



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JAN 25 2013**

Office: NEBRASKA 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:

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, Nebraska Service Center, denied the employment-based immigrant visa petition on July 9, 2012. The petitioner subsequently filed a motion to reopen and reconsider requesting that the director consider additional evidence pertaining to additional criteria as an alien of extraordinary ability under the regulations. The director accepted the motion but concluded that the petitioner failed to overcome the grounds for denial and issued a decision on the merits of the motion on September 28, 2012. The matter is now before the Administrative Appeals Office (AAO) as an appeal of the director's decision on the motion. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in the athletics, as a DanceSport dancer, 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 establish that he met the regulatory requirements for the criterion regarding awards and prizes and for the criterion regarding a leading or critical role.¹ Counsel maintains that the two additional criteria, along with the two criteria that the director found that the petitioner satisfied in the July 9, 2012 decision, is sufficient to establish the petitioner's eligibility for the classification he seeks. Considering the evidence in the aggregate, including the supplemental evidence the petitioner submits along with the appeal and submitted with the motion, the petitioner has not established eligibility for the benefit sought by a preponderance of the evidence.

¹ Counsel observes that there must have been a mistake in adjudicating the motion since the decision on the motion refers to the petitioner as "she" rather than as "he" throughout. This decision reflects an aggregate consideration of all submitted evidence and previously issued decisions, which includes a review of whether a misuse of the referencing pronoun for the petitioner reflects an inadvertent mistake or is indicative of an improper review of the evidence of record.

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.² With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns

² Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

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.*

II. ANALYSIS

A. Evidentiary Criteria³

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

In the July 19, 2012 denial decision, the director concluded that the petitioner failed to satisfy this criterion. Specifically, the director noted that many of the competitions the petitioner won appeared to be local or regional in nature. And while the petitioner submitted documentation indicating that he won the [REDACTED] on multiple occasions, the director found that the inclusion of “national” or “international” in a competition title does not necessarily suggest national or international recognition. In the motion before the director, the petitioner included additional evidence for this criterion including:

1. a webpage printout of 1st place in [REDACTED]
2. a webpage printout of [REDACTED]
3. a webpage printout of [REDACTED]
4. the petitioner’s DanceSport Classification Book;
5. background information on the [REDACTED]
6. a printout showing participation in the [REDACTED]

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

7. a printout showing participation in the [REDACTED]
8. a printout showing participation in the [REDACTED]
9. a printout showing participation in the [REDACTED]
10. a letter from [REDACTED] a former dance champion and teacher of ballroom dance; and
11. a letter from [REDACTED] a former dance champion, teacher of ballroom dance, and a governing judge of [REDACTED]

With two exceptions, the appeal brief largely makes references to documents that were previously submitted with the I-140 petition or with the motion to reopen and reconsider. The additional evidence in the above list that the petitioner submitted along with the motion is not persuasive evidence that helps to meet the plain meaning requirements of the regulation and does not aid the petitioner in overcoming the director's grounds for denial. For instance, items (8) and (9) relate to competitions that took place following the petitioner's filing date. Similarly, the petitioner also submits on appeal evidence of two competitions that he won in 2012. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971); 8 C.F.R. § 103.2(b)(1), (12).

Items (1) - (3) and items (6) - (9), like many of the awards the petitioner submitted along with the initial petition, appear to be regional or local competitions. While item (5), which provides information regarding the competition at the [REDACTED] does establish that the competition is a nationally recognized competition, the petitioner was a finalist and not the winner of that competition. The plain language of the regulation contemplates solely the winning prize or award. Other categories of distinction, such as a "finalist," are insufficient to satisfy the criterion. See 8 C.F.R. § 204.5(h)(3)(i). Item (10) provides a rationale for the age restrictions in dance competitions and item (11) explains that the term "national" or other words of similar import may not be used to identify a title of a particular event without the express written consent of the governing body of USA Dance or the National Dance Council of America. However, as the director noted in the July 9, 2012 decision, the designation of a competition as "national" or "international," even if subject to an internal approval process by the organizing body, does not demonstrate the national or international recognition of an award or prize. The petitioner does not include independent evidence showing that the competitions he describes are nationally recognized in the field as a whole. 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972), clarified in *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) and *Matter of Ho*, 22 I&N Dec. 206, 211 (Assoc. Comm'r 1998).

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).

In his initial application packet, the petitioner submitted evidence of membership in associations in the field. The director denied the petitioner's claim regarding this criterion and the petitioner does not identify any factual or legal error in this conclusion on appeal. Consequently, the AAO 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).

The director determined in the July 19, 2012 decision that the petitioner met this regulatory criterion and, while not all of the materials are "about" the petitioner or appeared in professional or major trade publications or other major media, the AAO affirms the director's conclusions with regard to this criterion.

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).

In his initial application packet, the petitioner submitted evidence of participation as a judge of the work of others in his field. The director denied the petitioner's claim regarding this criterion and the petitioner does not identify any factual or legal error in this conclusion on appeal. Consequently, the AAO concludes that the petitioner abandoned this claim. See *Sepulveda*, 401 F.3d at 1228 n. 2; *Hristov*, 2011 WL 4711885 at *9.

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 petitioner never claimed to meet this criterion. Nevertheless, the director determined in the July 19, 2012 decision that the petitioner met 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. See *Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at *7 (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). The alien's work also must have been displayed at an artistic exhibitions or showcases (in the plural).

_____ characterizes DanceSport participants as “athletes,” not performing artists. Internet materials for _____ indicate that the organization’s mission is to “gain national and global acceptance for DanceSport as an official medal sport in the Olympic Games.” Even considering his experience as a performer, the petitioner is not a visual artist and has not created tangible pieces of art that were on display at artistic exhibitions or showcases. Moreover, he is primarily an athlete. Thus, 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). Accordingly, the AAO withdraws the director’s finding with regard to this criterion and determines that the petitioner failed to establish his eligibility for this criterion.

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 the 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.”⁴ 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, 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. On appeal, counsel largely advances the same arguments and refers to the same evidence that the director considered under this criterion with the exception of two updated additions.

As an initial matter, counsel asserts that the petitioner played a leading and critical role for two establishments with a distinguished reputation: the _____. While the record contains promotional evidence about the head of _____ from an unidentified source, there is no independent evidence establishing the distinguished reputation of the ballet company or the dance club, apart from the assertions of counsel. However, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1998); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record, therefore, does not support the claim that _____ and _____ are establishments with a distinguished reputation.

⁴ See <http://www.merriam-webster.com/dictionary/distinguished>, accessed on January 22, 2013.

Counsel submits two letters on appeal, one from [REDACTED] to one from [REDACTED] to substantiate the claim of leading or critical role for the above mentioned establishments. The head of [REDACTED] and the owners of [REDACTED] previously submitted letters in support of the petitioner along with the Form I-140. The letters on appeal reflect a July 2012 date and more specifically detail the petitioner's leading or critical role in their respective establishments.

[REDACTED] writes:

[The petitioner] was the lead performer in one of our most famous ballet compositions called, [REDACTED]. Also, [REDACTED] took a big part in creating the show for [REDACTED] known artist [REDACTED] called [REDACTED]. This concert had an outstanding success and was translated and displayed later in [multiple countries].

[REDACTED] further comments that she picked him from a pool of 30,000 to aid her in developing the project idea and choreography for the [REDACTED] show. While the letter does clarify the petitioner's contributions for two specific performances or projects, there is insufficient details to conclude that the petitioner's impact on the establishment on the whole. The record includes a single program, that lists the petitioner only as responsible for choreography and costumes and the only review is of the general [REDACTED] concept and does not mention the petitioner at all.

Similarly, the joint letter from [REDACTED] states that: "[the petitioner] played a critical role in our studio for more than 10 years." The remainder of the letter discusses his excellence as a teacher and choreographer, but fails to articulate how the petitioner's role played a critical role in [REDACTED] on the whole. 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).

Accordingly, the petitioner failed to satisfy this criterion.

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.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 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.

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 USCIS, is the sole authority with the jurisdiction to decide visa petitions).