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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

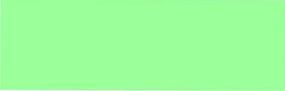


U.S. Citizenship
and Immigration
Services



DATE: **DEC 29 2014** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".


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” as an inventor, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), which makes visas available to aliens can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation. The director determined that the petitioner had not satisfied the initial evidence requirements set forth at 8 C.F.R § 204.5(h)(3), which requires documentation of a one-time achievement or evidence that meets at least three of the ten regulatory criteria.

For the reasons discussed below, we agree that the petitioner has not established his eligibility for the exclusive classification sought. Specifically, the petitioner has not submitted qualifying evidence of a one-time achievement pursuant to 8 C.F.R. § 204.5(h)(3), or evidence that satisfies at least three of the ten regulatory criteria set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x). As such, the petitioner has not demonstrated that he is one of the small percentage who is at the very top in the field of endeavor, and that he has sustained national or international acclaim. *See* 8 C.F.R. § 204.5(h)(2), (3). Accordingly, we will dismiss the petitioner’s appeal.

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) sets forth a multi-part analysis. First, a petitioner can demonstrate the alien’s sustained acclaim and the recognition of the alien’s achievements in the field through evidence of a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit this evidence, then a petitioner must submit sufficient qualifying evidence that meets at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The submission of evidence relating to at least three criteria, however, does not, in and of itself, establish eligibility for this classification. See *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination). See also *Rijal v. USCIS*, 772 F.Supp.2d 1339 (W.D. Wash. 2011) (affirming USCIS’ proper application of *Kazarian*), *aff’d*, 683 F.3d. 1030 (9th Cir. 2012); *Visinscaia v. Beers*, 4 F.Supp.3d 126, 131-32 (D.D.C. 2013) (finding that USCIS appropriately applied the two-step review); *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the “truth is to be determined not by the quantity of evidence alone but by its quality” and that USCIS examines “each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true”).

II. ANALYSIS

At the time of the original filing of the petition, the petitioner submitted a patent filing receipt from the United States Patent and Trademark Office (USPTO), an affidavit describing his patent, and copies of his passport pages and immigration documents. The petitioner did not identify which criteria, if any, under the regulation at 8 C.F.R. § 204.5(h)(3) that he purportedly met. It was not apparent from the review of the evidence to which criteria the evidence pertained. The burden is on the petitioner to establish his eligibility. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

The director issued a request for additional evidence (RFE) pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) describing each of the ten criteria under the regulation at 8 C.F.R. § 204.5(h)(3). In response to the director’s RFE, the petitioner provided background information regarding his invention and patent filing history, including screenshots from [www. \[REDACTED\]](#) and [www. \[REDACTED\]](#). The petitioner, however, did not identify any intended criteria or how his documents pertained to any specific criterion.

The director considered the petitioner’s documentation under each of the categories of evidence at 8 C.F.R. § 204.5(h)(3)(i) – (x) and determined that the petitioner did not meet any of the regulatory categories of evidence. On appeal, the petitioner claims eligibility for the published material

critterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), and the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi). In addition, the petitioner requests that his evidence be considered under the comparable evidence provision pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). As the petitioner does not contest the findings of the director for any of the other regulatory categories of evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) – (ii), (iv), and (vii) – (x), the petitioner has abandoned these issues. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885, at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal).

A. Evidentiary Criteria

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 plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “[p]ublished 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.” In general, in order for published material to meet this criterion, it must be about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the [REDACTED] nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers. Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that “[s]uch evidence shall include the title, date, and author of the material, and any necessary translation.”

On appeal, the petitioner refers to the screenshots from [www.\[REDACTED\]](http://www.[REDACTED]) and [www.\[REDACTED\]](http://www.[REDACTED]). According to its website, [REDACTED] Patents covers the entire collection of granted patents and published patent applications from the USPTO, the [REDACTED], and the [REDACTED]. Moreover, according to [REDACTED] it posts the latest United States patent applications each week before the USPTO decides to grant or deny them.² The petitioner’s documentation includes his patent application for his “[REDACTED]” that he submitted to the USPTO. The patent documentation does not discuss the petitioner, is not about the petitioner, and does not otherwise reflect published material about the petitioner relating to his work. The petitioner’s submission of his patent application does not reflect evidence of published material about him relating to his work consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

¹ See [https://\[REDACTED\]](https://[REDACTED]) Accessed on October 30, 2014, and incorporated into the record of proceeding.

² See [http://\[REDACTED\]](http://[REDACTED]) Accessed on October 30, 2014, and incorporated into the record of proceeding.

technology, let alone that the invention is considered a contribution of major significance in the field.

In addition, as indicated by the use of the plural in the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v), the petitioner must show that he has made more than one original contribution of major significance in the field. The use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) 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. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at *1, *12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *1, *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). Therefore, even if the petitioner were to establish that his invention reflects an original contribution of major significance in the field, which he has not, the submitted evidence does not show that the petitioner has made more than one original contribution of major significance in the field as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

Accordingly, the petitioner did not establish that he meets 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 plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires “[e]vidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media.” On appeal, the petitioner claims that “[redacted] and several other websites published this; copy of which is unavailable as mentioned in annexure-33 of the RFE sent.” In the petitioner’s RFE response, the petitioner claimed that “[redacted] also published my work in 2007 but copies of which are traceless now.” Furthermore, according to the petitioner’s “List of Attachments” for his RFE response, he indicated that annexure 33 was “[redacted]” and it was “Missing.”

The record of proceeding contains no evidence that the petitioner has authored scholarly articles in “[redacted] energsky and several other websites.” Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

Accordingly, the petitioner did not establish that he meets this criterion.

B. Comparable Evidence

On appeal, the petitioner claims:

As I am an independent inventor trying to be an entrepreneur in the business of my invented machine in US, and because my achievement is latest and yet to come in public so the award or the recommendations are not gained yet as necessarily so, the best comparable evidence could be my running machine only.

The petitioner then attempts to explain the features of his invention and compares the old version of his patent to his current amendments and submits three photos of his invention. The regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim “shall” include evidence of a one-time achievement or evidence of at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. Moreover, the regulation at 8 C.F.R. § 204.5(h)(4) provides “[i]f the above standards do not readily apply to the [petitioner’s] occupation, the petitioner may submit comparable evidence to establish the [petitioner’s] eligibility.” It is clear from the use of the word “shall” in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner’s burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner’s occupation as an inventor cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner mentions evidence in his brief on appeal that specifically addresses three of the ten criteria at the regulation at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner’s occupation. Further, the petitioner provided no documentation as to why the other regulatory categories of evidence would not be appropriate to the profession of an inventor. Moreover, the petitioner did not indicate how the photos of his invention should be comparatively analyzed and how they are comparable to the regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3)(i) – (x).

Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

B. Summary

For the reasons discussed above, we agree with the Director that the petitioner has not submitted the requisite initial evidence, in this case, evidence that satisfies three of the ten regulatory criteria.

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 his or her 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 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. As the petitioner has not done so, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of presenting evidence that satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3) and (4). *Kazarian*, 596 F.3d at 1122. Nevertheless, although we need not provide the type of final merits determination referenced in *Kazarian*, a review of the evidence in the aggregate supports a finding that the petitioner has not demonstrated the level of expertise required for the classification sought.⁴

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. at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁴ We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep’t of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, we maintain 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* INA §§ 103(a)(1), 204(b); 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).