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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

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DATE: **MAY 01 2012**

Office: NEBRASKA 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:



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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director, Nebraska Service Center, denied the employment-based immigrant visa petition on June 25, 2010. The petitioner, who is also the beneficiary, appealed the decision with the Administrative Appeals Office (AAO) on July 26, 2010. The appeal will be rejected.

On appeal, counsel has submitted a brief and additional evidence, some of which was already part of the record. Pursuant to 8 C.F.R. § 292.4(a) as well as the instructions to the Form I-290B, counsel must file a new Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative with any appeal filed on or after March 4, 2010. *See* 75 Fed. Reg. 5225 (Feb. 2, 2010). Counsel, however, failed to submit a new, updated Form G-28 with the appeal, filed July 26, 2010. On March 21, 2011, the AAO sent a facsimile to counsel's office, requesting counsel to submit an updated Form G-28 within ten calendar days.¹ As of the date of this decision, more than a month later, the AAO has not received the requested updated Form G-28. Accordingly, the AAO rejects the instant appeal as improperly filed, under the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(2).

In the alternative, the appeal would not succeed on the merits. The petitioner seeks classification as an "alien of extraordinary ability" in the sciences, specifically, in the field of biotechnology, 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 that the petitioner has 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; 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)-(x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

In the alternative, for the reasons discussed below, the AAO affirms the director's adverse decision that the petitioner has not established his eligibility for the exclusive classification sought. Specifically, the AAO finds that although the petitioner meets the authorship of scholarly articles criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(vi), he meets no other criteria. As such, he has not submitted the requisite evidence under at least three of the evidentiary categories for which evidence must be submitted to meet the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. In short, the AAO must dismiss the petitioner's appeal.

¹ Both the facsimile transmission and the facsimile send result report, dated March 21, 2011, have been made part of the record of proceedings.

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. 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 under the regulation at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the 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 under the regulations 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.” *Kazarian*, 596 F.3d at 1121-22.

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 (vi).

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)." *Kazarian*, 596 F.3d 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 presenting three types of evidence. *Kazarian*, 596 F.3d at 1122.

II. ANALYSIS

A. Evidentiary Criteria³

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).

When counsel initially filed the visa petition on January 12, 2010, he claimed that the petitioner meets the membership in associations criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(ii), because he is a member of the Phycological Society of America (PSA) and a life member of the Association of Microbiologists of India (AMI). In her June 25, 2010 decision, the director concluded that the petitioner has not met this criterion. On appeal, counsel asserts that the director erred. With respect to the petitioner's membership in the PSA, counsel asserts in his appellate brief that the evidence in the record establishes the petitioner's PSA membership, but counsel fails to point to any evidence showing that the PSA requires outstanding achievements from its members. Indeed, its bylaws do not indicate that the PSA has a policy of requiring its members to attain any level of achievements, let alone outstanding achievements. Rather, the bylaws state that "[a]ctive membership shall be open to an individual interested in phycology [the study of algae]," and who pays membership dues.

With respect to the petitioner's life membership in the AMI, counsel asserts in his appellate brief that to be a life member, the AMI required the petitioner to have "an exceptional academic standing" and a recommendation from [REDACTED] a professor in Thapar University's Department of Biotechnology and Environmental Sciences. The assertion, however, is not supported by the AMI's Rules, as shown in the March 12, 2010 AMI online printout.⁴ According to the AMI Rules,

³ Counsel does not claim that the petitioner meets the regulatory categories of evidence not discussed in this decision.

⁴ As first pointed out by the director in her June 25, 2010 decision, the petitioner has provided the AMI's Rules as displayed on the AMI website. The far right side of the text of the Rules, however, is missing. As such, the AAO's, as

membership “is open to all graduates in Microbiology or allied disciplines who pursue stu[dies,] teaching, research or profession in Microbiology or allied subjects.” To become a life member, an applicant must give “details of [his/her] academic standing” and be “recommended by at least one life member.” The petitioner’s academic standing, even if exceptional, however, is not an outstanding achievement. Neither is his ability to secure a recommendation from one of his professors.

Moreover, the AMI Rules provide no information as to the level of academic standing an applicant must achieve to be considered for an AMI life membership. Assuming *arguendo* that “exceptional academic standing” was a requirement for an AMI life membership and that it constituted an outstanding achievement, which as discussed above the AAO finds it does not, the AAO would nonetheless conclude that there is insufficient evidence in the record demonstrating that the petitioner’s academic standing has been judged by recognized national or international experts in their disciplines or fields. Like all students, the petitioner’s academic standing is based on his professors’ evaluation of his studies. There is insufficient evidence in the record establishing that all of the petitioner’s professors are recognized national or international experts in their disciplines or fields. Moreover, although counsel claimed that ██████████ recommended the petitioner for the AMI life membership, ██████████ December 15, 2009 letter, in which he discussed the petitioner’s research, makes no mention of this recommendation. The letter also makes no mention that ██████████ is associated with the AMI in such a way that he may recommend the petitioner to join the association as a life member.

Finally, had the AAO concluded that the petitioner’s membership in the AMI constituted membership in an association that requires outstanding achievements from its members, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires the petitioner to show his membership in more than one association that requires outstanding achievements, consistent with the statutory requirement for extensive documentation. Section 203(b)(1)(A)(i) of the Act. The petitioner has not made such a showing.

Accordingly, based on the evidence in the record, the AAO concludes that the petitioner’s membership in the PSA and AMI does not constitute 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. See 8 C.F.R. § 204.5(h)(3)(ii). The petitioner has failed to meet this criterion.

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).

At the time of the initial visa petition filing in January 2010, the petitioner was completing his Ph.D. studies at Thapar University in India. His curriculum vitae shows that he worked as a post graduate

well as the director’s, understanding of the AMI’s Rules is based on the text provided in the incomplete copy of the Rules.

lecture at D.A.V. College from July 2006 to April 2007. In support of this filing, counsel, relying solely on two reference letters, one dated December 15, 2009, from [REDACTED] and the other dated December 21, 2009, from [REDACTED] Head of Thapar University's Department of Biotechnology and Environmental Sciences, asserted that the petitioner meets the original scientific contributions of major significance criterion under 8 C.F.R. § 204.5(h)(3)(v). In his March 24, 2010 response to the director's request for evidence, counsel provided additional documents. The additional documents include the petitioner's scholarly articles, evidence of other authors' citation of the petitioner's articles and the petitioner's presentations at conferences.⁵ In her June 25, 2010 decision, however, the director concluded that the petitioner has not met this criterion. On appeal, counsel, relying on three reference letters – the two letters mentioned above and a December 9, 2009 letter from [REDACTED] again contends that the petitioner meets this criterion.

Under the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v), the petitioner must show both that his scientific contributions are original, and that they are of major significance in the field of biotechnology. [REDACTED] who supervised the petitioner during his Ph.D. studies, stated in his December 15, 2009 reference letter that the petitioner “made an important contribution in the field of environmental biotechnology” and that his “work could have critical applications in remediation of industrial wastewater.” [REDACTED] concluded his letter by stating his belief that “if [the petitioner] gets a chance to engage in further research in his field of expertise, he will contribute immensely in the area of wastewater treatment technologies.” This letter, however, is insufficient to show that the petitioner's work or research already constitutes either original contributions or contributions of major significance in the field of biotechnology. Indeed, there is no mention in [REDACTED] letter that the petitioner's research and findings relating to wastewater treatment are either original or of major significance. In fact, the impact of the petitioner's research, if any, is unknown and [REDACTED] merely predicted and speculated that there could be some level of impact if the petitioner were allowed to continue his research.

In his December 9, 2009 letter, [REDACTED] stated that “the contribution made and being made by [the petitioner] in the research and academic [sic] substantially exceed those being made by majority of research scholars and teachers at his age.” [REDACTED] further stated that the petitioner “has many original ideas relating to [the] use of microalgae, bacteria and industrial biowastes for removal of heavy metals from wastewater streams.” The letter, however, does not specify what these original ideas are, or if they are of major significance in the field of biotechnology. Merely repeating the language of the statute or regulations, however, does not satisfy the petitioner's burden of proof. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, No. 95 Civ. 10729, 1997 WL 188942 at *5 (S.D.N.Y. Apr. 18, 1997). Similarly, USCIS need not accept primarily conclusory assertions. See *1756, Inc. v. Attorney General of United States*, 745 F. Supp. 9, (D.C. Dist. 1990). Finally, like [REDACTED] closed his letter by stating his belief that “if [the petitioner] gets a chance to engage in

⁵ Although counsel's response is dated March 24, 2008, it appears that “2008” is a typographic error, because the director's request for evidence is dated February 19, 2010.

further research in his field of expertise, it may have important consequences in the area of bioremediation and biofuels development.” Essentially, [REDACTED] speculated in his letter that the petitioner’s research “may have important consequences” if it were continued. Based on the information provided in [REDACTED] letter, the AAO concludes that there is insufficient evidence to find that the petitioner has already made any original contribution of major significance in the field of biotechnology.

Similarly, [REDACTED] December 21, 2009 letter also does not show that the petitioner’s work or research constitutes either original contributions or contributions of major significance in the field of biotechnology. In his letter, [REDACTED] stated that the petitioner’s Ph.D. thesis work, entitled “Microalgal Diversity and its Role in Wastewater Treatment” is being “evaluated by renowned experts at both national and international level.” This indicates that at the time he wrote the letter, biotechnology experts had not determined the value of the petitioner’s research. [REDACTED] then stated that the petitioner had “made a substantial progress” in three aspects of environmental biotechnology, and concluded: “I strongly recommend that [the petitioner] be considered as a prospective & promising candidate for a suitable position at your place where his expertise and experience could be well justified.” Making a substantial progress, however, does not equate to making original contributions of major significance, which is required under this criterion.

In support of his assertion that the petitioner meets this criterion, counsel has submitted other evidence, including evidence showing that (1) the petitioner had published scholarly articles, (2) he had written a chapter in the book [REDACTED] which [REDACTED] an assistant professor in the Khalsa College Patiala in India, found to be “helpful [to students] for the better understanding of the subject,” (3) his thesis was referenced in the thesis of a fellow student at Thapar University, (4) his article “gave [REDACTED] a research scientist at Thapar University] a few worthy directions which could solve some of [the researcher’s] research problems,” (5) he had presented his research in conferences, and (6) reference letters from [REDACTED] a senior consultant to [REDACTED] and from [REDACTED] “a clergyman and respected member of [an unspecified] profession” from Evansville, Indiana. The evidence, however, is insufficient to show that the petitioner’s research, writing or conference presentations are widely influential as would be expected of contributions in the field of biotechnology that are both original and of major significance.

Accordingly, based on a review of all the evidence in the record, including documents not specifically mentioned above, the AAO concludes that the petitioner has not provided evidence of his original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field of biotechnology. See 8 C.F.R. § 204.5(h)(3)(v).

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 petitioner provided evidence that he authored a number of articles, including [REDACTED] a presentation published in [REDACTED]

██████████ published in the *Indian Journal of Experimental Biology* in 2008, (3) a book chapter, entitled ██████████ published in India, (4) ██████████ in October 2008, and (5) ██████████ accepted for publication in the *Indian Journal of Microbiology* in an unspecified year. Based on the petitioner's reference letters, the AAO finds that the *Indian Journal of Experimental Biology* and the *Indian Journal of Microbiology* constitute professional publications. Accordingly, the AAO finds that the petitioner has met the criterion under 8 C.F.R. § 204.5(h)(3)(vi).⁶

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).

In his appellate brief, counsel asserts that the petitioner meets this criterion because he presented his research and/or participated in a number of conferences, including (1) the Proceedings for the Ninth International in Situ and On-Site Bioremediation Symposium, in Baltimore, Maryland in 2007, (2) the 45th Annual AMI Conference in 2004, (3) the 46th Annual AMI Conference in 2005, (4) a 2005 International Conference on Microbial Diversity, (5) a 2004 International Conference on Bioconvergence, and (6) a 2005 Conference held at the University of Delhi South Campus in New Delhi, India. Counsel, however, has not provided any legal basis to support his assertion that the petitioner's scientific presentations made at biotechnology conferences constitute artistic exhibitions or showcases. The plain language of the criterion suggests that it is limited to evidence relating to the visual arts. This interpretation is longstanding and has been upheld by a federal district court. *See Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 1, 7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that even performances by a performing artist do not fall under the regulation at 8 C.F.R. § 204.5(h)(3)(vii)). In this case, as the petitioner is not a visual artist and has not created tangible pieces of art that were on display at artistic exhibitions or showcases, the AAO finds that the petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(vii). As at least one presentation appeared in a published conference proceeding publication, this evidence is best considered under the authorship of scholarly articles criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(vi), which it was.

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).

In support of his initial visa petition filing, relying on reference letters, counsel contended that the petitioner has performed in a leading or critical role for D.A.V. College in India. Specifically, ██████████ the Principal of the college, stated in his December 9, 2009 letter, that the petitioner "has

⁶ As the AAO has found in the petitioner's favor as to this criterion, it will not address additional issues raised in counsel's appellate brief.

played a critical role in the establishment of the newly introduced Department of Biotechnology in [D.A.V. College], without him it would never been [sic] an easy task.”

Similarly, [REDACTED] Principal Investigator of Fast Track Project in Punjab University’s Department of Science and Technology, stated in his January 25, 2010 letter (grammar as it appears in the original):

Today Department of Biotechnology at D.A.V. College . . . [is] well equipped and would never been [sic] an easy task without the leading contribution of [the petitioner, who] worked very hard for the establishment of this department at its initial phase by bring [sic] the world class technology and creating the best environment for the working of sophisticated instruments. As an active young researcher working in the field of biotechnology, always have been [sic] updated with the latest technology available and experience of routine handling of these instruments made his contributions extraordinary and critical for the department.

Merely repeating the language of the statute or regulations without providing much details or specifics as to what the petitioner did, however, does not satisfy the petitioner’s burden of proof. *See Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108; *Ayvr Associates, Inc.*, 1997 WL 188942 at *5. Moreover, USCIS need not accept primarily conclusory assertions. *See 1756, Inc.*, 745 F. Supp. at 9.

Even had the evidence established that the petitioner played a significant part in setting up D.A.V. College’s Biotechnology Department, the AAO would nonetheless conclude that the evidence did not demonstrate that the petitioner’s playing a significant part in a department within a college constituted performing in a leading or critical role for the college with an unknown number of departments. The plain language of the criterion requires that the petitioner performs in a leading or critical role for the organizations or establishments, not just a department within an organization or establishment.

Moreover, assuming *arguendo* that the petitioner had performed in a leading or critical role for D.A.V. College and that the college has a distinguished reputation, the petitioner nonetheless would not meet this criterion, because the plain language of the criterion states that the petitioner must play a leading or critical role for more than one organization or establishment that has a distinguished reputation. Counsel has only asserted that the petitioner performs such a role in one organization, D.A.V. College.

Accordingly, based on all the evidence in the record, including documents not specifically mentioned above, the AAO concludes that the petitioner has not submitted evidence that he has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. *See* 8 C.F.R. § 204.5(h)(3)(viii).

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. 8 C.F.R. § 204.5(h)(3)(ix).

Counsel contended that the petitioner meets this criterion because: (1) the petitioner receives 16,630 Indian rupees a month for his teaching position as a lecturer-in-biotechnology at D.A.V. College, (2) [REDACTED] who worked as a lecturer in biotechnology “on [a] purely temporary basis,” received 8,500 in Indian rupees a month for her teaching position, (3) a two-page March 29, 2010 online printout that counsel claimed shows that the average salary in the petitioner’s position is approximately 10,000 in Indian rupees, and (4) according to [REDACTED] the petitioner’s salary is “the highest salary for his services in this college set by Indian government and University grant commission for the said post”

First, the AAO notes that the evidence does not sufficiently show that the petitioner and [REDACTED] positions were the same. The April 27, 2010 letter issued by D.A.V. College clearly indicates that [REDACTED] was a temporary employee; while a similar letter issued by D.A.V. College makes no reference that the petitioner too was a temporary employee. Moreover, the AAO is without any information as to [REDACTED] educational background or how frequently she taught classes. In short, the AAO cannot conclude that the petitioner and Ms. Trikha’s positions were the same or substantially similarly.

Second, the AAO disagrees with counsel’s claim that the March 29, 2010 online printout establishes the average salary for someone in the petitioner’s teaching position. A review of the online printout shows that it is the Google search results for the search query “DAV college Abohar 10000 consolidated.” One of the results reads, “10000 or above per annum – leave shall be granted without pay; Principal, D.A.V. College of Education. 3. Education. Abohar. 4. Business Management &” Nothing in the two-page printout establishes the average salary of someone in the petitioner’s teaching position.

Finally, the D.A.V. College hired the petitioner to work as an educator and to teach students. The petitioner’s ability in education does not equate to his ability in biotechnology research, which is the basis of the visa petition. As such, his salary as a teacher does not sufficiently show what his salary would be as a biotechnology researcher.

Accordingly, the AAO finds that the petitioner has not shown that he has commanded a high salary or other significantly high remuneration for services, in relation to others in the field of biotechnology. *See* 8 C.F.R. § 204.5(h)(3)(ix).

For the reasons discussed above, the petitioner has not submitted the requisite evidence under at least three of the evidentiary categories for which evidence must be submitted to meet the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability.

B. Summary

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

III. CONCLUSION

As discussed, on March 21, 2011, the AAO sent a facsimile to counsel's office, requesting counsel to submit an updated Form G-28 within ten calendar days. Counsel has not submitted the requested updated Form G-28. Accordingly, the AAO rejects the instant appeal as improperly filed, under the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(2). In the alternative, the AAO finds that the appeal would fail on its merits because the documentation the petitioner has submitted in support of a claim of extraordinary ability does not clearly demonstrate that he has achieved sustained national or international acclaim and is one of the small percentage who have 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 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 antecedent regulatory requirement of presenting three types of evidence. *Kazarian*, 596 F.3d 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 petitioner has not overcome the grounds of denial.

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* INA §§ 103(a)(1), 204(b); 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 appeal was not filed with the required new Form G-28 and counsel did not remedy that deficiency upon request. Accordingly, the appeal must be rejected as improperly filed under the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(2).

ORDER: The appeal is rejected.