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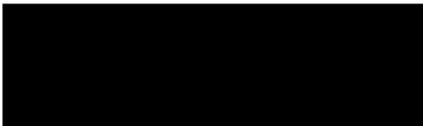
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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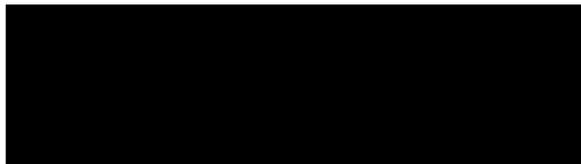


IN RE: Petitioner:
Beneficiary:



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.

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 with the field office or service center that originally decided your case by filing a 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 business, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A) as a Training Manager and Territory Sales Manager.¹ The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his 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, counsel states that the petitioner meets four of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3). More specifically, counsel asserts that the petitioner meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i), (v), (viii), 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,

¹ The record reflects that the alien filed the Form I-140, Immigrant Petition for Alien Worker, with the Nebraska Service Center on February 23, 2010, listing [REDACTED] as the petitioner under Part 1 of the form. Part 8 of the Form I-140, however, was signed by the alien. The regulation at 8 C.F.R. § 103.2(a)(2) states: “An applicant or petitioner must sign his or her benefit request.” Therefore, the alien is the petitioner in this matter.

(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.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 Criteria³

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

In response to the director's request for evidence (RFE), the petitioner submitted an August 18, 2010 letter from [REDACTED] stating:

[The petitioner's] accomplishments include:

- Leading candidate for Account Manager of the Year for 2010 based on year to date numbers;
- Salesman of the Month for February, March and July 2010;
- [REDACTED] for selling more than 25 used units in 2009;
- [REDACTED] awards in 2009 for most Allied Sales, greatest number of orders and 2nd place for most new customers;
- [REDACTED] awards in 2008 for most Allied Sales and most new customers and 2nd place for greatest number of orders;
- [REDACTED] in 2007 for most new customers and 2nd place for most Allied Sales;
- Mentored [REDACTED] in 2007-2008 before training program was formalized;
- Leading role in training of new Business Development Representatives [REDACTED] who started August 9th, 2010 and [REDACTED] who will start on August 23rd, 2010;
- Undertook additional responsibilities for Customer Service due to layoffs in 2009;
- Undertook additional territory coverage due to layoffs in 2010.

The petitioner also submitted the following:

1. [REDACTED] Award for selling 25 Units (2009);
2. [REDACTED] award plaque for "Most Allied Sales" (2009);
3. [REDACTED] award plaque for "Most Orders" (2009);
4. [REDACTED] "Account Manager of the Month: February 2010" (dated March 16, 2010);
5. [REDACTED] "Account Manager of the Month: March 2010" (dated April 20, 2010);
6. [REDACTED] Solutions "Account Manager of the Month: July 2010" (dated August 16, 2010);

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

7. [REDACTED] "Account Manager of the Month: September 2010" (dated October 18, 2010);
8. [REDACTED] "Account Manager of the Month: October 2010" (dated November 16, 2010);
9. [REDACTED] "Account Manager of the Month: November 2010" (dated December 9, 2010);
10. [REDACTED] "Report from the Field" recognizing the petitioner for "Competitive Conversion," "Competitive Triumph," and "Account Conversion" based on the number of trucks sold.

The preceding awards from [REDACTED] reflect institutional recognition from the petitioner's employer rather than nationally or internationally recognized prizes or awards for excellence in the field of endeavor. Further, the AAO notes that the "Account Manager of the Month" awards (items 4 – 9 above) and the "Salesman of the Month" awards for March 2010 and July 2010 (as mentioned in [REDACTED]'s letter) were received by the petitioner subsequent to the petition's filing date. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Accordingly, the AAO will not consider awards received by the petitioner after February 23, 2010 in this proceeding. Regardless, the petitioner did not submit evidence of the national or international *recognition* of his particular awards, such as national or widespread local coverage of his awards in industry or general media. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this case, there is no documentary evidence demonstrating that the petitioner's awards were recognized beyond his employer and therefore commensurate with nationally or internationally recognized prizes or awards for excellence in the field. Accordingly, the petitioner has not established that he meets this regulatory criterion.

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

In the director's decision, she determined that the petitioner failed to establish his eligibility for this regulatory criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of *major significance* in the field." [Emphasis added.] Here, the evidence must be reviewed to see whether it rises to the level of original business-related contributions "of major significance in the field." The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

The petitioner initially submitted a January 28, 2010 letter from [REDACTED] [REDACTED] stating:

[The petitioner] helped create our 'Success 4' Program which was developed specifically to help our new Sales Representatives with the technical aspects of our profession. This

knowledge is critical in increasing their level of confidence which leads them to more success and longer careers with the company.

There is no documentary evidence demonstrating that the petitioner's work in helping to create the "Success 4" Program for [REDACTED] is recognized beyond his company such that his work constitutes an original business-related contribution of major significance in the field. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) specifically requires that the petitioner's original contributions be "of major significance in the field" rather than limited to a particular company or employer. The record lacks documentary evidence showing that the petitioner has made original business-related contributions that have significantly influenced or impacted his field at large. The opinion of [REDACTED] is not without weight and has been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. See *id.* at 795-796; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of [REDACTED] statement and how he became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a Training Manager or Territory Sales Manager who has made original contributions of major significance in the field.

The petitioner also submitted information printed from [REDACTED] website about the "Maxipacker" High Density Racking System, but there is no documentary evidence showing that the petitioner was the originator of this system. Counsel states that the petitioner "has brought forth his expertise in specialized products such as high density Pallet shuttle storage system" and that the petitioner's "expertise in this type of product will help differentiate [REDACTED] product offerings." Assuming the petitioner's skills and expertise are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. See *Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm'r 1998). Regardless, there is no evidence showing that the petitioner's work equates to original business-related contributions of major significance in the field.

The petitioner's initial evidence also included a stock certificate indicating that [REDACTED] Counsel states:

Prior to working for [REDACTED] [the petitioner] worked for [REDACTED] As a Sales Representative he built strong relationships with such corporations as [REDACTED] He created a mentoring program for new sales representatives and enhanced training program for new sales representatives.

The record, however, does not include supporting documentary evidence showing that the petitioner created the preceding programs for [REDACTED]'s new sales representatives. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Regardless, there is no evidence demonstrating that the petitioner's mentoring and training programs for [REDACTED] constitute business-related contributions of major significance in the field.

In response to the director's RFE, the petitioner submitted a training manual he put together for his company entitled "RHSI Training." On appeal, the petitioner submits additional [REDACTED]. There is no evidence showing that the petitioner's training manuals have significantly impacted the field beyond [REDACTED] sales force. As previously discussed, contributions limited to the petitioner's company or employer do not equate to original contributions of major significance to the field as a whole. There is no documentary evidence demonstrating that the petitioner's work rises to the level of original business-related contributions of "major significance" in the field. For example, the record does not indicate the extent of the petitioner's influence on other training managers and territory sales managers in the field, nor does it show that the industry has specifically changed as a result of his work. Without additional, specific evidence showing that the petitioner's original work has been unusually influential, widely applied throughout his field, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that he meets this regulatory criterion.

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

The petitioner submitted documentation indicating that he has been employed as a Training Manager and Territory Sales Manager for [REDACTED]. The petitioner also submitted information about [REDACTED]. USCIS need not rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 317 Fed. Appx. 680 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). The director found that the petitioner has performed in a leading or critical role for [REDACTED] but that the petitioner had failed to establish that the company has a distinguished reputation. On appeal, the petitioner submits information and articles about [REDACTED] the parent company of [REDACTED]. The documentation pertaining to [REDACTED] parent company in [REDACTED] however, is not sufficient to demonstrate that the petitioner's immediate employer has a distinguished reputation.

Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence that the petitioner has performed in a leading or critical role for distinguished "organizations or

establishments” in the plural. The use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of “letter(s).” Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS’ ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at *1, *12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *1, *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for “a” bachelor’s degree or “a” foreign equivalent degree at 8 C.F.R. § 204.5(1)(2) requires a single degree rather than a combination of academic credentials). Therefore, even if the petitioner were to submit documentary evidence showing that his role and [REDACTED] Solutions’ reputation meet the elements of this regulatory criterion, which he has not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence of a leading or critical role for more than one distinguished organization or establishment.

In light of the above, the petitioner has not established that he 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.

In response to the director’s RFE, the petitioner submitted his Forms W-2, Wage and Tax Statements, reflecting gross pay of [REDACTED]. The petitioner also submitted prevailing wage search results from the U.S. Department of Labor for “Training and Development Managers” and “Sales Managers” in California. According to the submitted prevailing wage search results for Training and Development Managers, the Level 3 (experienced) wage is [REDACTED] per year and the Level 4 (fully competent) wage is [REDACTED] per year. Further, according to the submitted prevailing wage search results for Sales Managers, the Level 3 (experienced) wage is [REDACTED] per year and the Level 4 (fully competent) wage is [REDACTED] per year. The preceding Level 3 and Level 4 prevailing wage levels are well above the petitioner’s yearly gross pay. The petitioner also submitted “National Salary Data” from www.payscale.com indicating a pay range of “[REDACTED]” for Sales Training Managers and a pay range of “[REDACTED]” for Regional Sales Managers. The petitioner’s yearly gross earnings fall well below the upper pay level of [REDACTED] for Sales Training Managers and [REDACTED] for Regional Sales Managers. Thus, the preceding information from www.payscale.com and the U.S. Department of Labor fails to demonstrate that the petitioner’s yearly gross earnings constitute a “high salary or other significantly high remuneration for services, in relation to others in the field.” [Emphasis added.] The petitioner has failed to establish that he has earned a high salary or significantly high remuneration in comparison with those 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 he meets this regulatory criterion.

B. Summary

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

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

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.

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.

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).