music teacher. *See, e.g., Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002) (upholding a finding that competitive athletics and coaching are not within the same area of expertise). The petitioner has failed to submit documentary evidence of her salary or remuneration as an instrumental musician or music teacher.

In response to the director's request for evidence, the petitioner submitted a November 22, 2010 certificate stating: "[The petitioner] has been invited to perform at Guizhou Province Electricity Bureau many times and has earned the paid [sic] accordingly." The petitioner also submitted a November 22, 2010 certificate from the "Labor Union of Justice Bureau of Guizhou Province" stating: "[The petitioner] has been invited to Annual Chinese New Year Party from 1997 to current and has earned the paid [sic] accordingly." The English language translations accompanying the preceding certificates were not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, neither certificate specifies the amount of remuneration received by the petitioner for her services.

The petitioner's response included an internet printout from tiaona.com providing what counsel identifies as "average salary" information "regarding China 'Zheng' Performers." The internet printout lists the national "average monthly salary level" of a Zheng musician as ¥3,150. The petitioner also submitted a "Certificate of Salary Wage of Song and Dance Troupe of Guizhou Province" listing the salary for various job titles, a "Guiyang Dance Theater Certificate of Salary Wage" listing the average salary for various job titles, a certificate from the Guizhou Opera Company listing the average salary for its employees, and a document entitled "Statistics of All Employment Average Salary of 2008 in Guizhou Province," but the English language translations accompanying the preceding documents were not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, the petitioner's reliance on "average salary" information is not an appropriate basis for comparison. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires the petitioner to submit evidence demonstrating that she has received "a high salary or other significantly high remuneration" in relation to others in the field rather than simply earnings that are above average in her field.

There is no documentary evidence showing that the petitioner has received a high salary or other significantly high remuneration for services relative to other instrumental musicians and music teachers performing similar work. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 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). Accordingly, the petitioner has not established that she meets this regulatory criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence.

III. CONTINUING WORK IN THE AREA OF EXPERTISE IN THE UNITED STATES

Beyond the decision of the director, the statute and regulations require that the petitioner seeks to continue work in her area of expertise in the United States. *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the petitioner detailing plans on how she intends to continue her work in the United States. On the Form I-140, Immigrant Petition for Alien Worker, Part 6, "Basic information about the proposed employment," was left blank. In this case, the petitioner has not submitted letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement detailing plans on how she intends to continue working in the United States. Accordingly, the petitioner has not submitted "clear evidence" that she will continue to work in her area of expertise in the United States as required by the regulation at 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.

Even if the petitioner had 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 categories of evidence. *Id.* at 1122.

---

[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).

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.