



U.S. Citizenship
and Immigration
Services

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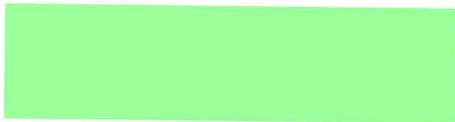


Date: **NOV 12 2013** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

APPLICATION: 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter 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 as a psychology researcher, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien’s “sustained national or international acclaim” and present “extensive documentation” of the alien’s achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserts the director erred in finding that the petitioner met only two of the regulatory criteria outlined in 8 C.F.R. § 204.5(h)(3). Counsel asserts that there is sufficient evidence to conclude that the petitioner met three additional regulatory criteria and established her eligibility as an alien of extraordinary ability.

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.*

II. ANALYSIS

As an initial matter, counsel asserts on appeal that the proper standard in these proceedings is the preponderance of the evidence standard of proof. According to the preponderance of evidence standard, USCIS determines the truth not by the quantity of the evidence alone but by its quality. *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). A thorough review of the record reveals that the petitioner has not submitted probative evidence

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).

of eligibility, as required by 8 C.F.R. §§ 204.5(h)(3)(i)-(x). Accordingly, the record indicates that the director did not violate the appropriate standard of proof in these proceedings.

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 director determined in his decision that the petitioner did not meet the requirements for eligibility under 8 C.F.R. § 204.5(h)(3)(ii). Counsel asserts on appeal that the petitioner submitted sufficient evidence to meet this criterion. Specifically, counsel observes that at least one of the associations to which petitioner belongs has multiple levels of membership, which reflects significance of achievements and contributions. In addition, counsel asserts on appeal that the director did not fully consider the expert letter that the petitioner submitted as supplemental evidence under this criterion.

This criterion contains several evidentiary elements the petitioner must establish. First, the petitioner must demonstrate that the beneficiary is a member of more than one association in his field. Second, the petitioner must demonstrate that the associations require outstanding achievements (in the plural) of its members. The final requirement is that admittance is judged, or adjudicated, by nationally or internationally recognized experts in their field. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner submitted evidence to substantiate her membership in two associations: the [REDACTED]

[REDACTED] Along with evidence of her membership in [REDACTED] the petitioner submitted printouts of webpages that describe how a person can join the organization along with pages that include the Articles of Association and the Charter. The information relating to membership describes the process of applying to become a member. Specifically, the information indicates that to become a member, a person needs to “serve a written statement addressed to [the President] . . .” and the requestor’s application is “considered by the Board of the [REDACTED] and can be examined in the absence of the applicant.” Additional materials indicate that members of [REDACTED] are:

The age of 18 Russian citizens, foreign citizens – doctors, psychologists, speech pathologists, social workers, researchers and other persons who share the goals of the Association who are ready to accept the Charter of the Association, pay an entrance fee, pay membership dues regularly and take a personal part of the work of the Association.

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

³ The petitioner also submitted information on the [REDACTED] of Voice as part of the record, but the petitioner neither submits documentation indicating that she is a member of this organization nor asserts on appeal that she is a member.

While there are higher requirements for honorary members, the petitioner has not established that she is an honorary member. The basic membership requirements are not outstanding achievements as required by the regulatory language under 8 C.F.R. § 204.5(h)(3)(ii). Thus, the petitioner's membership in NAS does not meet this criterion.

In support of her membership in [REDACTED] the petitioner submitted the following documents: a copy of her membership card showing that she is a full member; printed webpages stating the requirements of membership for the organization and its history; and a letter from [REDACTED] Vice President of [REDACTED] of Russia. Criteria for membership include the selection of “[individuals] dealing with various health problems and who have made a significant contribution to solving these problems . . .” and election to [REDACTED] membership “[i]s an expression of recognition of academic achievement and organizational creativity of the person.” The director concluded, the selection criteria of “significant contributions” and “recognition of academic achievement and organizational creativity” do not rise to the level of outstanding achievement, as required by the regulation. Consistent with this conclusion, the record contains no information explaining how [REDACTED] defines a “significant contribution.” While the letter from the Vice President of [REDACTED] of Russia states that the Presidium of [REDACTED] of Russia elected the petitioner as a full member because it recognized that she has “outstanding achievements in the field,” the letter does not state that demonstrable outstanding achievement is a necessary requirement to becoming a full member. While counsel on appeal states that it is arguable that different levels of membership with [REDACTED] would require more stringent requirements, the submitted letter does not substantiate that claim and the petitioner has not submitted additional documentation establishing that different membership levels have different requirements. Therefore, the petitioner has not demonstrated that her membership in [REDACTED] meets the elements required for eligibility under 8 C.F.R. § 204.5(h)(3)(ii). Moreover, the plain language of the regulation requires membership in more than one qualifying association.

Accordingly, the petitioner cannot meet this criterion.

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 petitioner previously submitted evidence under this criterion. The director's denial concluded that the petitioner did not meet this criterion and the petitioner does not identify any factual or legal error relating to this criterion on appeal. Consequently, 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).

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 determined in his decision that the petitioner met this regulatory criterion and the record supports the director's conclusions in this regard.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field. 8 C.F.R. § 204.5(h)(3)(v).

The director found that the petitioner failed to satisfy the requirements set forth at 8 C.F.R. § 204.5(h)(3)(v). The plain language of the regulation requires both that the petitioner's contributions be original and of major significance in the field. USCIS must presume that the word "original" and the phrase "major significance" are not superfluous and, thus, that they have some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3rd Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

On appeal, counsel asserts that the director erroneously dismissed expert letters corroborating the petitioner's publications, citation of her work, invitations to present her work, commercial exploitation of her patents, and the role of her contributions in the work of other scientists. Regarding the petitioner's published work, the regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). Evidence relating to or even meeting the scholarly articles criterion is not presumptive evidence that the petitioner also meets this criterion. The regulatory criteria are separate and distinct from one another. Because separate criteria exist for authorship of scholarly articles and original contributions of major significance, the two are not interchangeable.⁴ To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria. Thus, there is no presumption that every published article or presentation is a contribution of major significance; rather, the petitioner must document the actual impact of her article or presentation.

In response to the RFE, counsel indicated that exhibit 8 included "a list of [the petitioner's] publication [redacted] in 99 publications by other researchers in this field." This list, however, is a list of "related citations," all of which predate the petitioner's article. Thus, this list is not a list of articles that cite to the petitioner's work, which would not appear in print for several more years in most cases. Rather, they are "citations" (author, title, publication, date and page number) of articles on a related topic. The petitioner submitted copies of only a handful of articles that actually cite her work. The petitioner has not demonstrated that this level of citation is indicative of a contribution of major significance in the field.

⁴ 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 at 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.

The letter from [REDACTED] Vice President of [REDACTED] the letter from Dr. [REDACTED] Professor of Psychology at [REDACTED] the letter from Dr. [REDACTED] President of the [REDACTED] and the letter from Dr. [REDACTED] President of the [REDACTED] all attest to the petitioner's involvement in conferences or other venues where she was invited to present her work. The group of letters does not provide additional detail regarding the significance of a particular conference or series. More significantly, the record does not include evidence of the impact the petitioner's presentations on the field. Consequently, the record supports the director's determination that the submitted evidence regarding the petitioner's conference participation falls short of establishing contributions of major significance in the field.

As for the commercial exploitation of the petitioner's patents, counsel on appeal asserts that the record indicates that the Center of Speech Pathology and Neurorehabilitation has utilized the petitioner's patent innovation nation-wide and submits documentation of her patents for the first time on appeal. The director, in the Request for Evidence (RFE), specifically requested evidence of patents and their impact. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as on the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The response to the director's RFE was the petitioner's opportunity to document her patents and their impact. See *id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the patent evidence submitted on appeal.

The final group of expert letters are from the following experts: Dr. [REDACTED] Professor and Member of the [REDACTED] Dr. [REDACTED] Head of the Department of General Linguistics and the Laboratory for [REDACTED] Dr. [REDACTED] Head of the Special Psychology and Pedagogy Department of the [REDACTED] Dr. [REDACTED] and Dr. [REDACTED] Dr. [REDACTED] Lecturer of Philology and Teaching Methods in Primary Education at [REDACTED] and Dr. [REDACTED] Assistant Professor of Psychiatry at [REDACTED] School of Medicine.⁵ While these letters generally attest to the petitioner's contributions to the field, the assertions are vague and conclusory. For example, Dr. [REDACTED] writes generally: "Being a leader and active participant of professional community [the petitioner] is an author of scientific publications about speech pathology. Theoretical course of speech pathology in Russian universities is based on her scientific achievements." Similarly, the joint letter from Dr. [REDACTED] and Dr. [REDACTED] praise the petitioner in general terms: "[The petitioner] is a brilliant scholar, a member of the

⁵ The support letter from Dr. [REDACTED] and the support letter from Dr. [REDACTED] have little or no probative value for this criterion because the petitioner has provided incomplete or partial translations of these letters. The regulation at 8 C.F.R. § 103.2(b)(3) requires any document submitted as evidence and containing a foreign language to be accompanied by a full English translation.

[REDACTED] who has made a significant contribution to the development of Russian medical science. She is well respected for her engagement into many important psychological and logopedic researches.” 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). On appeal, counsel asserts that the petitioner’s submitted letters attesting to her contributions meet the requirements of *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). However, *Kazarian* specifically states that vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field, such as the letters the petitioner submitted under this criterion, are insufficient. 580 F.3d at 1036, *aff’d in part* 596 F.3d at 1122.

Accordingly, the petitioner cannot meet the regulatory requirements under 8 C.F.R. § 204.5(h)(3)(v).

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 director determined in his decision that the petitioner met this regulatory criterion and the record supports the director’s conclusions in this regard.

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 previously claimed to have submitted evidence under this criterion but does not assert eligibility under this criterion on appeal. Accordingly, the petitioner has abandoned this claim for purposes of the appeal. See *Sepulveda*, 401 F.3d at 1228; *Hristov*, 2011 WL 4711885 at *9.

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).

The petitioner submitted evidence in support of this criterion along with her Form I-140 and the accompanying supplemental statement. In the supplemental statement, counsel references letters from Dr. [REDACTED] from the [REDACTED] of the [REDACTED] and Dr. [REDACTED]

[REDACTED] Professor of Psychology at [REDACTED] and indicates that the petitioner’s clinical work had an impact on the city of Moscow. Counsel on appeal asserts that this criterion does not necessarily require a showing that the alien’s role was leading or critical to the organization as a whole. However, the plain language of 8 C.F.R. § 204.5(h)(3)(viii) indicates that the alien must perform a leading or critical role for an organization or an establishment rather than for a division or department. Furthermore, a city is not an organization or establishment, as required under the regulations, and not every clinician in Moscow who had a positive impact has necessarily performed in a leading or critical role for the city of Moscow. Furthermore, additional evidence in the record indicates that the petitioner’s clinical impact was directed through one specific organization, the [REDACTED] municipal clinical hospital in Moscow, Russia. Dr. [REDACTED] Head of the [REDACTED] in Moscow, attests that the petitioner had a “leading role in the creation of the Center, development of the forms and

methods of its work.” However, Dr. [REDACTED] does not state that the Center or hospital enjoyed a distinguished reputation, and the record does not otherwise contain evidence of the organization’s reputation.

Similarly, counsel indicates in the supplemental statement that the petitioner became a leading figure at [REDACTED] through involvement in the creation of an animated series as a form of psychotherapy. The record includes a letter from [REDACTED] Executive Producer of [REDACTED] attesting to the petitioner’s role in the studio’s project. However, the letter does not state that [REDACTED] has a distinguished reputation and the record does not include other evidence establishing that the organization enjoys a distinguished reputation.

Accordingly, the petitioner did not meet all the regulatory requirements outlined in 8 C.F.R. § 204.5(h)(3)(viii).

B. Summary

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

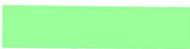
III. CONCLUSION

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.⁶ Rather, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.* at 1122.

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).

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NON-PRECEDENT DECISION

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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.