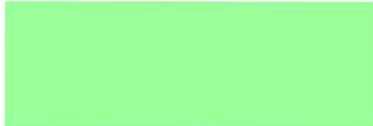




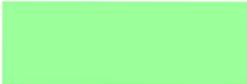
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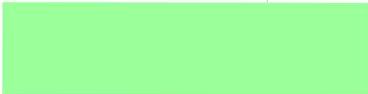


DATE: **JUN 02 2014**

Office: TEXAS SERVICE CENTER

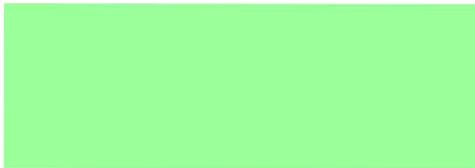
FILE: 

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:



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 on October 24, 2011. The director dismissed the petitioner's motions to reopen and reconsider on February 7, 2012, December 7, 2012 and September 30, 2013. It is also noted that the Administrative Appeals Office (AAO) rejected the petitioner's December 1, 2011 appeal on September 13, 2012 for being untimely filed. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in athletics as a mountaineer, 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, the petitioner submits a brief. The appeal, however, must address the director's most recent decision which concluded that the petitioner's filing did not meet the requirements of a motion to reopen or a motion to reconsider, as she did not provide any new facts or support any of her claims with "any precedent decisions showing how USCIS incorrectly applied the applicable law or Service policy." It is noted that all three of the director's decisions on motion concluded that the filings did not meet the requirements of a motion to reopen or reconsider. The petitioner's brief generally repeats the claims made in the prior motion regarding eligibility for the classification. Notwithstanding the petitioner's failure to address the director's most recent decision, for the reasons discussed below, the record supports the director's conclusion that the petitioner has not established 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)).

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).

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 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's initial decision discussed the evidence submitted for this criterion, including the [REDACTED] given to individuals who [REDACTED] and found that the petitioner failed to establish that the evidence was qualifying. On appeal, the petitioner "disagree[s] with the view of the USCIS" and states that "USCIS incorrectly applied the applicable law or Service policy," without specifically addressing any of the director's findings. The petitioner also fails to provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director's analysis. Therefore, the petitioner has abandoned this issue. *Desravines v. United States Attorney General*, No. 08-14861, 343 F. App'x 433, 435 (11th Cir. 2009) (finding that issues not briefed on appeal are deemed abandoned).

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's initial decision discussed the deficiencies in the evidence submitted for this criterion and found that the petitioner failed to establish that the evidence was qualifying. On appeal, the petitioner repeats the claims made in the prior motion. The petitioner states that her membership in two of the associations is "indicative of sustained national acclaim as being one of the very top of the field in mountaineering," but fails to demonstrate that any of the associations require outstanding achievements of their members. The petitioner fails to provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director's analysis. Therefore, the petitioner has abandoned this issue. *Id.*

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 director discussed the evidence submitted for this criterion, including newspaper articles and links

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

to websites, and found that the petitioner failed to establish that the evidence was qualifying. As stated in the director's initial and February 7, 2012, decisions, the director's request for evidence specifically requested documentary evidence, including circulation information, to establish that the articles appeared in major media. 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, USCIS need not accept evidence offered for the first time with a subsequent filing. *Cf. Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner seeks evidence to be considered, she must submit the documents in response to the director's request for evidence. *Id.* The petitioner has not explained how the director erred in failing to consider evidence that the petitioner failed to provide when first requested to do so.

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's initial decision discussed the evidence submitted for this criterion and found that "judging a beauty competition did not appear to be related to" her field. On appeal, the petitioner repeats the claim made in the prior motion that "the initial record contained evidence of the beneficiary that she served as a judge of the work of others," without explaining how a beauty competition is related to mountaineering. The petitioner also fails to provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director's analysis. Therefore, the petitioner has abandoned this issue. *Desravines*, 343 F. App'x at 435.

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

The director's initial decision stated "[t]he RFE explained that the initial record contained no evidence for this criterion" and that "[t]he RFE response did not further address this criterion." 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, USCIS need not accept evidence offered for the first time with a subsequent filing. *Cf. Matter of Soriano*, 19 I&N Dec. at 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. at 533. If the petitioner wishes evidence to be considered, she must submit the documents in response to the director's request for evidence. *Id.* Furthermore, the petitioner repeats the claim from the prior motion that "she has been named goodwill ambassador of two organizations," but fails to explain how that is an original contribution of major significance or explain why the AAO should find those claims any more persuasive than the director did. The petitioner also fails to provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director's analysis. Therefore, the petitioner has abandoned this issue. *Desravines*, 343 Fed.Appx. at 435.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The director's initial decision specifically discussed the deficiencies in the submitted evidence,

including a lack of “comparative data of other professional’s earnings for this field.” On appeal, the petitioner repeats her claim from the prior motion that her earnings were “significantly higher...in relation to others in her field in Nepal,” without addressing the deficiencies identified by the director. The petitioner did not provide any additional evidence or offer any additional arguments identifying any errors of law or fact in the director’s analysis. Therefore, the petitioner has abandoned this issue. *Id.*

B. Intent to continue to work in the area or expertise

This is an employment-based classification that requires that the alien seek to enter the United States to continue working in his area of expertise. Section 203(b)(1)(A)(ii) of the Act. It is “by virtue of such work” that aliens under this classification will substantially benefit prospectively the United States as envisioned under section 203(b)(1)(A)(iii) of the Act. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). Congress did not intend for aliens of extraordinary ability to immigrate to the United States and remain idle. 56 Fed. Reg. 30703, 30704 (July 5, 1991). While neither the statute nor the regulations specify that the employment must be full-time, minimal hours of employment as a hobby or incidental to the alien’s primary source of income does not substantially benefit prospectively the United States.

The regulation at 8 C.F.R. § 204.5(h)(5) provides:

No offer of employment required. Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

The petitioner has stated that she planned “to [REDACTED]” as well as “to complete the [REDACTED] by the year 2013,” but did not provide sufficient detail or clear evidence that she plans to continue her work in the United States. 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)).

Therefore, the petitioner has not submitted qualifying evidence under 8 C.F.R. § 204.5(h)(5).

C. Summary

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

IV. 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.³ 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.

³ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. 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).