

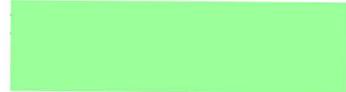


U.S. Citizenship
and Immigration
Services

(b)(6)



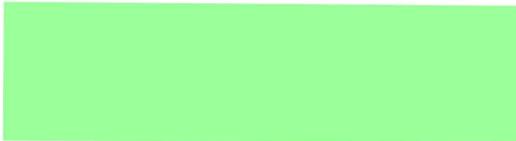
DATE: **MAR 31 2014** Office: TEXAS SERVICE CENTER



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 on June 26, 2013. The petitioner, who is also the beneficiary, appealed the decision to the Administrative Appeals Office (AAO) on July 25, 2013. The appeal will be dismissed.

According to parts 2 and 6 of the petition, the petitioner seeks classification as an alien of extraordinary ability in the arts, specifically, as an acrobatic entertainer and performer, 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 that the petitioner did not establish the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability as an acrobatic entertainer and performer.

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; 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)-(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 files a brief and additional supporting documents. Counsel asserts that the petitioner meets the nationally or internationally recognized prizes or awards criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(i), the membership in associations that require outstanding achievements criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the participation as a judge of others criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the authorship of scholarly articles criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(vi), and the display of work at artistic exhibitions or showcases criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(vii). On February 7, 2014, the AAO issued a notice of intent to dismiss and make a formal finding of misrepresentation. In that notice, the AAO advised the petitioner of online information that appeared to indicate a different author for an article the petitioner claims to have authored. On March 10, 2014, counsel responded to the AAO's notice with information undermining the reliability of the online information on which the AAO relied. Based on the new evidence, the AAO will not enter a finding of material misrepresentation. The AAO will, however, dismiss the appeal based on reasons stated in this decision. Specifically, the petitioner has not submitted qualifying evidence under 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 are at the very top in the field of acrobatic entertainment and performance, or that he has sustained national or international acclaim. See 8 C.F.R. §§ 204.5(h) (2), (3). Accordingly, the AAO will dismiss the petitioner's appeal.

I. THE 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.

United States 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. 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, internationally recognized award, or through the submission of qualifying evidence under at least three of the ten categories of evidence listed under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the 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 the 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.” *Kazarian*, 596 F.3d at 1121-22.

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 (vi).

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)." *Kazarian*, 596 F.3d 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 case, the evidence in the record supports the director's finding that the petitioner has not satisfied the antecedent regulatory requirement of presenting at least three types of evidence under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x), and has not demonstrated that he is one of the small percentage who are at the very top in the field of acrobatic entertainment and performance, or has achieved sustained national or international acclaim. See 8 C.F.R. §§ 204.5(h) (2), (3).

II. ANALYSIS

A. Evidentiary Criteria²

Under the regulation at 8 C.F.R. § 204.5(h)(3), the petitioner can establish the basic eligibility requirements by presenting evidence of a one-time achievement that is a major, internationally recognized award. In this case, the petitioner has not asserted or shown through his evidence that he is the recipient of a major, internationally recognized award at a level similar to that of the Nobel Prize. As such, the petitioner must present at least three of the ten types of evidence under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x) to meet the basic eligibility requirements.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 204.5(h)(3)(i).

On page 6 of her appellate brief, counsel asserts that the petitioner "won the gold [REDACTED] in November 1996." Counsel further asserts on page 7 of the brief that the petitioner won the [REDACTED]

[REDACTED]

Festival in 1996. The 1996 playbill for the festival indicates that the petitioner was one of an unspecified number of [REDACTED] members, and one of five named troupe members, who performed the [REDACTED] that won the [REDACTED]

² The petitioner does not claim that he meets the regulatory categories of evidence not discussed in this decision.

[REDACTED] and a committee member for the 2nd to the 5th [REDACTED] stated in his April 11, 2013 letter that the petitioner starred in the performance “Table Hoops” [that] was awarded the [REDACTED] Award in the [REDACTED]

The record also includes a 2000 Certificate of Honor, stating that the petitioner won the [REDACTED] [REDACTED] at the festival for his performance of “Springboard.” The 2000 playbill for the festival indicates that the petitioner was one of an unspecified number of [REDACTED] members, and one of three named troupe members, who performed the “Big Springboard” that won the [REDACTED] [REDACTED] asserted that the petitioner, along with other performers, performed the acrobatic act that won the award.

Although the petitioner has shown his receipt of the [REDACTED] Awards in 1996 and 2000, he has not provided sufficient evidence showing that the [REDACTED] constitute nationally or internationally recognized prizes or awards in the field of acrobatic entertainment and performance. According to [REDACTED] the festival “is famous throughout the world for its difficulty in skill and its authoritative nature.” The petitioner, however, does not support this letter with similar opinions outside of the local [REDACTED] region.

According to the [REDACTED] online printouts that the petitioner submitted, competitors from China, the Democratic People’s Republic of Korea, Russia, Sweden, Ukraine, Germany, Egypt, Hungary, Canada, France, Belgium, Mongolia, USA and Indonesia participated in the 1996 festival, and 23 troupes from 12 countries participated in the 2000 festival. The fact that the festival attracted performers from different countries does not qualify the festival’s prizes or awards as nationally or internationally recognized prizes or awards for excellence. At issue is not whether the pool of competitors was national or international but whether the field of acrobatic entertainment and performance recognizes the awards or prizes at the national or international level. Thus, the petitioner must provide evidence, such as, but not limited to, national media coverage of the festival and its awards and prizes, showing that the awards or prizes are recognized beyond the entity that issued the awards or prizes. These printouts also state that in 1996, the festival awarded three gold, six silver, nine bronze and seven excellence awards. The materials do not provide the number of awards per category in 2000 or discuss the recognition of the competition in the field. Rather, they state generally that the Chinese government sponsors the festival, which “is designed to provide equal competition opportunities for outstanding acrobats in the world and opportunities for performers to exchange skills and learn from each other so as to boost the development and innovation of acrobatics, and to make [REDACTED] a bridge connecting acrobats from all over the world.”

The petitioner also submitted an article in the [REDACTED] [REDACTED] as one of the top four acrobatics events. This conclusion in a local newspaper does not establish the recognition of the awards at this festival beyond Wuhan.

Although the petitioner has submitted other online materials that mention the festival, the petitioner has not shown that these materials are published in nationally or internationally circulated publications. These materials also do not specifically discuss either the 1996 or 2000 festival. Rather, they briefly reference the festival when discussing other acrobatic performers' competitive history.

Similarly, although the petitioner has presented an October 2005 Certificate of Honor, showing that a performance in which he participated won the [REDACTED] in 2005, he has not shown that the award constitutes a nationally or internationally recognized prize or award for excellence. According to the online printout entitled "[REDACTED]" states that in its 10th festival, "[t]hirty circus acts of thirty groups from sixteen countries . . . participated in the competition and performance during the festival." As noted, at issue is not whether the pool of competitors was national or international but whether the field of acrobatic entertainment and performance recognizes the awards or prizes at the national or international level. Thus, the petitioner must provide evidence showing that the award is recognized beyond the entity that issued the award. Although the record includes online materials that mention the festival, the petitioner has not shown that these materials are published in nationally or internationally circulated publications. These materials also do not specifically discuss the 2005 festival. Rather, they briefly reference the festival when discussing other acrobatic performers' competitive history.

Counsel asserts on page 10 of her brief that the petitioner's receipt of one of the five Best Performer [REDACTED] awards at the [REDACTED] 2001 constitutes his receipt of a nationally or internationally recognized prize or award for excellence in the field of endeavor. The petitioner submitted a letter from [REDACTED] Association and a judge at the festival, detailing the levels of qualifying events to participate in the festival. [REDACTED] describes a competitive selection process, the evidence does not establish the recognition this competition enjoyed in its first year of existence. Finally, as noted by the director in the request for evidence (RFE), the plain language of the criterion requires evidence of qualifying awards or prizes in the plural, consistent with the statutory requirement for extensive documentation. *See* section 203(b)(1)(A)(i) of the Act. As such, even if the petitioner's Best Performer title constitutes one qualifying award or prize, the record lacks evidence showing that the petitioner has received a second qualifying award or prize.

Finally, the record includes evidence of the petitioner's other accomplishments, including a Qualification Certificate of Specialty and Technology, which counsel categorized as "2006 National First-Class Award"; and a gold prize at the [REDACTED] Technical Skills Competition. On appeal, counsel has not continued to assert that these accomplishments meet the criterion. Accordingly, the petitioner has abandoned this issue, as he did not timely raise it on appeal. *Sepulveda v. United States 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 United States District Court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

Accordingly, the petitioner has not submitted documentation of his receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. The petitioner has not met this criterion. See 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. 8 C.F.R. § 204.5(h)(3)(ii).

In his June 26, 2013 decision, the director concluded that the petitioner did not meet this criterion. On appeal, the petitioner files for the first time the bylaws for the provincial acrobatic association of which the petitioner is a member. According to the bylaws, members must demonstrate specifically defined achievements, including an award at a certain level, and a jury selects the new members. The record also includes an April 22, 2013 letter from [REDACTED] and the petitioner's membership card. [REDACTED] describes the expertise of the jury. Thus, the petitioner has now established that this membership is qualifying.

The plain language of criterion, however, requires evidence of membership in qualifying associations, in the plural, consistent with the statutory requirement for extensive documentation. See section 203(b)(1)(A)(i) of the Act. The director noted this requirement in the RFE. Counsel did not challenge this statement in response. As the record lacks evidence of the petitioner's membership in a second qualifying association, the petitioner has not satisfied the plain language requirements of the criterion.

Accordingly, the petitioner has not submitted documentation of his 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 has not met this criterion. See 8 C.F.R. § 204.5(h)(3)(ii).

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. 8 C.F.R. § 204.5(h)(3)(iv).

The director concluded in his June 26, 2013 decision that the petitioner met this criterion. The evidence establishes that the petitioner participated as a judge at the [REDACTED]. Accordingly, the petitioner has presented evidence of his 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 petitioner has met this criterion. See 8 C.F.R. § 204.5(h)(3)(iv).

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).

On appeal, counsel asserts that the petitioner's articles published in the [REDACTED] meet this criterion. Counsel asserts that the two publications constitute professional publications because they "are the only media partners of the [REDACTED] [due to] their professionalism and advantages for culture promotion," and that they constitute major media because [REDACTED] is one of the top 5 papers in circulations in China and [REDACTED] ranks 85th of the world's 100 largest newspapers. The evidence in the record does not support counsel's assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

First, the evidence in the record does not establish that [REDACTED] constitute professional publications. According to [REDACTED], the two publications "were [the] only media partners in all previous [REDACTED]". Because of the advantages and professionals in cultural promotion, the professional articles from Acrobatic Association were all published on [REDACTED]. This statement does not establish the professional nature of the publications. According to a July 4, 2013 document [REDACTED] "has a film and television center, which produces the [REDACTED]". Although the document discusses [REDACTED] it does not provide information relating to the nature of the two publications or provide sufficient evidence establishing that they are professional publications. As their names suggest, the publications appear to be general news publications, and at times publish articles relating to acrobatic entertainment and performances.

The evidence in the record also does not establish that [REDACTED] constitute major media. Although [REDACTED] was one of the top five on circulation," he does not specify the geographic area in which the publication is a top five publication. Thus, the letter does not establish whether the publication is a top five publication nationally, provincially or locally. Although [REDACTED] "was listed on top 80" in the "58th World Press Institute[']s list of] top 100 newspaper[s] by circulation," the petitioner has not provided sufficient evidence showing that being a top 80 newspaper constitutes major media. Indeed, according to the World Association of Newspapers' online printout entitled "World's 100 Largest Newspapers," there are at least 15 newspapers from [REDACTED] that have a higher circulation number than that of [REDACTED]. [REDACTED] does not explain the basis of his knowledge relating to circulation information or the status of the publications.

Second, although the petitioner has presented evidence establishing that [REDACTED] and [REDACTED] constitute professional publications, the petitioner has not shown that his written work published in these publications constitutes scholarly articles, as required by the

plain language of the criterion. *See* 8 C.F.R. § 204.5(h)(3)(vi). Unlike scholarly articles that are published in professional or major trade publications, the petitioner has not shown that his published work appeared in a journal that utilizes peer review. Indeed, the petitioner did not include any references or citations to sources or other authors' work. Unlike scholarly articles, the petitioner's published work does not have footnotes, endnotes, or a bibliography, and rarely includes graphs, charts, or pictures as illustrations of the concepts the petitioner expressed. In addition, there is no evidence that scholars have taken note of his work. As such, the petitioner has not shown that his written work constitutes scholarly articles.

Accordingly, the petitioner has not submitted evidence of his authorship of scholarly articles in the field of acrobatic entertainment and performance, in professional or major trade publications or other major media. The petitioner does not meet this criterion. 8 C.F.R. § 204.5(h)(3)(vi).

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.
8 C.F.R. § 204.5(h)(3)(vii).

In his June 26, 2013 decision, the director found that the petitioner met this criterion. The evidence in the record does not support this finding. The AAO conducts appellate review on a *de novo* basis. *Soltane v. United States Dep't of Justice*, 381 F.3d 143, 145-46 (3d Cir. 2004). The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The evidence in the record includes posters and photographs relating to the petitioner's acrobatic performances as a member of the [REDACTED]. The interpretation that this criterion is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the criterion.

Accordingly, the petitioner has not provided evidence of the display of his work in the field at artistic exhibitions or showcases. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(vii).

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 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. The evidence consists of (1) awards at competitions with an international pool of competitors but undocumented national or international significance, (2) a single qualifying membership, (3) participation as a judge of youth competitions, authorship of articles of undocumented significance in the field, and (4) performances, which are inherent to the occupation of performing artist. This 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, however, need not further explain that conclusion in a detailed final merits determination.³ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of presenting three types of evidence. *Kazarian*, 596 F.3d at 1122.

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.