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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

B2



DATE: SEP 24 2012 Office: TEXAS 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, Texas 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 in this instance 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 solely challenges one of the director’s findings.¹ The petitioner asserts that he has established at least three of the regulatory criteria and has otherwise met the statutory requirements as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. The AAO affirms the director’s findings.

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

¹ The record reflects that the petitioner originally submitted evidence for consideration of five of the regulatory criteria under the regulations. Subsequent to the director’s decision concluding that the petitioner met only two of the regulatory criteria, the petitioner only raised a challenge to one of the director’s findings. Consequently, the AAO finds that the petitioner abandons the remaining claims on appeal. See *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005) citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at *9 (E.D. N.Y. Sept. 30, 2011).

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.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

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).

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.*

II. ANALYSIS

A. Evidentiary Criteria³

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).

The director found that the petitioner failed to establish the above criterion. In challenging this finding on appeal, the petitioner submitted new documentary evidence, some of which post-dates the filing date of his Form I-140 petition.

As an initial matter, the AAO will not consider evidence that post-dates the filing date of the petitioner's visa petition. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The petitioner relies upon the strength of three of his scholarly articles to stake the claim that he has contributions of major significance in the field. *See* 8 C.F.R. § 204.5(h)(3)(v). The regulations contain a separate criterion regarding the authorship of published articles. 8 C.F.R. § 204.5(h)(3)(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 scholarly articles.⁴

The petitioner maintains that his articles indicate contributions to the field, in part, due to the multiple citations of his article by other authors and researchers. Some of the citations that the petitioner highlights have been attributed since the priority date of the underlying visa petition and they will not be given any weight. The petitioner submits two lists comprised of publications that cite one of his two articles. The AAO observes that the citations of the first article mostly pre-date the filing date of his petition. However, twelve of the fourteen citations referencing his second article reflect a date of publication subsequent to his filing date. The AAO will not consider those citations that post-date the filing date. 8 C.F.R. §§ 103.2(1), (12); *see Matter of Katigbak*, 14 I&N at 49. Furthermore, the lists of citations do not contain the authors of those publications. Without information on authorship, the AAO cannot determine whether or not the list contains self-citations by the petitioner or his co-authors. The

³ The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

⁴ 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.

petitioner also has failed to identify the source of citations. In light of the above, the AAO finds that the petitioner has not demonstrated that his articles individually are garnering significant citations.

While the petitioner's research may be of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge has inherently made a contribution of major significance as a whole. To the extent that the petitioner attempts to demonstrate that his work goes beyond such a degree of contribution, he has provided letters from other researchers and scholars to substantiate his claim.

writes in his May 1, 2011, letter that he has collaborated with the petitioner over the past two years. continues:

Because [the petitioner] has an unusually broad profile as a scientist, he has been able to combine the insight from two different research areas into the "solvent density guided virtual screening method" and exploit the technique in drug discovery projects. I am currently evaluating hits obtained by this method and testing them for activity at nicotine acetylcholine receptors.

letter, while noting that the petitioner's exposure to two different areas uniquely positions him to be effective in a particular research methodology, does not specifically address how the petitioner's original work has made an impact to the field at large. His comments merely tend to indicate that the petitioner has made incremental progress to the general pool of knowledge.

In a letter dated September 15, 2011, where the petitioner worked as a research associate, writes:

After having become well-acquainted with his research contributions to the field of x-ray crystallography, it is in my expert and professional opinion that [the petitioner] is an exceptional researcher whose research abilities far outweigh those of many of his other similarly-educated peers.

In commenting upon the petitioner's research, he speculates as to the petitioner's future impact as follows:

[The petitioner's] findings have been accepted for publication in the a widely-read and authoritative scientific publication which has established [the petitioner] as a promising researcher in the future of computer-aided drug design. By developing and utilizing such a novel technique, I believe that [the petitioner's] research experiences and original contributions will lead to further significant finding in the areas of computer-aided drug design.

Some of [REDACTED] comments are directed at the fact that the petitioner has distinguished himself from his peers. The petitioner was a Research Associate as part of the [REDACTED] at the time he filed his Form I-140 and is currently a [REDACTED]

The AAO observes that these positions are in keeping with a scholar and researcher in the early part of his career. See the Department of Labor's Occupational Outlook Handbook, <http://www.bls.gov/ooh/Life-Physical-and-Social-Science/Biochemists-and-biophysicists.htm#tab-4>. And while the comments about the petitioner's research talents in relation to his peers are complimentary, they are vague and do not specifically show how his talents have made a significant contribution to the field as a whole. [REDACTED] letter states that the petitioner's research holds promise of significant findings for the future. But outside of mentioning one article authored by the petitioner, the letter does not detail how his research currently constitutes as a contribution of major significance.

In his letter supporting the petitioner's application before USCIS, [REDACTED] a retired [REDACTED] who co-supervised the petitioner's Ph.D. research, largely catalogs the petitioner's work in various labs and the resulting discoveries that led to publications. In referring to the impact of the petitioner's work, [REDACTED] writes, in part:

[The petitioner's] findings have been published in the [REDACTED] a widely-read and authoritative scientific publication which clearly establishes [the petitioner] as a promising researcher in the future of computer-aided drug design. Using this novel technique, I am confident that [the petitioner's] wide array of experiences and original contributions will lead to further significant findings . . .

Significantly, the highlighted excerpts from [REDACTED] letters appear to be virtually identical, suggesting that the language is not their own. Cf. *Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an immigration judge's adverse credibility determination in asylum proceedings based in part on the similarity of some of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

The director determined that the petitioner failed to establish the plain meaning requirements of 8 C.F.R. § 204.5(h)(3)(5), in part, because the director gave limited weight to the letters. The AAO agrees with the director that the opinions of experts in the field, while not without weight, cannot form the cornerstone of a claim of extraordinary ability. Specifically, 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).⁵ USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*,

⁵ 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.

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. The AAO observes that the petitioner's immediate colleagues appear to have authored the support letters. While such letters are useful in explaining the petitioner's role on various research projects, they are less useful in documenting his impact in the field, beyond his immediate circle of colleagues. Furthermore, the letters make conclusory statements that do not explain the impact of the petitioner's research beyond his immediate colleagues. After consideration of all the submitted evidence in support of this criterion, the AAO concludes that the petitioner did not meet his burden of impacting the field. Therefore the AAO affirms the director's finding.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 204.5(h)(3)(i).

While the petitioner originally submitted evidence relating to this criterion with his Form I-140, the director found that he failed to satisfy the requirements of the regulation, and the petitioner does not challenge the finding on appeal. Consequently, the AAO concludes that the petitioner has abandoned his claim regarding this criterion. *See Sepulveda*, 401 F.3d at 1228 n. 2; *Hristov*, 2011 WL 4711885 at *9.

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).

Like the criterion noted above, the petitioner does not challenge on appeal the director's finding that he failed to meet this criterion. Accordingly, the AAO concludes that the petitioner has abandoned his claim regarding this criterion. *See Sepulveda*, 401 F.3d at 1228 n. 2; *Hristov*, 2011 WL 4711885 at *9.

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 specialization for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv).

The director determined the petitioner established this criterion and the AAO affirms the finding.

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 AAO affirms the director in finding that the petitioner established this criterion.

B. Summary

The petitioner has submitted evidence that qualifies under only two of the regulatory subparagraphs, 8 C.F.R. § 204.5(h)(3)(iv) and (vi).

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.

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.⁶ Rather, the proper conclusion is that the petitioner has failed to satisfy the 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.

⁶ 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).