



U.S. Citizenship
and Immigration
Services

(b)(6)

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 business, specifically as a medical consultant, 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 that the petitioner submitted sufficient evidence to meet four of the regulatory criteria. Counsel maintains that the director either ignored or failed to give sufficient weight to the submissions. 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

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 initially submitted materials relating to this criterion along with her initial I-140 petition. The director did not make a specific finding regarding this criterion in the denial decision and the petitioner does not identify any factual or legal error relating to this criterion on appeal. Consequently, USCIS concludes that 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).

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 she 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.

On appeal, counsel asserts that the petitioner submitted two articles that were in major media. Counsel also maintains that the petitioner was featured in a television appearance, for which there is a translated transcript as part of the record. The record includes a blanket certification for the various publications submitted, including the translated transcription of the television program. "Petitioners and applicants for immigration benefits are required by regulation to provide certified English translations of any foreign language documents they submit." *Matter of Nevarez*, 15 I&N Dec. 550, 551 (BIA 1976) (citing 8 C.F.R. § 103.2(b), now promulgated at 8 C.F.R. § 103.2(b)(3)) which states: "Any document

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

containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." The language utilized within the regulation implicitly precludes a single certification that validates several translated forms of evidence unless the certification specifically lists the translated documents. Without a single translator's certification for each foreign language form of evidence, or a translator's certification specifically listing the documents it is validating, the certification cannot be regarded to be certifying any specific form of evidence. The final determination of whether evidence meets the plain language requirements of a regulation lies with USCIS. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988) (finding that the appropriate entity to determine eligibility is USCIS). Consequently, the foreign language documents that the petitioner presented as evidence of published material do not qualify as probative, credible evidence for this criterion.

Notwithstanding the problem with certification and translation noted above, counsel maintains that the monthly circulation of 50,000 issues of [REDACTED] and monthly circulation of 70,000 issues of [REDACTED] is sufficient to demonstrate that these publications are professional or major trade publication or other major media. The petitioner has failed to submit evidence showing that either one of the publications are professional or major trade publications. Similarly, the bare numbers are insufficient to determine whether they are indicative of publications that can be considered major media in Japan. The petitioner has failed to submit comparative evidence of distribution that would inform whether the above circulation numbers are reflective of regional or special interest publications, or are in fact consistent with other national or international publications that are accepted as major media in Japan. Significantly, other publications that have expressed interest in speaking with the petitioner but had yet to publish anything about her show circulation numbers in the hundreds of thousands. To qualify as major media, the publication should have significant national or international distribution. For example, some newspapers, such as the [REDACTED] nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.

Finally, the television appearance was not about the petitioner relating to her work. Rather, the petitioner was briefly interviewed as part of a larger story about fertility.

Accordingly, the petitioner has failed to satisfy the requirements pursuant to 8 C.F.R. § 204.5(h)(3)(iii).

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 petitioner submitted multiple testimonial letters in support of this criterion that various medical professionals submitted on the petitioner's behalf. The medical professionals or individuals who are connected with a medical facility who wrote a letter or multiple letters in support of the petitioner

[REDACTED]

All of the authors of the submitted letters remark on the excellent quality of the petitioner's work and notes that she is a top medical consultant or that the petitioner's business is the best, or one of the best medical consultant companies and include language that parrot the language of the statute or the regulations.

For example, [REDACTED] writes:

[The petitioner's] business model as an independent medical facility not bound to any particular U.S. medical facility is critical to her ability to serve her client's best interests by selecting the most appropriate healthcare providers rather than sending them all to a U.S. facility that she represents. This business model is unique, and sets her apart from all other medical consultancies both in terms of quality and effectiveness This is certainly an original contribution of major significance in medical consultancy.

Similarly, [REDACTED] states:

Based on my experience of working with [the petitioner] for these many years, I assure you that her business model – and the execution of her business model – is uniquely comprehensive. . . . The fact that she has built deep and lasting alliances with some of the best healthcare facilities in this country is due to her stellar reputation and international acclaim as a business professional in the medical consultancy field. She is a leader in the field, who has set the standard for other medical consultancy services to follow. . . . I therefore urge approval of her petition for U.S. permanent residence as a business person who demonstrates extraordinary ability, who has risen to the very top of her field of endeavor.

[REDACTED] letter typifies the testimonial letters, which attest, in various ways, to the petitioner's excellence in her work and the importance of her services to her clients. Nonetheless, while the petitioner's superior services provided through her medical consultant business has resulted in positive feedback from clients, there is insufficient documentation to suggest that her business has had a major impact in the field of medical consulting. Furthermore, 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.).

In addition, some of the testimonial letters that the petitioner provides undermine the petitioner's claim that her business constitutes an original contribution. [REDACTED] states that: "As the [REDACTED] since 1990, I regularly work with medical consultants from around the world who are interested in obtaining our hospital's services for their patients." [REDACTED] also notes: "[The petitioner] and her company are the simply the most competent, comprehensive medical consultancy with which I have ever worked." The letters indicate that the petitioner provides a more thorough and comprehensive international medical consultancy, but the record suggests that there are other international medical consultants. 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). Thus, the petitioner cannot establish her medical consultant business as an original contribution of major significance in the field of medical consulting, as required by the plain language of the regulation.

Lastly, notwithstanding the fact that the petitioner's medical consultant business is not original, the petitioner fails to satisfy the regulatory requirements for this criterion because her medical consultant business is a singular contribution. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires evidence of "contributions" in the plural, which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning.

For all the reasons discussed above, the AAO must conclude that the petitioner failed to establish with relevant and probative evidence that he meets this criterion and affirm the director's finding 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).

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role's matching duties. A critical role should be apparent from the petitioner's impact on the organization or the establishment's activities. The petitioner's performance in this role should establish whether the role was critical for organizations or establishments as a whole. The petitioner must demonstrate that the organizations or establishments (in the plural) have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-Webster's online dictionary defines distinguished as, "marked by eminence, distinction, or excellence."³ Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U.S. at 306. Therefore, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction,

³ See <http://www.merriam-webster.com/dictionary/distinguished>, accessed on February 4, 2013.

excellence, or a similar reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director determined that the petitioner failed to satisfy the requirements of this criterion because the record is insufficient to demonstrate that the petitioner's company, [REDACTED] Inc., is an organization with a distinguished reputation. The director further determined that that the petitioner did not serve in a leading or critical role in the various medical institutions in the U.S. including: [REDACTED]

[REDACTED] The petitioner claims these medical facilities are organizations with which she has developed collaborations or alliances. The director observed that the record does not establish that the beneficiary has worked for these organizations as an employee.

Counsel on appeal maintains that the petitioner need not have performed a leading or critical role as an employee of the organization. There is nothing in the regulations to suggest that a third party consultant to an organization can serve in a leading or critical role to the organization at large. See 8 C.F.R. § 204.5(g)(1) (evidence of experience shall consist of letters from employers). Counsel on appeal maintains that the director failed to comment on the voluminous documentation of the quality of work the petitioner performed on behalf of patients, consisting primarily of numerous emails from clients seeking referrals to U.S. medical institutions. However, USCIS determines the truth not by the quantity of evidence alone but by its quality. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) citing *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989). Evidence that the petitioner is able to attract and maintain clients is not probative to whether she has performed a leading or critical role for the institutions to which she refers those clients. More specifically, the importance of the services that the petitioner provided to individual patients does not necessarily indicate that the petitioner's role was critical to the various medical organizations. There is no evidence in the record suggesting that the number of patients that she worked with at each organization constituted a significant portion of the organization's patients such that the petitioner can claim a critical role on behalf of the treating organization, rather than a critical role for the individual patient.

Significantly, while the record includes complimentary testimonial letters from individuals in the organizations listed in the above paragraph, the letters do not indicate that the petitioner's was critical to the success of the organization. The medical organizations that petitioner mentions have obtained their reputation independent of the petitioner and there is insufficient evidence in the record that the petitioner's work was critical to the organization as a whole.

Even if the petitioner had established the distinguished reputation of the company she founded, the regulation requires evidence of a leading or critical role for organizations or establishments in the plural, consistent with the statutory requirement for extensive evidence.

Consequently, the AAO agrees with the director's findings and affirms his conclusions with regard to this criterion.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. 8 C.F.R. § 204.5(h)(3)(ix).

Counsel claims the petitioner's eligibility for this criterion for the first time on appeal. The petitioner did not claim that she met this criterion or submitted evidence relating to this criterion along with the Form I-140 petition and accompanying documents. The petitioner then failed to claim eligibility for this criterion and submit evidence in response to the director's Request for Evidence (RFE).

The methods vary by which a petitioner can be notified of evidentiary requirements. For example, a petitioner is considered to be on notice through the specific requirements outlined within the regulations, or through various forms of communication from USCIS to a petitioner or applicant noting an evidentiary deficiency or requesting more evidence. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The regulation at 8 C.F.R. § 204.5(h)(3) notified the petitioner of the specific filing requirements to demonstrate eligibility under the extraordinary ability classification. In addition, the instructions to the Form I-140 petition state that the petitioner "must attach evidence with [the] petition showing that the alien has sustained national or international acclaim" and then lists the ten regulatory criteria. The director's RFE requested supplemental documentation for various criteria and the petitioner submitted a response along with additional evidence. Therefore, the petitioner in this instance had multiple opportunities to present evidence and allege eligibility before the director prior to the director's issuance of the denial based on the merits of the underlying petition. The petitioner must claim every criterion that the petitioner would like to be considered before the director. In instances when the petitioner was notified of the types of evidence that are required to demonstrate eligibility and was afforded the opportunity to provide the evidence prior to the issuance of an adverse decision, new eligibility claims will not be considered on appeal. *See Matter of Soriano*, 19 I&N Dec. at 766.

If the petitioner would like for USCIS to consider claims to additional eligibility criteria, this must be accomplished through the filing of a new petition. *See id.* at 766. *Cf. Matter of Jimenez*, 21 I&N Dec. 567, 570 n.2 (BIA 1996) (finding that claims of eligibility for a waiver presented for the first time on appeal are not properly before the Board of Immigration Appeals and that the Board will not issue a determination on the matter.) Although the AAO maintains *de novo* review of appellate cases and a petitioner may supplement the record in regards to previous claims, a petitioner may not raise a previously unclaimed eligibility criterion on appeal. *Matter of Soriano*, 19 I&N Dec. at 766.

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.

ORDER: The appeal is dismissed.

⁴ 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).