



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **SEP 11 2013** Office: TEXAS SERVICE CENTER

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,

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 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 December 11, 2012. On December 19, 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 March 21, 2013. On appeal, the petitioner submits a brief with additional documentary evidence. For the reasons discussed below, 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.<sup>1</sup> 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.*

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<sup>1</sup> 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 Criteria<sup>2</sup>

*Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.*

Initially, counsel asserted that the petitioner's research grant and travel awards serve to meet this criterion. The director requested additional evidence, such as evidence of the significance of the awards, the pool of candidates, and the number of awards annually. In response, counsel discussed both the research grant and the travel awards in her cover letter and submitted additional evidence. The director concluded that the petitioner had not demonstrated that the awards were nationally or internationally recognized awards for excellence. On appeal, counsel's discussion of the research grant is virtually identical to the response to the director's RFE. Counsel's brief does not address the travel awards. The petitioner resubmitted previously submitted evidence, including the travel awards. Counsel claims that the petitioner qualifies under this criterion on appeal without indicating what error in law or error in fact the director made within his decision and without explaining why the AAO should find those claims any more persuasive than the director did. Therefore, the AAO considers the petitioner's claims under this criterion to be abandoned. *See Desravines v. United States Attorney Gen.*, No. 08-14861, 343 F. App'x 433, 435 (11th Cir. 2009) (finding that issues not briefed on appeal are deemed abandoned). Regardless, the record lacks any evidence that the petitioner has received any nationally or internationally recognized prizes or awards designed to recognize excellence in his field of endeavor rather than funding designed to support future research and travel awards designed to facilitate travel to conferences.

*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.*

The petitioner initially claimed eligibility under this criterion, but failed to respond to the director's RFE as it related to this regulatory requirement. Specifically, in the RFE, the director acknowledged that the petitioner is a member of the American Association for Cancer Research (AACR) but concluded that the petitioner had not demonstrated that AACR required outstanding achievements of its members. The director requested the "section of the association's constitution or bylaws which discuss the criteria for membership for the [petitioner's] level of membership in the association." The petitioner did not address this criterion in response and did not submit the requested bylaws or constitution. Thus, the director concluded that the petitioner had not satisfied the requirements of this criterion. On appeal, counsel reasserts that the petitioner meets this criterion and submits online membership application information for AACR reflecting that AACR is "open to investigators worldwide who have conducted two years of research resulting in articles in peer-reviewed publications relevant to cancer and cancer-

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

related biomedical science, or who have made substantial contributions to cancer research in an administrative or educational capacity.” Counsel repeats this language, but does not explain how two years of research resulting in peer-reviewed articles is an outstanding achievement for a cancer researcher or how a single membership can meet the plain language requirements of this criterion, which is worded in the plural.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of 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).

Where, as here, 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); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, he should have submitted the documents in response to the director’s request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

*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.*

The petitioner initially claimed eligibility under this criterion, but failed to respond to the director’s RFE as it related to this regulatory requirement. Specifically, in the RFE, the director acknowledged that the petitioner had submitted a list of articles that have cited his research but concluded that citing articles were not about the petitioner. The director requested evidence “that the submitted published material was about the [petitioner] and [his] work in the field.” The petitioner did not address this criterion in response and did not submit the requested evidence. Thus, the director concluded that the petitioner had not satisfied the requirements of this criterion. On appeal, counsel asserts that the citations to the petitioner’s research is evidence of the significance of his contributions, but fails to address this criterion. Accordingly, the petitioner has abandoned that claim. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005); *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.*

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 (3<sup>rd</sup> Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2<sup>nd</sup> 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 director determined that although the petitioner demonstrated his original contributions, he failed to document how these contributions were already of major significance in the petitioner's field.

Counsel separated his discussion of the petitioner's research into three areas: prostate cancer, biomedical cancer, and pneumonia. Within the appellate brief, counsel indicates that the petitioner's prostate cancer research demonstrates how to inhibit cancer cell development in androgen-independent prostate cancer. He supports this position by referencing the letter from [REDACTED] [REDACTED] states: "[The petitioner's research] would save thousands of lives in the United States and worldwide." [REDACTED] statement does not establish that the petitioner's research has resulted in a significant impact within the field, which is required by this regulatory criterion. Instead, he merely indicates a future potential impact that the petitioner's research could have in the field. Specifically, [REDACTED] asserts that researchers at [REDACTED] "closely follow" the petitioner's research and "look forward for many major contributions." 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). This evidence does not establish that, as of the priority date, the petitioner had contributed to his field in a significant manner as required by the regulation.

The petitioner also submitted a letter from [REDACTED] [REDACTED] is working with the petitioner on the research to block the growth of prostate cancer and discusses the collaborative research he and the petitioner are conducting. [REDACTED] explains that the screening tests he and the petitioner are performing "are very important in identifying new inhibitors that prevent prostate cancer." [REDACTED] did not explain how the petitioner's findings have already been shown to block cancer growth and does not assert that their research results are being widely adopted within the field. He only discussed the potential benefits that the research could yield.

The remaining letters identified within the appellate brief that relate to the petitioner's prostate cancer research only discuss the petitioner's research, the impact it could have, and his research findings. The letters do not indicate that his research findings have already been reproduced or verified within the field. Incremental improvements through screenings that narrow the list of potential inhibitors are not sufficient to meet this criterion's requirement that the petitioner has already made contributions within his field that are significant.

The appellate brief also asserts that the petitioner's "major, original scientific research contribution is [REDACTED] and that the binding of a particular [REDACTED]

[REDACTED] The brief summarizes these discoveries to conclude that the petitioner's findings will increase the likelihood that radiation therapy is an option for those patients whose tumors would not have otherwise responded favorably to such therapy. Counsel's brief supports this position first with the letter from [REDACTED] [REDACTED] described the petitioner's research findings as original and important, and stated that "the significance of [the petitioner's] work lies in the development of new drugs [REDACTED]

[REDACTED] continues that the petitioner's work has "opened up new ways to develop drugs to combat human cancer in the absence of [REDACTED] Although [REDACTED] indicated that a prestigious international journal cited to the petitioner's research within a few months, [REDACTED] did not indicate that new drugs had been developed that mimic the [REDACTED] While the petitioner's research has received some attention in the literature and may have the potential to eventually impact the field, it has not resulted in significant progress toward the creation of a proven drug to mimic the [REDACTED] Consequently, the petitioner has not demonstrated that his findings have already impacted the field; he has only showed that it has the potential to do so, which is not sufficient to meet this criterion's requirements.

[REDACTED] indicated that the petitioner's research "findings lead to the development of new strategies in radiation therapy to treat cancer patients who have [REDACTED]" However, [REDACTED] did not identify any radiation provider that has changed its procedures based on the petitioner's work. Instead, [REDACTED] simply asserts that he has cited the petitioner's work without elaborating on how he has utilized the petitioner's findings. The remaining letters noted within the appellate brief indicate that the petitioner's research findings can lead to the development of cancer fighting drugs, that it shows a high potential for cancer treatment, and that it could induce cancer cell death. The plain meaning of the regulatory language requires evidence that the petitioner's original contributions have already impacted the field at a level consistent with contributions of major significance.

The petitioner also presents his work related to pneumonia research as a contribution of major significance in his field. However, the letters generally identify areas of potential contributions in which the petitioner's "discovery opens up the possibility of developing drugs . . . which could lead to

the prevention of [REDACTED]. Research findings that are important and have the potential to make a significant impact within the petitioner's field fall short of the level of research that has proven its worthiness and has been implemented, adopted, and has had a measurable impact within a field of endeavor. Research that has the potential to be a breakthrough finding is not sufficient to satisfy this criterion's requirements. See 8 C.F.R. §§ 103.2(b)(1), (12).

Solicited letters 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 (9<sup>th</sup> Cir. 2009) *aff'd in part* 596 F.3d 1115 (9<sup>th</sup> Cir. 2010). 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 abilities and research findings, 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).

Within the initial filing, the petitioner provided evidence of being invited to give conference presentations related to his research and citations to his work. Only evidence that was in existence on the date the petitioner filed the petition is probative of the petitioner's eligibility as of that date. As a result, any presentations or citations that occurred after December 11, 2012 are not probative evidence of eligibility in this proceeding. However, the petitioner failed to document that any of his scholarly presentations were widely cited or had otherwise had a significant impact in his field.

Within the proceedings before the director, the petitioner initially submitted a scientific article titled,

[REDACTED] Although the petitioner did not provide the number of times this article had been cited by others in the field, he did provide evidence in response to the RFE that indicated 81 citations. However, the authors of this article, [REDACTED], merely cited to one of the petitioner's articles and thanked him for his technical assistance rather than also listing him as an additional author. The petitioner has not established that citations to an article to which his contribution was insufficient to garner authorship credit is probative of the petitioner's impact in the field. As such, this article has limited probative value in establishing the impact of the petitioner's research.

The petitioner provided additional evidence in response to the RFE demonstrating that one of his articles received a small number of citations. It is not persuasive that this small amount of citations of the petitioner's article is reflective of the major significance of his work in the field. The petitioner

failed to establish how those minimally cited findings have significantly contributed to his field as required by this regulatory criterion.

Based on the foregoing, 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.

*Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

The petitioner claims eligibility under this criterion based on his role performed at the [REDACTED]. The leading or critical role arguments within the appeal brief are virtually identical to the response to the director's RFE. The petitioner claims that he qualifies under this criterion on appeal without indicating what error in law or error in fact that the director made within his decision and without explaining why the AAO should find those claims any more persuasive than the director did. Therefore, the AAO considers the petitioner's claims under this criterion to be abandoned. *See Desravines*, 343 F. App'x at 435. Regardless, the record lacks any evidence that the petitioner has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

Even if the petitioner had demonstrated that his claims related to [REDACTED] satisfy this criterion's requirements, [REDACTED] is but one organization the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence that the petitioner has performed in a leading or critical role for "organizations or establishments" in the plural, consistent with the statutory requirement for extensive documentation. *See* section 203(b)(1)(A)(i) of the Act.

#### 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.<sup>3</sup> Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent 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.

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<sup>3</sup> 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).