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



U.S. Citizenship
and Immigration
Services

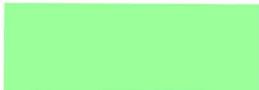


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Office: TEXAS SERVICE CENTER

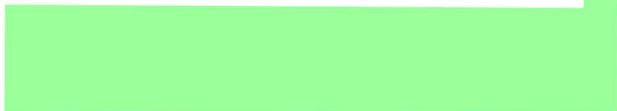
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IN RE:

Petitioner:

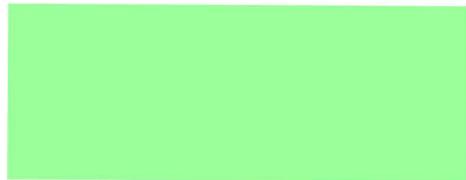
Beneficiary:



APPLICATION:

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,

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” in the arts, as a folk singer, 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 asserts that the director misapplied the law by not considering the evidence in the aggregate, as part of a merits determination. The petitioner further asserts that he met the criteria relating to awards, membership, published material, and high salary in addition to the two criteria that the director determined the petitioner met.

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. 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.*

II. ANALYSIS

A. Evidentiary Criteria²

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).

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

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).

The director determined that the petitioner did not meet this criterion. The petitioner submitted the following evidence for consideration under this criterion:

- (1) The [REDACTED] as Folk Singer (2010);
- (2) First Position, [REDACTED] (2009);
- (3) First Position, [REDACTED] (2007);
- (4) First Position, [REDACTED] by [REDACTED] (2006);
- (5) Second Position, [REDACTED] (2003);
- (6) First Position, [REDACTED] by [REDACTED] (2009);
- (7) A certificate for Best Folk Singer at the [REDACTED] program by [REDACTED] (2012);
- (8) [REDACTED] (2010);
- (9) Two news clippings regarding the [REDACTED]
- (10) A certificate for first position at [REDACTED] (2004);
- (11) The [REDACTED] (2012);
- (12) A letter from [REDACTED] folk singer;
- (13) A letter from [REDACTED] President of [REDACTED]
- (14) A letter from [REDACTED]
- (15) A letter from [REDACTED] of [REDACTED]
- (16) A letter from [REDACTED], Judge of the [REDACTED] and [REDACTED]
- (17) A letter from [REDACTED]

As an initial matter, the director concluded that the awards submitted for consideration were local or regional in nature. On appeal, the petitioner asserts that some of the awards, such as the [REDACTED] and the [REDACTED] plainly include the term "national" in the title. However, the inclusion of the word "national" on the face of a certificate of award, without additional background information outlining the details of the award such as the scope of the competition, the caliber of participants, or the process for selection, is insufficient to demonstrate that the award is nationally or internationally recognized. Moreover, USCIS need not accept the promotional descriptions of an organizer or issuer of an award. *Cf. Braga v. Poulos*, No. CV 06 5105 SJO (C.D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on promotional assertions on the cover of a magazine as to the magazine's status as major media).

Regarding the letters of support noted above, the petitioner asserts that the director erroneously concluded that they do not indicate that his awards were for excellence in the field of endeavor. The letters do show that the petitioner won awards due to his talent and for excellence in the field of folk singing. For example, [REDACTED] a folk singer who served as a judge for the [REDACTED] writes:

Among 41 different contestants, I vividly remember even now that [the petitioner's] singing and presentation had won over our hearts. We awarded him the first prize. I respect his brilliance and creativity even now. We have in the present collaborated in various programs also.

Even accepting that the petitioner won his various awards for excellence in his field of endeavor, the record does not contain sufficient evidence to demonstrate that the awards are nationally or internationally recognized. The record contains minimal details regarding the awards such as the criteria used to grant the awards, the significance of the awards, the reputation of the organization or panel granting the awards, the geographic scope of the selection process, the number of awards conferred annually, and the previous winners of the award.

The petitioner included a newspaper clipping from [redacted] and a nearly identical clipping from [redacted] with no author listed. Rather than reporting on the event where the petitioner received the award, the clippings reflect that [redacted] and the [redacted] and [redacted] congratulate the petitioner on his receipt of the [redacted]. Moreover, the newspaper clippings include the photocopy of each clipping alongside an excerpt of the name and date of the papers as they appear on the front page of each respective newspaper. Such reproductions do not accurately reflect where the clippings originally appeared in the paper and do not establish that the clippings appeared in the claimed publications. These brief clippings with no attributed author that appeared in an undocumented location in the paper do not establish the national or international recognition of the awards.

Finally, the petitioner submitted an article in the [redacted] about the petitioner's first position win at the [redacted]. The record contains a notarized letter indicating that the [redacted] is a weekly six-page publication based in the village/town of [redacted] with 5000 printed copies, which is consistent with the circulation numbers for a local or regional publication. Regional coverage of an award does not establish that the award is nationally or internationally recognized.

Accordingly, the petitioner did not satisfy the plain language requirements of 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).

The director observed that to meet this regulatory requirement, the evidence must establish: (1) membership in associations; (2) that the associations are in the beneficiary's field; (3) that the associations require outstanding achievements of their members; and (4) that membership eligibility is judged by recognized national or international experts in their field.

To demonstrate his eligibility, the petitioner submitted a letter from [redacted] Vice President of the [redacted]. In relevant part, the letter states:

Membership of [sic] this organization is awarded to only those individuals who have made a significant contribution in the field of folk music and folk duet music and that

have very good reputation [sic]. . . . In honor of [the petitioner's] contribution to the folk culture and folk music of Nepal, this organization has granted him the membership. Granting of membership is one of the ways with which this organization honors the contribution of individuals in promoting folk music.

On appeal, the petitioner asserts that the director determined that the petitioner established all of the above elements but concluded that he did not satisfy 8 C.F.R. § 204.5(h)(3)(ii). The record reveals that the submitted evidence does not meet all four elements such that he satisfies the plain language requirements of the regulation. The director, in the Request for Evidence (RFE), specifically requested the petitioner to provide the NFDA's constitution or bylaws which discuss the criteria for membership. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (stating that a petitioner is on notice through various forms of communication from USCIS to a petitioner or applicant noting an evidentiary deficiency or requesting more evidence). The petitioner did not submit this evidence in response to the RFE or even on appeal.

The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. The director provided notice of the insufficiency of the evidence pursuant to this criterion and requested primary evidence in the form of the constitution or bylaws that discuss membership. The letter discussing membership is not primary evidence and the petitioner did not demonstrate that the primary evidence does not exist or cannot be obtained. Therefore, there is a presumption of ineligibility in this instance. *See* 8 C.F.R. § 103.2(b)(2)(i).

In addition, the letter from [redacted] states that membership is granted to individuals who have made "significant contributions." Without additional information further defining the scope of significant contributions within the [redacted] the evidence does not demonstrate that the referenced contributions rise to the level of "outstanding achievement," as required by the regulation. Finally, the record does not include evidence demonstrating that recognized national or international experts in the field judge membership eligibility for the [redacted]. Thus, the record reveals that the petitioner did not establish at least two of the four required elements necessary to satisfy the regulation.

The petitioner on appeal also asserts that the director drew improper inferences from the articles stating that the [redacted] has performed political satire. Whether the [redacted] performs political satire has no bearing on whether the association's membership criteria satisfy the regulatory requirements. The record, however, reveals that the submitted evidence does not satisfy the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

Accordingly, the petitioner did not meet this criterion.

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. 8 C.F.R. § 204.5(h)(3)(iii).

The director concluded that the evidence the petitioner submitted in support of this criterion did not satisfy the requirements of 8 C.F.R. § 204.5(h)(3)(iii). The record includes the following evidence that the petitioner submitted pursuant to this criterion:

- (1) An article from [REDACTED]
- (2) An article from [REDACTED]
- (3) An article from [REDACTED]
- (4) An article from [REDACTED]
- (5) An article from [REDACTED]
- (6) Three articles from the [REDACTED]
- (7) An article from the [REDACTED]
- (8) An article from [REDACTED]
- (9) A clipping from [REDACTED]
- (10) A clipping from [REDACTED]
- (11) An article from [REDACTED] described in the translation as a weekly;
- (12) An article from [REDACTED]
- (13) An article from [REDACTED]
- (14) An article from [REDACTED]
- (15) An article from [REDACTED]
- (16) An article from [REDACTED]
- (17) A notarized letter from the [REDACTED] regarding publishing rights and information about the [REDACTED] and [REDACTED]
- (18) A State Department Country Conditions report about Nepal.

As an initial matter, not all of the published materials outlined above are about the petitioner. One of the [REDACTED] articles, the article from [REDACTED] and the article from [REDACTED] discuss a competition and solely mention the petitioner's name as one of the judges of the competition. The mentioning of the petitioner's name is insufficient to establish that those three articles constitute published material about the petitioner. Similarly, the nearly identical clippings from the [REDACTED] and [REDACTED] consist of a photograph with a caption congratulating the petitioner for his win of the [REDACTED] Photographs with a caption and no listed author do not constitute published material about the petitioner and do not meet the requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii), which requires the author of the material.

To fully satisfy the requirements of the regulation, even when published material is about the petitioner, the petitioner must show that the material appears in professional or major trade publications or other major media. The appearance of the word "national" in the title of the publication does not establish the circulation or distribution of the publication. *See Braga*, No. CV 06 5105 SJO, *aff'd* 2009 WL 604888 (concluding that USCIS did not have to rely on the promotional assertions on the cover of a magazine as to the magazine's status as major media).

The record in this instance only includes background information for three publications: the [REDACTED] and [REDACTED]. As noted above, the clipping from [REDACTED] and one of the articles from the [REDACTED] are not about the petitioner and, as such, do not satisfy the requirements of the regulation.

As for the remaining two [REDACTED] articles, the record contains a notarized letter indicating that the [REDACTED] is a weekly publication in Nepali with 5000 printed copies. The letter also indicates that the headquarters is located in [REDACTED] Sub-metropolis. The information in the letter regarding the distribution and printed copies is consistent with a local or regional publication. Therefore, the evidence does not establish that the [REDACTED] is a professional or major trade publication or other major media.

The petitioner submitted a Department of State Country Conditions report for Nepal (Country Conditions report) as part of the evidence for consideration pursuant to this regulatory criterion. On appeal, the petitioner asserts that [REDACTED] qualifies as major media because of its significant national distribution. The petitioner observes that the submitted Country Conditions report includes [REDACTED] in the list of major English-language papers and that the director should have accepted the information from the Country Conditions report as prima facie evidence of major media. The Country Conditions report, in relevant part, states:

Major daily English-language newspapers include [REDACTED] and [REDACTED]. The last and its vernacular sister publication are owned by a government corporation. There are hundreds of smaller daily and weekly periodicals that are privately owned and of varying journalistic quality.

As an initial matter, the Country Conditions report makes no claims regarding the publications' distribution numbers. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Furthermore, the petitioner has not established that a major, English-language newspaper is necessarily a major publication in the overall media market, which would include publications in Nepali, the official language. Without additional information, such as the targeted audience of [REDACTED] and the circulation numbers for the newspaper, the record does not substantiate the petitioner's claim of the publication as major media. Moreover, some of the articles the petitioner submits from [REDACTED] are in Nepali, and the record contains no evidence regarding the distribution or circulation of the Nepali version of this publication.

Accordingly, for all of the foregoing reasons, the evidence does not satisfy 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 specification for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv).

The director determined that the petitioner established his eligibility under 8 C.F.R. § 204.5(h)(3)(iv) and the record supports the director's determination in this regard.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. 8 C.F.R. § 204.5(h)(3)(ix).

The director concluded that the petitioner did not meet this criterion because there is insufficient evidence in the record to substantiate this claim. The record includes a letter from [REDACTED] Chief Editor for the [REDACTED] which states that the magazine, "expresses its thankfulness with an excellent wage amount for the well known folk singer . . . in 8/05/2011 for entertaining thousand [sic] of audiences by singing his celebrated and melodious songs." The director also considered a letter from [REDACTED] Chief of [REDACTED] Ltd., stating that one of the petitioner's albums sold 15,000 copies, which resulted in a payment of NRS 10 per sold album for a total of NRS 150,000 (US \$1600).

On appeal, the petitioner asserts that the director's "speculation" that the petitioner's salary was not "high" did not have any foundation. The petitioner also references *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994), and claims that the petitioner's salary level as compared to what individuals in the same field in the United States earn is irrelevant. The standard of proof in these proceedings is preponderance of the evidence. The preponderance of evidence standard, however, does not relieve the petitioner from satisfying the basic evidentiary requirements required by the statute and regulations. Therefore, if the statute and regulations require specific evidence, the petitioner is required to submit that evidence. See section 203(b)(1)(A)(i) of the Act; 8 C.F.R. §§ 204.5(h)(2), (3). See also *Matter of Chawathe*, 25 I&N Dec. 369, 375 n.7 (AAO 2010). In this instance, the petitioner needed to submit evidence establishing his salary in addition to background information demonstrating the comparative salary level of other folk singers in Nepal. An undisclosed "excellent wage amount" for a one-time event is insufficient to establish the petitioner's salary level. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990). Similarly, the letter indicating that the petitioner was paid the equivalent of \$1600 is insufficient to establish his high salary level because the letter does not establish that \$1600 is the petitioner's gross annual salary and is insufficient to establish his high salary or other significantly high remuneration because the petitioner has not submitted documentation showing high end wages or one-time event remuneration for professionals in his field.

Since the record does not include comparative evidence showing high end wages for folk singers in Nepal, the petitioner has not established that his own salary is higher in relation to others in the field. As stated above, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Accordingly, the petitioner did not satisfy the plain language requirements of this criterion.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales. 8 C.F.R. § 204.5(h)(3)(x).

The director concluded that the petitioner met this criterion and the record supports the director's conclusions regarding the petitioner's eligibility pursuant to this criterion.

B. Summary

The petitioner has failed to submit sufficient relevant, probative evidence to satisfy the 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 has risen to the very top of the field of endeavor.

The petitioner asserts that the director erred in not conducting a two-step analysis in his decision. The petitioner asserts that the director needed to conduct a merits determination as part of his analysis. In this instance, the director concluded that the petitioner submitted sufficient evidence to satisfy the regulatory requirements of two types of evidence and the record supports the director's conclusions. In accordance with *Kazarian*, a merits determination is not required in this instance.

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

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). 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).

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.