



U.S. Citizenship
and Immigration
Services

(b)(6)



Date:

OCT 29 2013

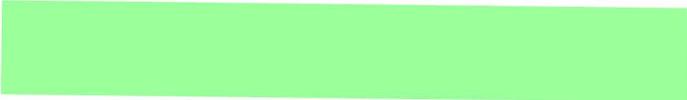
Office: TEXAS SERVICE CENTER

FILE:



IN RE:

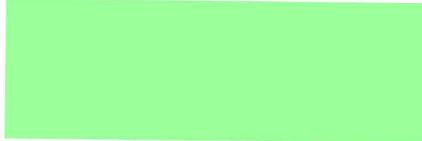
Petitioner:
Beneficiary:



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, 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 to classify the beneficiary as an “alien of extraordinary ability” in the sciences, specifically as a clinical pediatric endocrinologist, 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 beneficiary’s 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 has submitted credible probative evidence showing that the beneficiary fulfilled the definition of extraordinary evidence. Counsel further asserts that the director erred in denying that the beneficiary made original scientific and scholarly contributions of major significance in his field and that USCIS failed to properly review all of the evidence submitted showing that the beneficiary performs a leading or critical role for an organization that has a distinguished reputation.

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 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 determined that the petitioner did not satisfy the plain language requirements of this criterion. After a thorough review of the evidence of record, including the testimonial letters submitted along with the response to the director's Request for Evidence (RFE), the record supports the finding that the petitioner submitted sufficient documentation establishing the beneficiary's original scientific and scholarly contributions of major significance in the field of pediatric endocrinology, specifically in the areas of disorders of water balance in children and the production of the hormone vasopressin. Numerous experts and leaders in the beneficiary's field attest to his contributions, in particular, to the book chapters that the beneficiary authored or co-authored in his area of expertise for multiple publications that the petitioner documented as the leading texts in the field of pediatric endocrinology. In light of the above, the petitioner has established that the beneficiary satisfies the requirements of this criterion. Accordingly, the AAO withdraws the director's finding with regard to this criterion

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 that the petitioner submitted sufficient evidence demonstrating that the beneficiary met this criterion. Upon review of the evidence of record and the director's decision, there is sufficient documentation in the record to meet the plain meaning requirements under 8 C.F.R. § 204.5(h)(3)(vi).

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 director determined that the beneficiary did not play a leading or critical role within [REDACTED]. The director further determined that even if the beneficiary played a leading or critical role within [REDACTED] the beneficiary does not meet the requirements of this criterion because the regulatory language requires evidence that the beneficiary performed a leading or critical role for organizations or establishments (in the plural).

As an initial matter, based on the letter from Dr. [REDACTED] Chief of the Division of Endocrinology at [REDACTED] which details the importance of the beneficiary's role to the Division, the record supports the conclusion that the beneficiary performed a critical role for the Division of Endocrinology. In addition, the petitioner submitted sufficient evidence documenting that the Division of Endocrinology at [REDACTED] has a distinguished reputation. The regulation, however, requires evidence of a leading or critical role for an organization or establishment

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

as a whole rather than for a division or department. Regardless, even if the petitioner established that the Division of Endocrinology is an organization or establishment, the petitioner cannot establish the beneficiary's eligibility under this criterion because he has not submitted evidence showing the beneficiary's performance in a leading or critical role for organizations or establishments (in the plural) that have a distinguished reputation.

On appeal, counsel asserts that there is no precedent or guidance that requires a petitioner to show that a beneficiary was in a leading or critical role in more than one organization. The plain language of 8 C.F.R. § 204.5(h)(3)(viii), however, requires performance in a leading or critical role for organizations or establishments (in the plural), which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(K)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation.³

Accordingly, the petitioner did not demonstrate the beneficiary's eligibility pursuant to 8 C.F.R. § 204.5(h)(3)(viii).

Comparable evidence under 8 C.F.R. § 204.5(h)(4).

The petitioner submitted additional evidence regarding the scarcity of endocrinologists in the U.S. medical system that did not fall under the ten categories outlined in 8 C.F.R. § 204.5(h)(3). The director concluded in his decision that the petitioner did not meet the requirements under the regulation to have the evidence considered as comparable evidence that substituted one of the outlined regulatory eligibility criteria. On appeal, counsel asserts that the additional evidence was not intended to replace or substitute the typical criteria, but submitted to buttress the petition. A petitioner must first submit evidence that meets the plain language of three criteria or comparable evidence before relying on other evidence that might be relevant to a final merits determination. Regardless, evidence of a shortage would not be a relevant consideration in a final merits determination. Special or unusual knowledge or training is not even sufficient by itself to meet the national interest threshold for the lesser classification at section 203(b)(2)(B)(i) of the Act. *New York State Dep't of Transp.*, 22 I&N Dec. 215, 221 (Assoc. Comm'r 1998). The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

³ See *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

B. Summary

The petitioner did not submit sufficient relevant, probative evidence to satisfy the regulatory requirement of three types of evidence.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.⁴ Rather, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.* at 1122. The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The 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.

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).