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

(b)(6)

DATE: MAY 0 1 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 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.

I. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner seeks classification as an "alien of extraordinary ability" in the arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A).[1] 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, on behalf of the petitioner, asserts that the petitioner submitted sufficient qualifying evidence under three of the ten regulatory categories. Considering the evidence in the aggregate, the petitioner has not established eligibility for the benefit sought by a preponderance of the evidence.

On February 20, 2013, this office advised the petitioner and counsel of the AAO's intent to find material misrepresentations and afforded the petitioner 15 days to respond. As of this date, more than 40 days later, the AAO has received no response.

II. ISSUES PRESENTED ON APPEAL

A. Misrepresentation

The petitioner has willfully misrepresented an accomplishment. The petitioner submitted multiple texts as books in support of the claim that he authored or that the collections included his work. One of the volumes includes a work titled '[redacted]" a poem authored by another Chinese poet.

B. Eligibility under Section 203(b)(1)(A) of the Act.

[1] The petitioner on his I-140 Form provides no other detail under Part 6, under "Job Title" except "Alien of Extraordinary Ability." The petitioner, however, has submitted documents in support of his application reflecting that he is a poet and a literary critic.

The AAO upholds the director's ultimate determination that the petitioner has not established his eligibility for the classification sought.

III. MISREPRESENTATION

A. Legal Authority

Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

B. Analysis

Beyond upholding the director's decision to deny the petition, the AAO is making a formal finding of willful misrepresentation of a material fact that should be considered in any future proceeding where the petitioner's admissibility is an issue.[2] On February 20, 2013, in accordance with the

[2] It is important to note that while it may present the opportunity to enter an administrative finding of willful material misrepresentation, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to that of a permanent resident. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and

regulation at 8 C.F.R. § 103.2(b)(16)(i), this office issued a notice to the petitioner's and counsel's addresses of record advising the petitioner of derogatory information indicating that the petitioner submitted false documentation of a published work of poetry as his own. The petitioner signed the Form I-140, thereby certifying under penalty of perjury that "this petition and the evidence submitted with it are all true and correct."

As the derogatory findings relate to the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(v) and (vi), they are material to this proceeding. The AAO's notice discussed the derogatory finding as follows:

> The initial evidence [the petitioner] submitted in support of the petition includes a poem [the petitioner] purportedly composed, titled "[redacted]," which was presented in a poetry volume [the petitioner] submitted and claimed as containing selections of [the petitioner's] own work. An internet search reveals that the actual author of the poem '[redacted]' is [redacted] (also known as [redacted] a poet who died in 1989.[3] Therefore, the poem, [redacted]' does not appear to have resulted from [the petitioner's] authorship. Furthermore, the director's March 28, 2012, decision observed and made reference to the fact that the record is insufficient to substantiate [the petitioner's] claims of authorship, and [the petitioner has] yet to respond to these observations. This letter provides specific notice of the apparent misrepresentation of the authorship of the poem, '[redacted]' and requires a response.

Based on the above, it has been determined that another poet authored the poem that is part of the volume of works the petitioner claimed as his own.

The petitioner submitted numerous documents and multiple bound volumes as part of his original petition, but failed to outline the specific regulatory criteria that the bound volumes allegedly satisfied. However, the statement accompanying the initial visa petition identifies 8 C.F.R. §§ 204.5(h)(3)(v) and (vi) as criteria that the petitioner claims the submitted documentation satisfied. Therefore, the misrepresentation was material to the petitioner's eligibility for the underlying visa petition.

By filing the instant petition and submitting as evidence a volume of work which includes a poem that another poet wrote, the petitioner has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Because the petitioner has failed to provide competent independent and objective evidence to overcome, fully and persuasively, the AAO's finding that he claimed the work of another as his own, the AAO affirms the previous finding that

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1255(a).

[redacted] accessed on February 19, 2013.

the petitioner has willfully misrepresented a material fact. This finding of willful material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

Regarding the instant petition, the petitioner's failure to submit independent and objective evidence to overcome the derogatory information discussed above seriously compromises the credibility of the petitioner and the remaining documentation. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Nevertheless, the AAO will address the petitioner's failure to demonstrate that he meets at least three of the ten categories of evidence that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3).

IV. ELIGIBILITY UNDER SECTION 203(B)(1)(A) OF THE ACT

A. Legal Authority

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.[4] 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.*

B. Evidentiary Criteria[5]

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).

The director determined that the petitioner failed to satisfy the requirements of this criterion. Counsel, on behalf of the petitioner, asserts on appeal that the director misinterpreted the plain language of the regulations in finding that the petitioner failed to establish that he won *major* awards. Counsel asserts that 8 C.F.R. § 204.5(h)(3), the subsection that outlines the requirements of a one-time achievement describes evidence of a one-time achievement as, "a major, international recognized award." Counsel suggests that because 8 C.F.R. § 204.5(h)(3) requires a "lesser nationally or internationally recognized prize," to consider under this criterion whether a prize or award is major would be a misapplication of

[4] 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).

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

the law. Congress' sole example of a one-time achievement is a Nobel Prize. H.R. Rep. No. 101-723, 59 (September 19, 1990). A lesser nationally or internationally recognized prize than the Nobel Prize would still be a major prize and the AAO finds no error on the part of the director to disqualify the petitioner's evidence on that basis. *See Rijal v. USCIS*, 772 F.Supp.2d 1339, 1345 (W.D. Wash. 2011) (noting that Congress entrusted the decision of defining a major award to the administrative process). Moreover, the plain language of 8 C.F.R. § 204.5(h)(3)(i) requires that a qualifying award be nationally or internationally *recognized.* There is no evidence in the record of national or international recognition for any of the prizes or awards the petitioner claims. Accordingly, the AAO concurs with the director's determination that the petitioner failed to establish he meets this criterion.

> *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).

This criterion contains several evidentiary elements the petitioner must address. The first is that there are associations (in the plural) in the petitioner's field that consist of formal membership. The second requirement is that the petitioner is a member of these associations. The third element is that the associations require outstanding achievements (in the plural) as a condition of admittance. The final requirement is that admittance is judged, or adjudicated, by nationally or internationally recognized experts in their field who determine if the aforementioned outstanding achievements are sufficient for admission.

The director found that the petitioner failed to meet the requirements of 8 C.F.R. § 204.5(h)(ii). The petitioner submitted evidence of membership in two organizations and based on the submitted documentation, the director could not determine that the listed associations required outstanding achievement as an essential condition for admission for membership. On appeal, counsel on behalf of the petitioner, asserts that the director's finding in this regard "did not provide any reason(s) or analysis, except for jumping into subjective conclusion, which has failed to provide the beneficiary a meaningful opportunity for rebuttal." The petitioner in this instance failed to include the criteria for membership for the two organizations. The plain language of the regulation indicates that a petitioner submit documentation establishing that "outstanding achievements of their members" is required for membership. 8 C.F.R. § 204.5(h)(3)(ii). Consequently, the director's conclusions in this regard does not constitute "subjective conclusion" and instead is based upon the plain language requirements of the regulation.

Accordingly, the AAO affirms the director's conclusions in this regard and the petitioner has failed to satisfy the requirements of the regulation.

> *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).

While the petitioner originally submitted evidence relating to this criterion, the director found that the petitioner failed to satisfy the requirements of the regulation, and the petitioner does not challenge the finding on appeal. Consequently, the AAO concludes that the petitioner has abandoned his claim regarding this criterion. *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-2731, 2011 WL 4711885 at *9 (E.D. N.Y. Sept. 30, 2011).

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.* 8 C.F.R. § 204.5(h)(3)(iv).

The director found that the petitioner failed to satisfy the requirements for this criterion. On appeal, counsel for the petitioner asserts that the petitioner submitted evidence from seven organizations or establishments *inviting* him to serve as a judge as a member of an award evaluation committee. Counsel maintains the director misinterpreted the regulation in stating: "Simply being invited to be a judge of the work of others in the same or an allied field is not sufficient for this criterion." Other than the broad allegation of misinterpreting the regulation, counsel fails to specify a substantive legal claim on appeal under this criterion. A passing reference without substantive arguments is insufficient to raise that ground on appeal. *Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. 433, 435 (11th Cir. 2009). Even assuming *arguendo*, that the petitioner properly raised this ground on appeal, the AAO agrees with the director that the invitation to judge an event does not mean that the petitioner accepted the invitation and actually participated in the judging process. The petitioner has failed to submit evidence showing that he actually judged as a member of the various award evaluation committees and fails to satisfy the plain language requirements of the regulation. Consequently, the petitioner failed to satisfy the regulatory requirements pursuant to 8 C.F.R. § 204.5(h)(3)(iv).

> *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 originally submitted evidence relating to this criterion but the director found that he failed to satisfy the requirements of the regulation, and the petitioner does not challenge the finding on appeal. The AAO, therefore, finds that the petitioner has abandoned his claim regarding this criterion. *See Sepulveda* at 1228 n. 2; *Hristov v. Roark*, 2011 WL 4711885 at *9.

> *Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.* 8 C.F.R. § 204.5(h)(3)(vi).

The petitioner also submitted evidence relating to this criterion before the director, but the director found that he failed to satisfy the requirements of the regulation, and the petitioner does not challenge the finding on appeal. The AAO concludes that the petitioner has also abandoned his claim regarding this criterion. *See Sepulveda* at 1228 n. 2; *Hristov v. Roark*, 2011 WL 4711885 at *9.

C. Summary

The petitioner has failed to submit relevant, probative and credible evidence that qualifies under any of the regulatory subparagraphs.

V. 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.

As an initial matter, the AAO's finding of willful misrepresentation, to which the petitioner failed to reply with independent and objective evidence, casts doubt on all of the petitioner's claims. Nonetheless, the AAO finds that in the alternative, the petitioner has failed to establish eligibility under section 203(b)(1)(A) of the Act and the implementing regulations.

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.[6] 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.

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[6] 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).

ORDER: The appeal is dismissed and the AAO enters a separate finding of willful misrepresentation of a material fact.

FURTHER ORDER: The AAO finds that the petitioner knowingly submitted a poem authored by another poet in an effort to mislead USCIS on elements material to his eligibility for a benefit sought under the immigration laws of the United States.