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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

[Redacted]

DATE: **FEB 27 2013** Office: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

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,

Ron Rosenberg
Acting 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 arts, specifically as a master artisan glassblower, 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 asserts the director failed to consider and give proper weight to all the evidence of record in finding that the petitioner did not have original contributions of major significance in the field of glassblowing. In addition, counsel states that the director erred by discrediting publications because they included references to the petitioner’s partner. Counsel also asserts that the petitioner sufficiently established that he participated as a judge of others. Considering all of the evidence in the record, the petitioner has not established eligibility for the benefit sought by a preponderance of the evidence.

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

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. 8 C.F.R. § 204.5(h)(3)(iii).

This criterion contains three evidentiary requirements the petitioner must satisfy. First, the published material must be about the petitioner and the contents must relate to the petitioner's work in the field under which he seeks classification as an immigrant. The published material must also appear in professional or major trade publications or other major media (in the plural). Professional or major trade publications are intended for experts in the field or in the industry. To qualify as major media, the publication should have significant national or international distribution and be published in a predominant national language. The final requirement is that the petitioner provide each published item's title, date, and author and if the published item is in a foreign language, the petitioner must provide a translation that complies with the requirements found at 8 C.F.R. § 103.2(b)(3). The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner submitted a group of newspaper clippings, as well as articles from magazines. The director determined that the petitioner failed to meet this criterion. On appeal, the petitioner alleges that the director erred by discounting any article that also mentioned the petitioner's former partner. The AAO conducts appellate review on a *de novo* basis. AAO's *de novo* authority is well recognized by the federal courts.³ See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). After considering the evidence submitted for this criterion, the AAO observes that much of the clippings only refer to the petitioner in a photograph and a caption, or the petitioner has only provided a partial translation of the article. Thus, most of the material is not "about" the petitioner.

The petitioner, however, submitted two articles that are about him. The magazine article titled, [REDACTED] features the petitioner. Similarly, the newspaper article with the translated title, [REDACTED] discusses the petitioner and his former partner and their joint exhibition. The AAO finds that the content of the article is about the petitioner. However, the petitioner has failed to submit documentation relating to the distribution of the newspaper indicating that the publication constitutes major media. Similarly, the petitioner fails

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

³ Counsel in the appeal brief repeatedly requests a remand to consider specific items of evidence. In light of the AAO's *de novo* review, the AAO may consider all referenced evidence and a remand of the proceedings is not required.

to include information about the magazine in which the article about the petitioner appears. Thus, the petitioner has failed to show that the magazine is a professional or major trade publication.

Consequently, the petitioner has failed to meet all of the plain language requirements for 8 C.F.R. § 204.5(h)(3)(iii).

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 petitioner submitted a letter from [REDACTED], as evidence under this criterion. The director determined that the information failed to sufficiently describe the petitioner's role at the [REDACTED] to meet the requirements of the regulation. On appeal, the petitioner submitted another letter from [REDACTED] Executive Director of the [REDACTED] which clarifies the jury process and the petitioner's role in the event. Upon review of all the evidence in the record for this criterion, the AAO observes that the petitioner satisfied the plain language requirements. Accordingly, the AAO withdraws with the director's findings in this regard and concludes that the petitioner met this criterion.

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 determined that the petitioner failed to establish his eligibility under this criterion. The petitioner initially submitted a sales list of customers who purchased his glass work, letters of support attesting to his contributions, and an article about the [REDACTED] candlestick. The director dismissed the sales list as persuasive evidence under this criterion, in part, because some of the purchases occurred after the filing date of the petition. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) (requiring eligibility at the time the application or petition was filed). On appeal, the petitioner submits an updated sales list that includes the names of individuals who were existing customers on the date of filing and a declaration from [REDACTED] the petitioner's former partner, attesting that the [REDACTED] candlestick is the petitioner's original work. Counsel asserts that the director erred by failing to take into account the fact that the [REDACTED] candlestick has been copied by competitors and was the subject of an intellectual property infringement action, which the petitioner initiated.

At the outset, the updated sales list, as well as the article discussing the plagiarizing of the petitioner's [REDACTED] candlestick and the subsequent legal action, relates to the commercial success of the petitioner's creations, both generally and more specifically to the popularity of the [REDACTED] candle. Even accepting that the candlestick is an original creation, the popularity or the commercial viability of an artistic work is not necessarily indicative of its significance in the field. At issue is the impact of the petitioner's work in the field. As for the petitioner's individual pursuit of legal action for intellectual property violations, the petitioner's legal pursuit essentially constitutes an effort at protecting his personal property rights and does not demonstrate that his work is a contribution of major significance in the field. Specifically, the existence of an imitator does not demonstrate a wider impact in the field as

a whole. Therefore, the sales list and the article describing the candlestick and associated plagiarism are not relevant, probative evidence relating to this criterion.

The petitioner also submitted testimonial letters as evidence for this criterion. [REDACTED] writes that the petitioner's candlestick has: "spawned numerous imitators, none of which can come close to the quality of the original. The item continues to be a best seller among glass art." [REDACTED] also comments that she has: "purchased many of these sculptures for myself and to give as gifts. They have been so well received in fact, that every single person to whom I have given these [REDACTED] has subsequently visited our shows and purchased additional [REDACTED]." These two examples, according to [REDACTED], are specific, original works of major significance in the field of artistic glassblowing. Similarly, [REDACTED] states that: "his collection of sculptures, [REDACTED] was a stunning success during the time they were on display in our galler." [REDACTED] then concludes that the petitioner is, "indeed one among a small number of present day individuals who have risen to the pinnacel of this ancient art form." Both authors make conclusory remarks about the petitioner's impact on the field based on individual, local examples. 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). Moreover, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava.*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

[REDACTED] writes: "Through your spontaneous help and support, you contributed greatly to the [REDACTED] booth in [REDACTED] which was able to offer a continuously changing program that was extremely interesting to the onlookers." [REDACTED] states that: "[the petitioner's] work amounts to a significant contribution to the art of glassblowing. A collection of his sculpture entitled, [REDACTED] which are on display in our museum, consistently attract much praise from visitors." [REDACTED] expresses that the petitioner's efforts helped in making a success of a one-time, city-wide exhibition. [REDACTED] observes that the petitioner's collection in her museum has garnered praise from visitors. These testimonials do not attest to contributions that rise to the level of major significance. The plain language of the regulation requires both that the petitioner's contributions be original and of major significance in the field. USCIS must presume that the word "original" and the phrase "major significance" are not superfluous and, thus, that they have 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). Talent alone, without a demonstrated impact in the field as a whole, is not indicative of a contribution of major significance in the field.

Accordingly, the petitioner has failed to meet this criterion.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases. 8 C.F.R. § 204.5(h)(3)(vii).

The director determined that the petitioner satisfied the regulatory requirements for this criterion. After considering the evidence submitted relating to this criterion, the AAO affirms the decision of the director in this regard.

B. Summary

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

III. CONCLUSION

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

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.⁴ 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.

⁴ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. 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).

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ORDER: The appeal is dismissed.