

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



DATE: **NOV 03 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:

SELF-REPRESENTED

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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which 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 sciences, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien’s “sustained national or international acclaim” and present “extensive documentation” of the alien’s achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, the petitioner submits a statement. For the reasons discussed below, upon review of the entire record, including the evidence submitted on appeal, the AAO upholds the director's conclusion that the petitioner has not established eligibility for the exclusive classification sought.

I. LAW

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

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien’s entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term “extraordinary ability” refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien’s sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO’s decision to deny the petition, the court took issue with the AAO’s evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent “final merits determination.” *Id.* at 1121-22.

The court stated that the AAO’s evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that “the proper procedure is to count the types of evidence provided (which the AAO did),” and if the petitioner failed to submit sufficient evidence, “the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded).” *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.*

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

II. ANALYSIS

A. Evidentiary Criteria²

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

Contrary to the petitioner's assertion on appeal that "USCIS accepted the award for substantial contribution as a speaker at the [REDACTED] the director simply stated that it "appears to qualify," but as stated in his request for evidence, "no background information has been submitted to support this award and no evidence has been submitted to document the national or international nature of the award." In response to the director's request for evidence, the petitioner submitted what appears to be a press release regarding the event and the large number of international attendees. However, the press release does not include any information about the award or the selection criteria for the award.

While the AAO disagrees with the director's statement that "[t]he Best Paper Awards appear to have been won by multiple individuals," implying that the award must be won by the petitioner alone, the record lacks evidence that the awards were nationally or internationally recognized for excellence in the field. Although the petitioner submitted evidence that the conference had a large number of international attendees, international attendance is not evidence that the prize is internationally, or even nationally, recognized and is not evidence that the prize was given for excellence in the field. The petitioner also submitted what is purportedly a copy of the [REDACTED] newsletter which mentions the receipt of the award. However, the excerpt, even if it were from the [REDACTED] newsletter as claimed by the petitioner, only indicates that the award was recognized within the [REDACTED]

On appeal, the petitioner also asserts that his "award for ranking 8th in all of India in the [REDACTED] [REDACTED] was not considered in the original application because it restricted the awardees to students." The AAO is not persuaded that receiving an award as a student at the age of twelve or thirteen equates to receiving an award for excellence in the petitioner's field of endeavor. Unlike the "restricted" examples the petitioner provides, such as the [REDACTED], an award limited to pre-college students in science is limited to a pool of candidates who are not working in the field.

The AAO notes that the petitioner also initially submitted evidence of the TOCAB Institute award, but does not address it on appeal. Thus, the petitioner has abandoned any claim regarding this award. See *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at *9 (E.D. N.Y. Sept. 30, 2011).

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

In the director's request for evidence, he specifically requested, among other things, "documentary evidence of the criteria used to grant the prize or award, including evidence that a criterion for winning the award or prize was excellence in the field" and "the significance of the prizes or awards, to include the national or international recognition that the prizes or awards share." The petitioner failed to provide such evidence in response to the director's request for evidence and on appeal.

In light of the above, the AAO affirms the director's decision that the petitioner has not satisfied the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

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 concluded that the petitioner did not submit qualifying evidence under 8 C.F.R. § 204.5(h)(3)(ii). On appeal, the petitioner asserts that "USCIS did not consider" additional information submitted in response to the director's request for evidence regarding his membership in the [REDACTED] and the [REDACTED] and [REDACTED]. As stated by the director in his denial, the "evidence must demonstrate that the association requires outstanding achievement as an essential condition for admission to membership."

In response to the director's request for evidence, the petitioner submitted a portion of the [REDACTED] bylaws and the [REDACTED] bylaws, along with a letter from the Chair of each committee. According to the [REDACTED] bylaws, "[m]embers of a Committee shall be selected on the basis of their qualifications and their ability to contribute to the Committee's work." [REDACTED] Chair of the [REDACTED] and a former professor of the petitioner, states that "membership is only open to accomplished researchers whose work is well documented with many publications in peer-reviewed journals, recognition in their area of expertise, awards and [a] track record of original research." The [REDACTED] bylaws state that the "[c]ommittee is composed of persons actively conducting research in Design Automation" and "membership...is attained by active participation at the conference and at the committee meeting. By default, those who actively participate become members of the committee." [REDACTED] Chair of the [REDACTED] states that "[m]embers of the committee are typically distinguished researchers in their fields." It is clear from the bylaws and from the letters that outstanding achievement is not required to be a member of either of these committees. The AAO also notes that the plain language of the regulation requires evidence that membership *in the association*, and not a subsequent selection to a committee, requires outstanding achievement.

The AAO notes that the petitioner also submitted evidence of membership in *Who's Who in America 2012*, but does not address it on appeal. Thus, the petitioner has abandoned any claim regarding this membership. *Id.*

In light of the above, the AAO affirms the director's decision that the petitioner has not satisfied the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

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

The director found that the petitioner satisfies the plain language requirements of the regulation at § 204.5(h)(3)(iv) and the AAO affirms the director's finding.

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

On appeal, the petitioner asserts that, in addition to letters of reference, the petitioner's original contributions are evidenced by his publications, textbook, awards, memberships, mentions in newsletters and invitations to 1) submit papers, 2) serve on panels and 3) present his work. While the petitioner has received a few awards, co-authored several articles which have been cited, presented his work at a number of conferences and is a member of a few associations, the regulations contain separate criteria regarding awards, membership and the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(i), (ii) and (vi). If the regulations are to be interpreted with any logic, it must be presumed that the regulation views contributions as a separate evidentiary requirement from awards, memberships and scholarly articles.³ The simple fact that the petitioner's findings have been published in journals and a textbook and presented at conferences does not create a presumption that the findings, upon dissemination in the field, impacted the field, or are otherwise original contributions of major significance. Furthermore, as has previously been established, the petitioner did not meet the awards or the membership criterion.

As stated by the director in his denial, "[y]ou should be able to show...how the field has changed as a result of your work beyond the incremental improvements in knowledge and understanding expected from valid original research. You should show that your work has been adopted by many or that your work has led to company investment in new products or processes, not that there is potential to do so at some time in the future."

On appeal, the petitioner asserts that although "USCIS acknowledged" most of the above-mentioned evidence, USCIS failed to consider four of ten submitted reference letters, three of which were submitted in response to the director's request for evidence. In general, the letters praise the petitioner's skills and research findings. The petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of

³ Publication and presentations are not sufficient evidence under 8 C.F.R. § 204.5(h)(3)(v) absent evidence that they were of "major significance." *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reaffirmed its holding that the AAO did not abuse its discretion in finding that the alien had not demonstrated contributions of major significance. 596 F.3d at 1122.

knowledge in the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. The AAO must presume that the phrase "major significance" is not superfluous and, thus, that 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).

Dr. [REDACTED] a Research Mechanical Engineer at the [REDACTED] states that the petitioner, "in conjunction with his research group[,]...has been contributing to the state of the art in reliability engineering on a consistent basis." The letter also states that the petitioner "has developed a simulation code that assists in making reliability-cost tradeoff decisions in an optimal way." Writing code is a function of an engineer's job. The letter fails to demonstrate that the code is a contribution of major significance to the field of engineering, rather than a contribution to a client. The AAO notes that according to a letter from [REDACTED]

[REDACTED] at Oakland University, where the petitioner is a Postdoctoral Associate, the petitioner "has already shown that he is an integral part of the research team that *will* directly affect this U[.]S[.] Army project. He *helped* our research on reliability estimation and component reliability allocation. He also *proposed* a design decision making methodology for making decisions using uncertain designer preferences." (Emphasis added.) [REDACTED] the recipient of funding from [REDACTED] also states that the petitioner's "research...can prove to be the right step in the right direction." However, the letter fails to demonstrate that the petitioner has already made an original contribution of major significance, rather than the potential for a future contribution. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katighak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

[REDACTED] and [REDACTED] at [REDACTED] states that his foundation has reached "an understanding" with [REDACTED] "to develop methods to optimally utilize [] waste heat in greenhouses," based on the petitioner's research. Again, the letter fails to demonstrate that the petitioner has already made an original contribution of major significance, rather than the potential for a future contribution. *Id.*

[REDACTED], a faculty member at the [REDACTED], states that the petitioner's research on "formal decision based design methods...fills th[e] gap" and that his "current research directions are also promising." The petitioner has also "recently proposed a way to infer system topology from tests." As with all of the submitted letters, the letter fails to demonstrate that the petitioner has already made an original contribution of major significance, rather than the potential for a future contribution. *Id.*

[REDACTED] an Assistant Professor at the University of [REDACTED] states that "[i]t is an excellent honor to receive the best paper award" for the paper he co-authored with the petitioner and that the petitioner's "jointly published [] book...is a timely contribution to the engineering design community and [the] American Society for Mechanical Engineers." The award

was contemporaneous with the actual presentation and does not establish the ultimate impact of the work upon dissemination. The letter fails to identify a single original contribution, let alone one that could be considered of major significance.

Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010).⁴ Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

The ten regulatory criteria at 8 C.F.R. § 204.5(h)(3) reflect the statutory demand for “extensive documentation” in section 203(b)(1)(A)(i) of the Act. 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 of original contributions of major significance.

The petitioner also asserts on appeal that “[c]itations are only one criterion for judging the quality of research, and in light of universal recognition of my work, should have played a minor part in the decision.” While the AAO may agree that citations are not the only type of evidence that can show the impact of a published article, it is clear from the director’s decision that the petitioner did not meet this criterion based on the evidence submitted, not simply because of “a very small number of citations by other researchers.”

In light of the above, the AAO affirms the director’s decision that the petitioner has not satisfied the plain language requirements of the regulation at 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.

The director found that the petitioner satisfies the plain language requirements of the regulation at § 204.5(h)(3)(vi) and the AAO affirms the director’s finding.

C. Summary

As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

⁴ In 2010, the *Kazarian* court reiterated that the AAO’s conclusion that “letters from physics professors attesting to [the alien’s] contributions in the field” were insufficient was “consistent with the relevant regulatory language.” 596 F.3d at 1122.

III. CONCLUSION

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.⁵ Rather, the proper conclusion is that the petitioner failed to demonstrate that he has satisfied the antecedent regulatory requirement of three types 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.

⁵ 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).