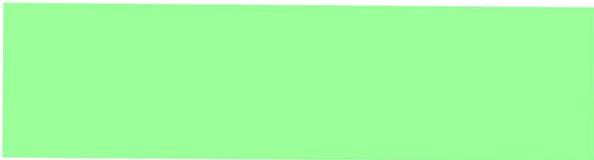




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

Office: NEBRASKA SERVICE CENTER

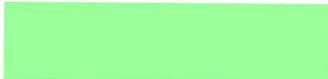
FILE:



SEP 23 2013

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
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on September 6, 2012 and affirmed his decision on December 18, 2012. 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 postdoctoral fellow, 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 on behalf of the alien under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel submits a brief. For the reasons discussed below, upon review of the entire record, the petitioner has not established his eligibility for the exclusive classification sought.

I. LAW

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

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

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

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

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

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

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

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

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

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

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. On appeal, counsel states that “USCIS erred in not determining that Petitioner met the standards of 49 *Buletini v. INS*, 860 F. Supp 1229 [(E.D. Mich. 1994)] for 3 other criteria.” In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Moreover, the court in *Buletini* acknowledged that “the examiner must evaluate the quality, including the credibility, of the evidence presented to determine if it, in fact, satisfies the criteria.”

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).

Buletini, 860 F. Supp. at 1234. Regardless, as discussed below, the petitioner has not submitted qualifying evidence that meets the plain language requirements for at least three criteria. 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 antecedent regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

A. Evidentiary Criteria²

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

The director discussed the submitted evidence and found that the petitioner failed to establish that the evidence was qualifying. On appeal, counsel asserts that the petitioner's awards are not regional and any age restrictions are not disqualifying. As stated by the director in his request for evidence, in order to satisfy this criterion, the petitioner could submit such evidence as:

- The criteria used to grant the prizes or awards;
- The significance of the prizes or awards, to include the national or international recognition that the prizes or awards share;
- The reputation of the organization or panel granting the prizes or awards;
- Who is considered for the prizes or awards, including the geographic scope for which candidates may apply;
- How many prizes or awards are awarded each year[.]

The petitioner failed to submit any information which demonstrates that any of the awards are nationally or internationally recognized for excellence.

Regarding the [REDACTED] award from the [REDACTED] and [REDACTED] according to information submitted in response to the director's request for evidence, "[t]he purpose of this award is to encourage young and talented nuclear medicine investigators to have the financial aid to attend the meeting and present their work." Irrespective of any age limits, the petitioner's receipt of financial assistance to present his work at a conference does not constitute his receipt of a nationally or internationally recognized prize or award for excellence in his field of endeavor.

Regarding the [REDACTED] and [REDACTED] certificate from the [REDACTED] and [REDACTED] respectively, although the record contains information regarding [REDACTED] the record contains no information to demonstrate the national or

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

international significance of the award. The national reach of the conference itself does not establish that every award the conference organizers issue is a nationally or internationally recognized award for excellence in the field.

Regarding the selection of the petitioner's book as the [redacted] [sic]," the record only contains a copy of the certificate and a translation. Regarding the [redacted], it was awarded by the petitioner's university to [redacted]

Again, the record contains no evidence to demonstrate the national or international significance of the awards.

On appeal, counsel asserts that "USCIS has engaged in unauthorized rule-making by claiming that the criteri[on] requires multiple awards." The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires the petitioner's receipt of more than one prize or award. 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 AAO can infer that 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. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapshot.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). Regardless, the petitioner has not established that at least one of his awards is a nationally or internationally recognized award for excellence.

In light of the above, the petitioner has not established that he meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

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 director thoroughly discussed the submitted evidence and found that the petitioner failed to establish that the evidence was qualifying. On appeal, counsel states on the Form I-290B that "[d]ocumentation submitted about these associations described the requirements for membership which reach the level of outstanding, not the level of extraordinary that USCIS seems to require." Contrary to counsel's assertion that USCIS seemed to be relying on "extraordinary" requirements, the director correctly stated in his decision that "[e]vidence must demonstrate that the association requires outstanding achievement as an essential condition for admission to membership." The director also stated that:

Requirements that only include employment or activity in a given field; minimum education, experience or achievement; recommendations by colleagues or current members; or payment of dues do not satisfy this criterion since these requirements do not constitute outstanding achievements.

Counsel did not provide any additional evidence or identify any errors of law or fact in the director's analysis regarding this criterion in the appellate brief. Therefore, the AAO considers these claims 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).

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 submitted foreign language documents and uncertified translations of three news articles. The director found that "[t]he evidence submitted does meet this criterion." However, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the "evidence shall include the title, date, and author of the material, and any necessary translation" and that the material be published "in professional or major trade publications or other major media." Based on a review of the record of proceeding, the AAO must withdraw the findings of the director for this criterion.

None of the material contained the name of the author. Furthermore, the submitted translations did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Specifically, the translator did not certify the translations as complete and accurate. In addition, the petitioner failed to provide any evidence that the material appeared in professional or major trade publications or other major media, such as circulation and/or distribution data for the publications.

In light of the above, the petitioner has not established that he meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

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 specialization for which classification is sought.

The director found that "evidence submitted does not satisfy this criterion." Based upon a review of the record, the AAO withdraws the findings of the director for this criterion. There is sufficient documentation that the petitioner satisfies the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) through his research proposal and manuscript review positions.

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

The director thoroughly discussed the submitted evidence and found that the petitioner failed to establish that the evidence was qualifying. The petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. The phrase "major significance" is not superfluous and, thus, that it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3rd Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. 2003). To be considered a contribution of major significance in the field of science, it can be expected that other experts would have reproduced or otherwise applied the petitioner results. Otherwise, it is difficult to gauge the impact of the petitioner's work.

On appeal, counsel states on the Form I-290B that the "[p]etitioner submitted ample evidence to satisfy this requirement within its original application and its [m]otion to [r]econsider." It must be noted however, that counsel did not contest the director's finding for this criterion in the motion to reopen and motion to reconsider. In the attached appeal brief, counsel provides the same quotes from the Adjudicator's Field Manual that counsel quoted in the initial cover letter, lists the petitioner's awards, and quotes from a reference letter characterizing the petitioner's background as solid. Counsel does not, however, point to any specific error in the director's analysis under this criterion and offers no analysis of the evidence under the guidelines quoted other than to suggest that the petitioner's awards demonstrate the significance of the petitioner's contributions. Counsel cites no legal authority holding that evidence directly relating to one criterion is presumptive evidence of meeting a separate criterion. Regardless, as discussed above, the petitioner has not established the significance of his awards. Given the absence of any discussion of this issue on motion or a specific discussion regarding the issue on appeal, the petitioner has abandoned this issue. *Sepulveda*, 401 F.3d at 1228, n.2; *Hristov*, 2011 WL 4711885, at *9. With regard to the appeal, a passing reference without substantive arguments is insufficient to raise that ground on appeal. *Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. at 435.

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

The director found that the petitioner satisfies the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) and the record supports the director's finding.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The director thoroughly discussed the submitted evidence and found that the petitioner failed to establish that the evidence was qualifying. Counsel did not provide any additional evidence or offer any additional discussion identifying any errors of law or fact in the director's analysis regarding this

criterion. Therefore, the petitioner has abandoned this claim. *Desravines v. U.S. Atty. Gen.*, 343 *Fed.Appx. at 435.*

C. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

III. CONCLUSION

Had the petitioner submitted the requisite evidence on behalf of the beneficiary 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.³ Rather, the proper conclusion is that the petitioner failed to demonstrate that the beneficiary has satisfied 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.

³ 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) (noting that the AAO conducts appellate review on a *de novo* basis). 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).