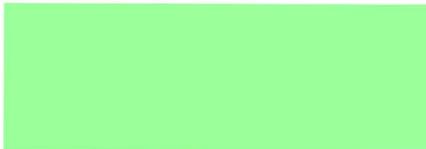




U.S. Citizenship
and Immigration
Services

(b)(1)



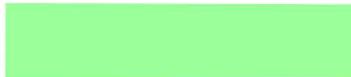
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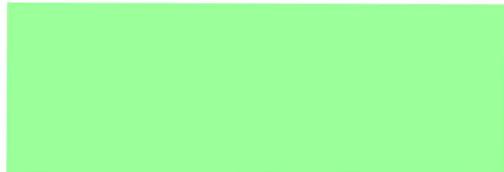


IN RE: Petitioner:
Beneficiary:



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition on April 19, 2012 and dismissed the petitioner's motion to reopen and motion to reconsider on March 5, 2013. The petition 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 arts as a musician, 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, counsel submits a brief. Although counsel's brief states that a letter from the Embassy of Nepal, along with a copy of the director's March 15, 2013 decision, is included, the record only contains a copy of the director's decision. For the reasons discussed below, the record supports 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.

Initially, the petitioner submitted a [REDACTED] from the [REDACTED] Region Development Center that includes a signature from the Chief Guest, the President of Nepal; a certificate of special class from the Radio Broadcasting Development Committee of Radio Nepal; and letters of appreciation. As permitted by the regulation at 8 C.F.R. § 204.5(g)(2), the director specifically and clearly requested additional evidence regarding the submitted certificates, including the criteria for the awards, the significance of the awards, the reputation of the organization or panel issuing the award, the candidate pool for the award, the number of prizes or awards issued each year and previous winners of the awards. The petitioner failed to include any of the additional requested evidence in his response. The director determined that the record contained no evidence explaining the significance of the awards, the evaluation criteria, or the reputation of the issuing authority. He also determined that the record contained no evidence that the field, nationally or internationally, recognizes either of the awards. On motion, counsel asserted that the signature of the President of Nepal demonstrates that the [REDACTED] is nationally recognized and the petitioner submitted information from *Wikipedia* about the [REDACTED] of Nepal that does not address the Award of Honor. The director concluded that the petitioner had not submitted the evidence requested in the previous request for evidence and noted that there are no assurances about the reliability of the content from *Wikipedia*, an open, user-edited internet site. See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008).

On appeal, as previously stated, although counsel stated on appeal that the petitioner was submitting a letter from the Embassy of Nepal regarding the [REDACTED] certificate, the record does not contain a copy of this letter. Even if the letter was in the record, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered,

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

he should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO would not consider the letter.

Finally, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires the petitioner's receipt of more than one prize or award. 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 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 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *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(l)(2) requires a single degree rather than a combination of academic credentials).

Therefore, even if the petitioner had submitted satisfactory evidence regarding the Award of Honor, the petitioner would still not satisfy this criterion.

Furthermore, the petitioner fails to specifically address any of the other previously submitted evidence. Thus, the petitioner has abandoned any claim regarding the other certificate and letters of appreciation. *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); *see also Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

In light of the above, the petitioner has not established that he meets the plain language requirements of this regulatory criterion.

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.

On appeal and in the motions to reopen and reconsider, counsel incorrectly states that the director's decisions "failed to consider the letter from the Music Association of Nepal ("MAN")." In fact, both decisions quote directly from the letter.

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish that the evidence was qualifying. On appeal, counsel repeats previous claims, without explaining why the AAO should find those claims any more persuasive than the director did. The petitioner also fails to provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director's analysis. Therefore, the petitioner has abandoned this issue.

Desravines v. United States Attorney General, No. 08-14861, 343 F. App'x 433, 435 (11th Cir. 2009) (finding that issues not briefed on appeal are deemed abandoned).

In light of the above, the petitioner has not established that he meets the plain language requirements of this regulatory criterion.

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The director discussed the evidence submitted for this criterion, including a brochure containing a fact sheet for the publication *Kamana*, and found that the petitioner failed to establish that the evidence was qualifying. On appeal, counsel repeats previous claims, without explaining why the AAO should find those claims any more persuasive than the director did. The petitioner also fails to provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director's analysis. Therefore, the petitioner has abandoned this issue. *Id.*

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 established that the beneficiary satisfies the plain language requirements of the regulation at § 204.5(h)(3)(iv) and the record supports that finding.

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

The director discussed the evidence submitted for this criterion, including letters praising the petitioner's skills, and found that the petitioner failed to establish that the evidence was qualifying because the letters did not explain how skills is an original contribution of major significance. On appeal, counsel repeats previous claims, without explaining why the AAO should find those claims any more persuasive than the director did. The petitioner also fails to provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director's analysis. Therefore, the petitioner has abandoned this issue. *Id.*

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The record does not support the director's finding that the petitioner meets this regulatory criterion. The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)).

As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

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

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish that the evidence was qualifying. On appeal, counsel merely states that he and the petitioner “reinstate [the] petitioner’s argument in response to the petition that he may qualify for this criterion,” without explaining why the AAO should find those claims any more persuasive than the director did. The petitioner also fails to provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director’s analysis. Therefore, the petitioner has abandoned this issue. *Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. at 435.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish that the evidence was qualifying because the petitioner had not submitted primary evidence of his income. On appeal, counsel repeats previous claims, without explaining why the AAO should find those claims any more persuasive than the director did. The petitioner does not submit primary evidence or explain why primary evidence is not required. *See* 8 C.F.R. § 103.2(b)(2). The petitioner also fails to provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director’s analysis. Therefore, the petitioner has abandoned this issue. *Id.*

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish that the evidence was qualifying. On appeal, counsel repeats previous claims, without explaining why the AAO should find those claims any more persuasive than the director did. The petitioner also fails to provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director’s analysis. Therefore, the petitioner has abandoned this issue. *Id.*

C. Summary

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

IV. 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.³ Rather, the proper conclusion is that the petitioner has failed to satisfy 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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

³ 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).