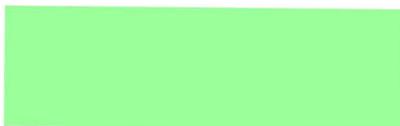


(b)(6)

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



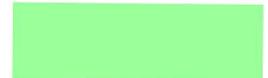
U.S. Citizenship
and Immigration
Services



DATE: **JUL 15 2013**

Office: TEXAS SERVICE CENTER

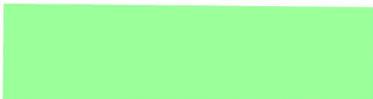
FILE:



IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 sciences, pursuant to section 203(b)(1)(A) of the Immigration and Nationality 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.

The petitioner’s priority date established by the petition filing date is March 6, 2012. On August 8, 2012, the director served the petitioner with a request for evidence (RFE). After receiving the petitioner’s response to the RFE, the director issued his decision on November 26, 2012. On appeal, the petitioner submits a brief with additional documentary evidence. For the reasons discussed below, the AAO upholds the director’s ultimate determination that the petitioner has not established his eligibility for the classification sought.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. See H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the 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

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The director determined the petitioner met the requirements of this criterion. The petitioner has submitted sufficient evidence to establish that he meets this criterion.

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

The plain language of this regulatory criterion contains multiple evidentiary elements that the petitioner must satisfy. The first is evidence of the petitioner's contributions (in the plural) in his field. These contributions must have already been realized rather than being potential, future contributions. The petitioner must also demonstrate that his contributions are original. The evidence must establish that the contributions are scientific, scholarly, artistic, athletic, or business-related in nature. The final requirement is that the contributions rise to the level of major significance in the field as a whole, rather than to a project or to an organization. The phrase "major significance" is not superfluous and, thus, it has 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). Contributions of major significance connotes that the petitioner's work has significantly impacted the field. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner provided expert letters, his citation record and peer review record, and his research findings as evidence under this criterion. The director determined that the petitioner failed to meet the requirements of this criterion. In affirming the director's finding, this decision does not afford less weight to the petitioner's research findings because they were the result of a small collaboration.

On appeal, counsel asserts: "The USCIS has erred by increasing the evidentiary threshold to demonstrate sustained national and international acclaim. Further, the Service erred in its application of the standard of proof needed to make the final merits determination." In evaluating evidence, USCIS must "examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

On appeal counsel identifies two letters from those in the field as representative of the evidence counsel claims the director discounted.

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

The first letter counsel quotes is from [REDACTED] Associate Professor of Chemical Engineering at the [REDACTED]. Within the letter, [REDACTED] expressly stated the petitioner's "achievements are genuinely outstanding!" [REDACTED] also stated the petitioner "has made several innovative and original contributions of major scientific significance to the fields of synthetic and biofunctional nanoparticles 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.). Similarly, 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). More specifically, [REDACTED] stated: "[REDACTED] is one of the top investigators in the field of modified nanoparticle synthesis. This is exemplified by his landmark research efforts on the detection of Staphylococcal enterotoxin B (SEB) published in [REDACTED]. [REDACTED] explained that the petitioner developed a method that "allows an extremely promising detection limit . . . in under 2 hr [sic] time using a 'fluorocount' method . . . This work and these results are clearly a high-value product." [REDACTED] did not indicate the level of improvement that the petitioner's findings hold over the current detection time limit, nor did he describe how this improvement has already impacted the petitioner's field. Rather, [REDACTED] indicated that the petitioner's findings were promising and that they have the potential to impact his field. Although [REDACTED] continues to describe the future potential and how the petitioner's "ongoing work in this field will no doubt lead to strategies for the design of novel biological and medically-important compounds," [REDACTED] did not describe how the petitioner has already made significant impacts within his field. A petitioner must establish the elements for the approval of the petition at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Counsel's second example of a letter the director discounted is the letter from [REDACTED] works in the [REDACTED]. On appeal counsel indicates [REDACTED] is an independent expert who has not worked with the petitioner and that he has relied on the petitioner's work. [REDACTED] did indicate that he and other researchers have relied on the petitioner's findings. Any research, in order to be accepted for publication, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge and contributes to the constant progression of the field has inherently made a contribution of major significance to the field as a whole.

That the petitioner's findings will provide a prospective benefit to the United States as a permanent resident is a requirement under the Act. *See* section 203(b)(1)(A)(iii) of the Act. However, neither of the authors identified how the petitioner has already made a significant impact in his field, which is required by this regulatory criterion. A petitioner must establish the elements for the approval of the petition at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. at 49. This evidence does not establish that, as of the priority

date, the petitioner had made a contribution of major significance in the field as required by the regulation.

The remaining letters within the record assert future impacts within the petitioner's field and claim that the petitioner possesses the traits and talents to become an outstanding research scientist. However, none of the letters sufficiently described how the petitioner's work has already made a significant and original impact in his field. The majority of the letters claimed that his findings were of major significance, but none establish that these findings have resulted in influential innovations in the petitioner's field. The Act already contains the requirement that the petitioner will provide a prospective benefit to the United States as a permanent resident. See section 203(b)(1)(A)(iii) of the Act. However, possible future innovations are not in line with the regulatory requirement that the petitioner has already made a significant impact in his field. A petitioner must establish the elements for the approval of the petition at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. See *Matter of Katigbak*, 14 I&N Dec. at 49. This evidence does not establish that, as of the priority date, the petitioner had made contributions of major significance in the field as required by the regulation.

Contained within the remaining expert letters are claims that the petitioner's speeches and presentations at conferences constitute contributions of major significance in the field. Publication and presentations are not sufficient evidence under 8 C.F.R. § 204.5(h)(3)(v) absent evidence that they were of "major significance." *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reaffirmed its holding that the AAO did not abuse its discretion in finding that the alien had not demonstrated contributions of major significance. 596 F.3d at 1122. Furthermore, several letters from the petitioner's colleagues were provided pursuant to the petitioner's request. Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010).

The Board of Immigration Appeals (BIA) has stated that testimony should not be disregarded simply because it is "self-serving." See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998); *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); see also *Matter of Acosta*, 19 I&N Dec. 211, 218 (BIA 1985)). The Board clarified, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Matter of S-A-*, 22 I&N Dec. at 1332. If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. at 1136.

In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" was insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. The opinions of experts in the field are not without weight and have been considered above. While such letters can provide important details about the petitioner's

skills, they cannot form the cornerstone of a successful extraordinary ability claim. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact" but rather is admissible only if it will assist the trier of fact to understand the evidence or to determine a fact in issue). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. While letters authored in support of the petition have probative value, they are most persuasive when supported by evidence that already existed independently in the public sphere. Such independent evidence might include but is not limited to letters from independent industry experts with firsthand knowledge of the petitioner's impact in the field, media coverage, and citations to the petitioner's work.

The record contains evidence that the petitioner has authored several scholarly articles. The regulation at 8 C.F.R. § 204.5(h)(3) contains a separate criterion regarding the authorship of published articles. 8 C.F.R. § 204.5(h)(3)(vi). If every provision of the regulation is to have meaning, USCIS must presume that the regulation views contributions as a separate evidentiary requirement from scholarly articles. Counsel asserts on appeal that the petitioner's citations corroborate the experts' statements about the significance of the petitioner's publication record and shows that other researchers are influenced by the petitioner's work. While the number of citations to the petitioner's work is a factor, it is not the only factor to be considered in determining the petitioner's eligibility for this criterion. Generally, the number of citations is reflective of the petitioner's original findings and that the field has taken some interest to the petitioner's work. However, it is not an automatic indicator that the petitioner's work has been of major significance in the field. In this case, the record contains evidence that, over a period of approximately 10 years, the petitioner has authored 24 articles published in scientific journals, one review paper, and one book chapter. While the petitioner's steady publication of articles over a long period of time has resulted in a significant number of citations in the aggregate, the number of citations per article is also relevant. The record reflects that, as of the date of filing, two of the petitioner's articles had received a moderate amount of citations. While a moderate amount of citations demonstrates awareness of the petitioner's work and its value, not every researcher who performs valuable research has inherently made a contribution of major significance in the field as a whole. Moreover, the content of those citations the petitioner submitted as examples of his impact does not reveal significant reliance on the petitioner's results as suggested by counsel. The Feature Article on fluorescent dye-doped silica nanoparticles "summarizes recent developments" in this area and cites the petitioner's work as one of at least 117 articles. Three other review articles cite the petitioner's work as one of at least 405, 68 and 65 articles. None of these articles singles the petitioner's work out as any more significant in the field than the other articles cited.

Counsel states: “Only research findings that are considered ‘fundamental or important discoveries’ to their field of research are mentioned in the introduction of scientific publications.” Counsel failed to provide evidence in support of this assertion. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported assertions of counsel in a brief are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). A communication with a total of 17 footnotes reporting on a new strategy for synthesizing core-shell nanoparticles of Ag@SiO₂ cites the petitioner’s research as one of five articles within one footnote supporting the proposition that there exists recent “increased interest in silica-coated metal nanoparticles for diverse applications.” The remaining citing articles in the record merely cite the petitioner’s work within a summary of past research in the area without implying that the authors specifically applied the petitioner’s work in their own research.

As additional support of the position that the petitioner’s citation record sufficiently qualifies him under this criterion, counsel provides several AAO administrative decisions that reference citation records. The cited cases are unpublished and nonbinding decisions. 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. The AAO may consider the reasoning within the unpublished decision; however, the analysis does not have to be followed as a matter of law. Some of the non-precedent administrative decisions counsel references are not for the same immigrant classification under which the petitioner is applying.³ Counsel’s reliance on the AAO’s unpublished decisions does not establish that the petitioner’s moderately cited articles are indicative of or consistent with contributions of major significance in his field.

Counsel further asserts that USCIS erred in its representation of the number of citations the petitioner’s published material garnered. While the petitioner did establish that two of his articles were cited moderately, this moderate amount is not consistent with counsel’s statement: “We wish to point out that several of the Applicant’s publications were cited numerous times as evidence of more than one qualifying contribution of major significance in the field.” As discussed above, the number and content of citations does not establish that the petitioner has made contributions of major significance.

The petitioner’s patents, patent applications and grants do not by themselves serve as the measure of an individual’s ability to qualify for this classification. A patent merely provides the patentee “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States, and, if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout the United States, or importing into the United States, products made by that process.” See 35 U.S.C. § 154. Rather, the level of the impact in the field as a whole through the wide use of the innovation is a more appropriate measure to determine if an alien has sufficiently influenced his field. See *Matter of New York State Dep’t. of*

³ While the outstanding researcher classification under section 203(b)(1)(B) of the Act is within the same preference category as the classification requested in this matter, the contributions criterion is different for the two classifications. Compare 8 C.F.R. § 204.5(i)(3)(i)(E) with 8 C.F.R. § 204.5(h)(3)(v).

Transp., 22 I&N Dec. 215, 221 n. 7, (Assoc. Comm'r 1998). The petitioner failed to document any impact from his patent applications or patents, such as licenses or other interest in the petitioner's patented innovations.

Based on the foregoing, the evidence demonstrates that the petitioner is a talented researcher and prolific author with potential, but it falls short of establishing that the petitioner had already made contributions of major significance in the field. Thus, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The director determined the petitioner met the requirements of this criterion. The petitioner has submitted sufficient evidence to establish that he meets this criterion.

B. Summary

The petitioner has failed to satisfy the antecedent 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 have 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 antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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).

(b)(6)

NON-PRECEDENT DECISION

Page 10

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.