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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

PUBLIC COPY

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[redacted]

DATE: MAR 1 3 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Lori B
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on February 17, 2011, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability as a director of operations in real estate. The director determined that the petitioner had not established the beneficiary's requisite extraordinary ability and failed to submit extensive documentation of her sustained national or international acclaim.

At the initial filing of the petition, the petitioner submitted a letter describing its company and submitted documentary evidence regarding background information relating to the petitioner such as income tax statements and promotional material. Regarding the beneficiary, the petitioner submitted testimonial letters, newspaper, magazine, and Internet-related articles, and income tax statements. However, the petitioner failed to specifically identify which criteria, if any, under the regulation at 8 C.F.R. § 204.5(h)(3) that the beneficiary purportedly met. As such, the director issued a notice of intent to deny the petition pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) describing each of the criteria and indicated that the documentary evidence failed to establish eligibility for the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) and the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). The director did indicate that the beneficiary met the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Finally, the director determined that the petitioner failed to submit any documentary evidence that related to any of the remaining seven categories of evidence.

In response to this notice, the petitioner asserted:

> [W]e can understand [the director's] position if [the director] came to [the director's] conclusion through a strict interpretation of the statute. The key to understanding [the beneficiary's] extraordinary ability requires one to analyze the totality of the circumstances, because the three out of ten criteria under 8 C.F.R. Section 204.5(h)(3) unfairly discriminates against Real Estate Executives. In [the director's] Intent to Deny, while "Part Two: Final Merits Determination" should have considered the totality of the evidence as required by *Kazarian*, all that is mentioned in this part is the lack of evidence on the 3/10 test.
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> [The director] initially determined that we have not tendered three of the ten (3/10) items that would demonstrate extraordinary ability. Unfortunately, many of these items are simply not applicable or simply would not help prove one has extraordinary ability in the Real Estate field. For example, there are few awards in this genre . . . and unfortunately one who works in this field does not typically publish [emphasis in original] written materials, display art work or record box office sales. It is simply not a part of their professional responsibilities. Admittedly, purely based on what you are probably accustomed to, this is a very different I-140 petition. In many other professions are readily researchable, and the documentation

> that USICS [sic] requests in order to show extraordinary ability are certainly applicable. . . . [W]e hope that this petition is discriminated against due to its uniqueness.

In addition, the petitioner submitted screenshots from www.observer.com, www.nyc-architecture.com, and www.glasssteelandstone.com and argued that the beneficiary was eligible for the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v) and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). Moreover, the petitioner claimed that the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x) were not applicable to the beneficiary's field of real estate. Regardless, the petitioner argued that the documentary evidence should be considered under the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) and the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii). The AAO notes that the petitioner failed to provide any arguments or submit any additional documentation regarding the beneficiary's eligibility for the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix).

In the director's final decision, she determined that the petitioner failed to establish the beneficiary's eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), and the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). Further, the director again found that the beneficiary met the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, the director indicated that the petitioner failed to submit any documentary evidence regarding the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x).

Regarding the petitioner's apparent reliance on comparable evidence, the director stated:

> 8 C.F.R. Section 204.5(h)(4) states that if the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.
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> In a letter you submitted from [the petitioner], you indicated that the requirement to meet three out of the ten criteria under 8 C.F.R. Section 204.5(h)(3) unfairly discriminates against real estate executives and many of the criteria are not applicable or do not help prove extraordinary ability in the real estate field.

> While you indicated that not all [of] the criteria apply to the beneficiary's field, you did not submit evidence show why the standards do not readily apply to the beneficiary's occupation. However, based on an analysis of the evidence as "comparable" evidence, it failed to demonstrate that the beneficiary has met three of the ten [criteria] as a result. The burden is on the petitioner to demonstrate this.

On appeal, counsel asserts:

> In our response to the intent to deny, we argued that the 3/10 test does not apply to someone in Real Estate and that in order to best determine [the beneficiary's] extraordinary ability, the focus needed to be on the famous landmark buildings she has purchased in New York City and the number of jobs she has and will be creating. In the denial, this analysis was ignored. The denial stated "while you indicated that not all the criteria apply to the beneficiary's field, you did not submit evidence to show why the standards do not readily apply to the beneficiary's occupation." We disagree with this statement. We took each of the ten criteria and explained how each of the criteria that did apply, does not apply [sic]. For example, while this seems self-evident, we explained why evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk or video sales does not apply to a Real Estate Executive, and we tried [to] offer comparables [sic]. None of this was analyzed in the denial, and the [director] seemingly denied this because of failure to meet the 3 out of 10 test, and hence [the beneficiary] failed to meet the extraordinary ability standard. Thus, we believe our analysis was completely ignored.
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> We are keeping our appeal brief, because we believe the record speaks for itself. It is quite rare to come across a foreign national who in the three years she has been in US, as Head of US Operations of a major international company, has worked on transactions involving two of the words [sic] most famous landmark buildings. [The director] honed on the 3/10 test, and while we explained why this test unfairly discriminates against a Real Estate Executive, no weight was given to our explanation except to re-state that [the beneficiary] failed to meet the 3/10 test.

On appeal, counsel does not contest the director's specific findings, offer any additional arguments, or submit any additional documentary evidence regarding the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the high salary criterion at 8 C.F.R. § 204.5(h)(3)(ix), and the director's final merits determination pursuant to *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). The AAO, therefore, considers these issues to be abandoned. *See 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).

The sole issue raised by counsel on appeal is the argument that meeting at least three out of the ten regulatory categories of evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(3) "[do] not apply to someone in Real Estate."

There is no provision in the regulation that exempts an alien from the requirements set forth in the regulation at 8 C.F.R. § 204.5(h)(3). Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the beneficiary's "sustained national or international acclaim" and present "extensive documentation" of his or her 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, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific 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. Therefore, regardless of counsel's claim that an alien in the real estate field, such as the beneficiary, cannot meet the three out of ten requirement, the regulation does not permit any deviation from demonstrating sustained national or international acclaim through evidence of a one-time achievement or meeting at least three out of the ten regulatory categories of evidence.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Again, the regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts.

The AAO acknowledges that the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to the beneficiary's occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In this case, the regulatory language precludes the consideration of comparable evidence as there is no indication that eligibility for visa preference in the beneficiary's occupation as a director of operations in real estate cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner claimed the

beneficiary's eligibility either at the original time of filing the petition or in response to the director's notice of intent to deny for the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), and the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). Indeed, the director found that the beneficiary met the plain language of the regulation for the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, as it relates to the awards criterion, while counsel claims that there are few awards in the petitioner's field, he acknowledges there are awards.

As the petitioner claimed the beneficiary's eligibility under at least five of the criteria, and as the director found that the petitioner actually meets one of those criteria, the AAO is not persuaded by counsel's argument that the regulation at 8 C.F.R. § 204.5(h)(3) "unfairly discriminates against a Real Estate Executive" and that comparable evidence should be considered in this instance.

An inability to meet a criterion is not necessarily evidence that the criterion does not apply to the beneficiary's occupation. Further, while the AAO agrees with the petitioner that the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii) and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x) do not apply to the beneficiary's occupation, the petitioner failed to submit any documentary evidence to support its assertions that any of the remaining three criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3) "[do] not apply to someone in Real Estate." 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)). Where an alien is simply unable to meet or submit documentary evidence of three of the criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

The petitioner has failed to overcome the director's specific grounds for denial regarding each of the individual criteria. Moreover, counsel has failed to address the director's final merits determination in which he found the petitioner failed to establish that the beneficiary has reached a "level of expertise indicating that she is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and that she has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. §§ 204.5(h)(2) and (3). *See also Kazarian,* 596 F.3d at 1115. The petitioner did not meet the plain language for any of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). Review of the record does not establish that the petitioner has distinguished herself to such an extent that she may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of her field. The evidence is not persuasive that the petitioner's achievements set her significantly above almost all others in her field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act, and the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.