

(b)(6)



U.S. Citizenship
and Immigration
Services



Date: **DEC 11 2013** Office: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

APPLICATION: 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
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 seeks classification as an “alien of extraordinary ability” in the sciences as a life and environmental scientist, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). According to the petitioner’s curriculum vitae, she was employed as a postdoctoral associate at the time of filing. 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 asserts that USCIS did not consider all of the evidence of record in issuing the decision. Specifically, counsel states that USCIS did not consider or acknowledge the submitted citation record. Counsel also asserts that USCIS did not provide a basis for determining as insufficient two additional support letters that the petitioner submitted for establishing contributions of major significance. In addition, counsel asserts that USCIS improperly dismissed as insufficient the letter submitted to substantiate the petitioner’s critical role in an organization with a distinguished reputation.

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 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 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).

The petitioner previously submitted evidence under this criterion. The director's decision concluded that the petitioner did not meet this criterion and the petitioner does not identify any factual or legal error relating to this criterion on appeal. Consequently, the petitioner abandoned this claim. 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-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).

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. 8 C.F.R. § 204.5(h)(3)(iv).

The director determined in the decision that the petitioner met this regulatory criterion and the record supports the director's conclusions in this regard.

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 concluded that the petitioner did not meet this criterion. On appeal, counsel asserts that the director did not properly weigh the citation record in making his decision. In addition, counsel asserts that the director did not give sufficient consideration to the letter from Dr. [REDACTED] and the letter from Dr. [REDACTED] which the petitioner submitted in response to the director's Request for Evidence (RFE).

The evidence submitted along with the petitioner's Form I-140 in support of this criterion is insufficient to satisfy the regulatory requirements. The petitioner listed the following experience on her curriculum vitae: as a scientist pool officer at [REDACTED]; as a postdoctoral research scientist at [REDACTED] and as a postdoctoral associate at [REDACTED]. The petitioner submitted letters from the following colleagues with the Form I-140 petition: [REDACTED] Director at [REDACTED] Ph.D., Professor of Genetics and Development and Obstetrics and Gynecology at [REDACTED], Professor and Vice-Chairman of Radiation Oncology at [REDACTED] Ph.D., Scientist-D at the [REDACTED]. The petitioner also submitted

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

letters from the following independent members of her field: [REDACTED] Ph.D., Assistant Professor of Internal Medicine at [REDACTED] Scientist at the [REDACTED] India; [REDACTED] Ph.D., Chief Scientific Officer at [REDACTED] Ph.D., Professor of Biochemistry, Molecular Biology, and Biotechnology at [REDACTED], India.

While many of the letters from the above group are complimentary of the petitioner's talents as a researcher and scientist, they are largely vague and conclusory regarding the impact the petitioner's work has had in the field. For instance, Dr. [REDACTED] writes: "I have no doubt that [the petitioner's] contributions on these important issues of health would benefit the healthcare and economy of United States, to a great extent. . . . I would say that the experience, [the petitioner] has gained in her research career, would be of immense help to any nation." Similarly, Dr. [REDACTED] writes: "I am happy to have known one of the environmental scientist's [sic] like [the petitioner], it is because of the work of such scientists' [sic] that our understanding of how pollutants can affect our health has increased considerably. The credit of cleaner and healthier environment goes to people like her, who are behind all the research and creating awareness on how pollutants affect our health." 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).

Other references discuss the petitioner's mastery of techniques and potential for future contributions. Dr. [REDACTED] praises the petitioner's mastery of gene-screening techniques and overall talent and concludes that she "has great potential and promise to make substantial contributions in biomedical sciences." Dr. [REDACTED] references the petitioner's application of sophisticated molecular techniques and ability to apply high-throughput methods and concludes that "her subsequent discoveries here will have an immediate impact on the design of drugs that specifically target such disease forms." The mastery of existing techniques that others developed is not an original contribution in the field. Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires evidence of past contributions of major significance, not the potential to make such contributions in the future.

Some of the letters from the above group specifically discussed the petitioner's areas of research and asserted that her work in these areas added to the knowledge base in the field. For example, Dr. [REDACTED] observes: "This important discovery of delineating one of the pathways of hormone-induced cancer is an important and crucial study conducted by [the petitioner], she is responsible for becoming a platform for further research on how and what pathways are involved in the formation of oxidative stress in normal cells that compel a normal condition to get transformed into a diseased state. [The petitioner's] research has not only advanced our understanding of the mechanism of oxidative stress involved in hormone-induced breast carcinogenesis, but also provided very important information for early diagnosis and prediction of tumor formation." 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 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 phrase "major significance" is not superfluous and, thus, has some meaning. To be considered a contribution of major significance in the field of science, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the petitioner's work. The petitioner's independent references do not claim to be influenced by the

petitioner's work and, for the most part, provide little explanation for how they know of the petitioner's work.

Counsel on appeal asserts that the letter from [REDACTED] Ph.D., Ex-Deputy Director of the [REDACTED] which the petitioner submitted along with the response to the director's RFE, demonstrates the impact of the petitioner's work. Dr. [REDACTED] describes the scope of the petitioner research regarding the effects of the Pippaliyadi drug and observes that the research was important because India recommended the subject drug for inclusion in the country's National Population Control Program. However, there is nothing in the record or letter to suggest that the decision to include the drug as part of the program was related to or was a direct result of the petitioner's study. For example, the petitioner did not submit existing or proposed guidelines citing the petitioner's work. While the petitioner lists on her curriculum vitae a 2007 journal she authored on the subject in 2007, the record contains no evidence of citations of this article.

With respect to the letter from [REDACTED] a professor at the School of Studies in Zoology and Biotechnology at [REDACTED] the letter appears to be another example where the author discusses the petitioner's research in some detail and observes that her research has added to the field. Dr. [REDACTED] however, focuses on the novelty of the petitioner's research in that she published results not previously reported in the field. While the petitioner's research results are original, she has not demonstrated that they are of major significance.

As noted by the director, the record also contains evidence that independent experts have cited the petitioner's work. Specifically, two of the petitioner's articles, one of which is a review article that compiles the work of others rather than reporting her own original results, have garnered a moderate number of citations each. A moderate number of citations, without supplemental evidence providing some context for the significance of the citations, does not conclusively demonstrate that the petitioner's work is widely known and has had a significant impact on the field. On appeal, counsel submits two unpublished AAO decisions for the proposition that citations can demonstrate eligibility under this criterion. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, both decisions counsel provides reference "hundreds" of citations, including one article that individually received more than one hundred citations. The petitioner in this matter has not submitted evidence of hundreds of citations. Thus, counsel has not explained the relevance of these unpublished decisions.

For all of the above reasons, the petitioner does not meet this criterion.

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 director determined in the decision that the petitioner met this regulatory criterion and the record supports the director's conclusions in this regard.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii).

The petitioner submitted evidence under this criterion along with the Form I-140 petition. The petitioner subsequently submitted an additional letter in support of this criterion in response to the director's RFE. On appeal, counsel asserts that the director did not sufficiently consider all the submitted evidence for this criterion.

In general, a leading role is evidenced from the role itself, its duties, and how it fits within the hierarchy of the organization or establishment. A critical role is one in which the petitioner positively impacted the success or standing of the organization or establishment.

According to her curriculum vitae, the petitioner was working as a postdoctoral associate at [REDACTED] at the time of filing. The petitioner has not documented how postdoctoral associates fit within the hierarchy of [REDACTED] or even the center at [REDACTED] where the petitioner works. Notably, Dr. [REDACTED] lists his postdoctoral experience under education and training on his curriculum vitae. Dr. [REDACTED] Associate Professor of Cell Biology at [REDACTED] School of Medicine, one of the petitioner's references, characterizes his postdoctoral employment as "Postdoctoral training" on his curriculum vitae. Dr. [REDACTED] lists his postdoctoral fellowships as his first professional experience upon completing his Ph.D., subsequently advancing to an assistant researcher position and then an assistant professor position. The record as a whole does not demonstrate that a postdoctoral associate position is a leading role for [REDACTED] or the center at [REDACTED] where the petitioner works.

With regard to whether the petitioner's role was critical, the petitioner relies on letters. The support letter from [REDACTED] Director of the [REDACTED] which the petitioner submitted along with the initial Form I-140 petition package, provides: "[The petitioner] was recruited from [REDACTED] New York in a role to set up and maintain a cell culture laboratory and as an assay development scientist In addition to managing the cell culture laboratory, [the petitioner] is also responsible and a crucial member of the [REDACTED] as an assay development scientist."

In response to the RFE, the petitioner submitted a letter from [REDACTED] Ph.D., Associate Professor of Cell Biology at the [REDACTED]. He writes about the petitioner's role at the [REDACTED] as follows: "[The petitioner] was recruited from [REDACTED] New York to be responsible for a position of utmost importance and a critical nature, and that was to set-up the human/animal cell culture laboratory and the wet lab for performing research and development work at [REDACTED]. It is important to mention that [a] cell culture laboratory is the most fundamental and the most necessary requirement for any research involving studies in *in vitro*." Dr. [REDACTED] provides additional detail relating to the petitioner's role, explaining the projects for which the petitioner has performed a critical role. The plain language of the regulation, however, requires that the petitioner have performed in a critical role for an organization or establishment, not an individual project. Most of the projects are pending publication, and Dr. [REDACTED] does not explain how they have impacted [REDACTED]. While Dr. [REDACTED] discusses a collaboration with [REDACTED] which resulted in the publication of the results on [REDACTED] website, Dr. [REDACTED] does not explain how this project impacted the

reputation or overall success of [REDACTED] such that the petitioner's work on this project can be considered a critical role for [REDACTED].

Even if the petitioner's role was a critical role, the evidence of record is insufficient to satisfy all of the plain language requirements of the criterion. While the section of Dr. [REDACTED] letter describing the [REDACTED] and the work done there is under the heading: "I. THE [REDACTED]

[REDACTED] the letter does not provide any information about [REDACTED] reputation and there is no independent documentation supporting the claim of a distinguished reputation. 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* 2009 WL 604888 (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). Moreover, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) and *Matter of Ho*, 22 I&N Dec. 206, 211 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Finally, even if the record had supported the conclusion that the petitioner performed in a critical role for [REDACTED] an organization with a distinguished reputation, the regulatory language at 8 C.F.R. § 204.5(h)(3)(viii) requires that the alien in question demonstrate a leading or critical role for organizations or establishments (in the plural), which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A) 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 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.⁴

For all of the above reasons, the petitioner does not meet the plain language requirements of 8 C.F.R. § 204.5(h)(3)(viii).

B. Summary

The petitioner has failed to submit sufficient relevant, probative evidence to satisfy the regulatory requirement of three types of evidence.

⁴ *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).

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.⁵ 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 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.

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 U-SCIS, is the sole authority with the jurisdiction to decide visa petitions).