

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: FEB 11 2015 Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

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 singer 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), which makes visas available to aliens who 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 while the petitioner had submitted the initial required evidence by meeting at least three of the ten regulatory criteria at 8 C.F.R. § 204.5(h)(3), the totality of the evidence was insufficient to establish eligibility.

On appeal, the petitioner asserts that he meets the criteria under 8 C.F.R. § 204.5(h)(3)(i), (iii), (iv) and (vii). For the reasons discussed below, 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). In addition, we agree with the director that, in the final merits determination, the petitioner has not shown that he is one of a small percentage who have risen to the very top of the field or 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. 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.

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

A. Prior O-1 Visa Petitions

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. The regulatory standard and requirements for an immigrant and nonimmigrant alien of extraordinary ability in the arts are different. The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) as simply “distinction,” which is further defined as follows:

Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

The regulation relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field as “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.” While the ten immigrant criteria set forth in the regulation at 8 C.F.R. § 204.5(h)(3) appear in the nonimmigrant regulation,

8 C.F.R. § 214.2(o)(3)(iii), they refer only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. Separate criteria for nonimmigrant aliens of extraordinary ability in the arts are set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv). The distinction between these fields and the arts, which appears in the regulation at 8 C.F.R. § 214(o), does not appear in the regulation at 8 C.F.R. § 204.5(h). As such, the petitioner's approval for a nonimmigrant visa under the lesser standard of "distinction" is not evidence of his eligibility for the similarly titled immigrant visa.

Moreover, it must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. United States Dep't of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). We need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions, we would not be bound to follow the contradictory decision of a service center as the law is clear that an agency is not bound to follow an earlier determination as to a visa applicant where that initial determination was based on a misapplication of the law. *Glara Fashion, Inc. v. Holder*, 11 CIV. 889 PAE, 2012 WL 352309 *7 (S.D.N.Y. Feb. 3, 2012); *Royal Siam v. Chertoff*, 484 F.3d 139, 148 (1st Cir. 2007); *Tapis Int'l v. INS*, 94 F. Supp. 2d 172, 177 (D. Mass. 2000) (Dkt.10); *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D.La. 1999), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

B. Evidentiary Criteria¹

Under the regulation at 8 C.F.R. § 204.5(h)(3), the petitioner can establish his sustained national or international acclaim and that his achievements have been recognized in the field of endeavor by presenting evidence of his receipt 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, to meet the basic eligibility requirements, 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).

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 appeal, the petitioner asserts that his [REDACTED] is a nationally or internationally recognized prize or award for excellence in the field. The evidence in the record does

¹ We have reviewed all of the evidence the petitioner has submitted and will address those criteria the petitioner claims to meet or for which the petitioner has submitted relevant and probative evidence.

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not support this assertion. The petitioner has not shown that he meets this criterion for the following reasons.

First, the petitioner has not shown that the [REDACTED] is nationally or internationally recognized. According to an undated letter from [REDACTED] which the petitioner filed on appeal, the petitioner won the [REDACTED] from a pool of approximately 50,000 individuals who auditioned for the show. The letter states that approximately 10 percent of those who auditioned were from countries other than the United States. At issue here is not whether the competition is open to performers from different parts of the world. At issue is whether the award is recognized either nationally or internationally. As evidence of the award's recognition and reputation, the petitioner has submitted evidence from the [REDACTED] the organization that issued the award, and from individuals who have worked with the petitioner. Such self-promotional evidence has minimal evidentiary value. *See Braga v. Poulos*, No. CV 06-5105 SJO 10 (C.D. Cal. July 6, 2007), *aff'd*, 317 F. App'x 680 (9th Cir. 2009) (concluding that we 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 petitioner has not supported the self-promotional evidence with more independent evidence, such as, but not limited to, independent journalistic coverage of his receipt of the award in nationally or internationally circulated publications.

Moreover, the evidence shows that the petitioner's award is given to amateur performers weekly. The issuance of the award on a weekly basis and the limited pool of amateurs are factors not commensurate with an award that has national or international recognition. The record includes an award certificate signed by the producer of [REDACTED]. In her December 16, 2009 letter, [REDACTED] Chief Executive Officer (CEO) of [REDACTED] the petitioner's employer, states that [REDACTED] is a weekly competition for "aspiring artists and performers" who hope that "the magic of the hallowed stage and the approval of the infamous audience will launch their careers in the entertainment world." According to [REDACTED] Vice President and Associate General Counsel, Business and Legal Affairs, [REDACTED] the petitioner appeared on an episode of [REDACTED] and won an award, for which the petitioner received \$5,000. The petitioner has not shown that his award, given only to amateur performers on a weekly basis, is either nationally or internationally recognized. In addition, although the petitioner and his employer assert that his performance at the competition was televised, the petitioner has not submitted evidence, such as a letter from the competition organizer or a television station, in support of the assertion. Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *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)).

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

² The record contains several letters from this individual, two of which include the spelling [REDACTED]. One of the letters with this alternate spelling contains that spelling both in the text of the letter and the signature line.

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 petitioner met this criterion. The evidence in the record supports this conclusion. The petitioner has submitted an article entitled '[REDACTED]' published in the Entertainment Section of [REDACTED] which is about the petitioner's experience competing in the television show [REDACTED]. The petitioner has shown that [REDACTED] is a major media publication. According to [REDACTED] official promotional materials, [REDACTED] reaches 1.8 million readers in several [REDACTED] markets daily. Accordingly, the petitioner has provided published material about him in professional or major trade publications or other major media, relating to his work in the field. The petitioner has met this criterion. See 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 concluded that the petitioner met this criterion. The evidence in the record supports this conclusion. Specifically, the record includes an undated letter from Ms. [REDACTED] stating that the petitioner "has been asked to join a panel and be a judge of the work of others to help select talent for [the] roster of performers . . . at [REDACTED]." The letter states that "[a]s a result of [the petitioner's] contribution on [the] panel of judges, [REDACTED] has] added 3 new singers and performers to [the] team and continue[s] to work with them till this date." On appeal, the petitioner submits another undated letter from Ms. [REDACTED], stating that "[d]ue to [the petitioner's] excellence as a vocal performer, [REDACTED] invited him to join [its] panel of judges. He accepted [the] invitation and gladly participated. He did exceptionally well, made accurate decisions and analogies."

Accordingly, the petitioner has submitted 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 meets this criterion. See 8 C.F.R. § 204.5(h)(3)(iv).

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).

The director concluded that the petitioner met this criterion. The evidence in the record does not support this finding. We conduct appellate review on a *de novo* basis. *Soltane*, 381 F.3d at 145-46. We 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 [REDACTED] 229 F. Supp. 2d at 1043.

The evidence in the record shows that the petitioner has performed on [REDACTED], at [REDACTED] events, a basketball game in [REDACTED] and as a member of the band [REDACTED]. Some of these performances have been recorded and posted on the internet. This criterion,

however, is limited to the visual arts. The interpretation that this criterion is limited to the visual arts is longstanding and has been upheld by a federal district court. *See 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).

C. Final Merits Determination

The petitioner has met only two criteria, the published material in major media criterion and the participation as a judge of the work of others criterion. 8 C.F.R. § 204.5(h)(3)(iii), (iv). Notwithstanding this finding, in accordance with the *Kazarian* opinion and given that the director's sole basis of denial was a final merits determination, we will conduct a final merits determination. All the evidence in the record is considered in the context of whether or not the petitioner has demonstrated: (1) his "level of expertise indicating that [he] is one of [a] small percentage who have risen to the very top of the field of endeavor," and (2) that he "has sustained national or international acclaim and that his . . . achievements have been recognized in the field of expertise." Section 203(b)(1)(A) of the Act; 8 C.F.R. §§ 204.5(h)(2), (3); *see also Kazarian*, 596 F.3d at 1119-20. For the reasons discussed below, the petitioner has not made such a showing. Accordingly, the appeal must be dismissed.

The evidence in the record shows that the petitioner is a working singer and performer who has won an amateur vocal competition. The evidence, however, is insufficient to show that he is one of a small percentage who have risen to the very top of the field or that he has sustained national or international acclaim. *See* 8 C.F.R. § 204.5(h)(2), (3). The record also includes evidence of the petitioner's active participation in the [REDACTED] program. Although his participation shows his character, it does not establish his achievements or success as a singer and performer, a field in which he claims extraordinary ability.

With regard to the prizes or awards for excellence criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(i), a criterion worded in the plural, we concluded that the petitioner has not met this criterion. As discussed, the petitioner's [REDACTED] is not a nationally or internationally recognized prize or award for excellence in the field. Only amateur performers may compete for this award and a winner is selected on weekly basis. The petitioner has not submitted any independent evidence, such as, but not limited to, independent journalistic coverage of his receipt of the award in nationally or internationally circulated publications, which might demonstrate the reputation or prestige of the award.

With respect to the published material about the alien criterion under the regulation 8 C.F.R. § 204.5(h)(3)(iii), and the judging criterion at 8 C.F.R. § 204.5(h)(3)(iv), although the petitioner meets

these criteria, he has not shown that this evidence is indicative of sustained national or international acclaim. See section 203(b)(1)(A) of the Act; 8 C.F.R. §§ 204.5(h)(2), (3); see also *Kazarian*, 596 F.3d at 1119-20. The *Kazarian* court recognized that evidence satisfying a given criterion might not, in fact, be indicative of national or international acclaim and may be evaluated as such in the final merits determination. Most of the materials the petitioner has submitted in support of this criterion are not about the petitioner. Rather, they are promotional materials or event announcements for a band in which the petitioner is a member or events in which the petitioner was scheduled to perform. Moreover, videos of the petitioner's performances posted on social media websites not only do not meet this criterion, but they are not necessarily indicative of national or international acclaim because the videos can be updated by anyone who has internet access, including the petitioner, and the petitioner has not shown that the petitioner's performances have garnered unusually high viewership online. In addition, the petitioner has not shown that one article in *Metro* that discusses his experience on a television show is indicative of his sustained national or international acclaim.

The petitioner submitted evidence that he participated as a judge of performers for his employer. The petitioner has not submitted evidence relating to how frequently he served as a judge for his employer, or evidence showing that he served as a judge for any other entities. As the petitioner's judging experience is limited in scope to his employer, a private company that provides entertainment for weddings, corporate events and charity galas, he has not shown that his judging experience is indicative of his national or international acclaim.

With regard to the display at artistic exhibitions or showcases under 8 C.F.R. § 204.5(h)(3)(vii), we concluded that the petitioner has not met this criterion. See section 203(b)(1)(A) of the Act; 8 C.F.R. §§ 204.5(h)(2), (3); see also *Kazarian*, 596 F.3d at 1119-20; *Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at 7. Even if the petitioner has met this criterion, he has not shown his eligibility for the employment classification sought. The *Kazarian* court recognized that evidence satisfying a given criterion might not, in fact, be indicative of national or international acclaim and may be evaluated as such in the final merits determination. The petitioner has performed on the television show [REDACTED] a weekly competition [REDACTED] a basketball game in [REDACTED] and as a member of the band [REDACTED]. Performing in events, however, is inherent to the petitioner's occupation as a singer and performer. The ability to secure employment in one's occupation is not indicative of national or international acclaim. The petitioner has not shown that the frequency of his performances or the venues where he has performed are indicative of his national or international acclaim in the field. In addition, the petitioner has not provided sufficient evidence showing that only musicians at the very top of the field may perform at the venues where he had performed. In fact, he performed at the [REDACTED] as an amateur performer. As such, the petitioner has not shown that his performances are indicative of his national or international acclaim in the field of musical performance.

Ultimately, the record does not support the petitioner's eligibility as an alien of extraordinary ability in the field. A single amateur award, a single article about the petitioner in qualifying media, judging responsibilities for his own employer and performances that are inherent to the occupation of performing artists do not amount, in the aggregate, to the type of extensive evidence of sustained acclaim required by the statute. Section 203(b)(1)(A)(i). Accordingly, even in the aggregate, the

evidence does not distinguish the petitioner as one of the small percentage who have risen to the very top of the three field.

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 his field of endeavor.

A review of the evidence in the aggregate, however, does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of the field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established his 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.