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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 18 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 luthier (one who makes and repairs stringed instruments), 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 the petitioner had not satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3), which requires documentation of a one-time achievement or evidence that meets at least three of the ten regulatory criteria.

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

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien’s entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. See H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term “extraordinary ability” refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

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

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

II. ANALYSIS

A. Previously Approved O-1 Petitions

While U.S. Citizenship and Immigration Services (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. First, the regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts* are dramatically different. 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 on of that small percentage who have risen to the very top of the field of endeavor.” While the ten immigrant criteria set

forth at 8 C.F.R. § 204.5(h)(3) appear in the nonimmigrant regulation at 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. Rather, 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 8 C.F.R. § 214(o) does not appear in 8 C.F.R. § 204.5(h). As such, the petitioner's approval for a non-immigrant visa under the lesser standard of "distinction" is not evidence of his eligibility for the similarly titled immigrant visa.

In addition, 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. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989); *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). Moreover, 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 on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *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. Foreign Language Document Translations

The translations of the letters the petitioner submitted with the initial petition filing do not comply with the terms of 8 C.F.R. § 103.2(b)(3) which states: "Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Similar language is contained within the Form I-140 instructions. The translator(s) did not certify that he or she was competent to perform the translation or that the English translation is accurate and complete. Because these translations do not comply with 8 C.F.R. § 103.2(b)(3), they have no probative value. Nevertheless, although the director included language within the request for evidence (RFE) relating to certified translations of foreign language documents, he did not specify which translations did not comply with the regulation, which would have allowed the petitioner to address the concern. Accordingly, we will review the uncertified translations.

Even if the translators had certified the translations as required by the regulation, the director correctly concluded that the petitioner's evidence does not establish eligibility.

C. Evidentiary Criteria¹

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

This criterion contains several evidentiary elements the petitioner must satisfy. According to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i), the evidence must establish that the alien is the recipient of the prizes or the awards. The clear regulatory language requires that the prizes or the awards are nationally or internationally recognized. The plain language of the regulation also requires the petitioner to submit evidence that each prize or award is one for excellence in the field of endeavor. The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion.

The director noted several issues relating to the prizes or awards evidence and determined that the petitioner did not meet the requirements of this criterion. On appeal, the petitioner identifies three prizes or awards. The petitioner characterizes the first award as the "1st Award, Section Viola at the [REDACTED]". The translation reflects the award's name is "Category YOUNGSTERS 1st AWARD Section VIOLA." On appeal, the petitioner provides the award in a foreign language and a certified English translation. In this instance, the petitioner provides no documentary evidence demonstrating that the Youngsters 1st Award Section Viola is recognized beyond the presenting organization.

According to the translation, the second award is the first prize in the "2nd National Lutherie Contest 'YOUNG LUTHIERS' [REDACTED]". The certificate further indicates: "Contest reserved for the pupils of the [REDACTED]". The petitioner provided an article from the website [REDACTED], it titled, "Violin making contest in [REDACTED]". Although this article appears to be related to the competition in which this award was issued, the article does not identify this award beyond explaining that there are awards in three sections, one for professional violin makers, an open contest and a contest reserved to juniors or graduates holding a diploma for not longer than two years." The petitioner did not provide information about the publication in which this article appears; moreover, the article does not suggest that the junior competitions are nationally or internationally recognized. The same information appears in a [REDACTED] article in [REDACTED]. Finally, on appeal the petitioner submits an article entitled "Lutherie. National Contest." The petitioner asserts that the article appeared in [REDACTED] but the publication name does not appear on the foreign language document or the translation. The article indicates that the contest had an international jury composed of luther masters, but does not demonstrate that the youth

¹ The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

[REDACTED]

portion of the competition, limited to pupils of the [REDACTED] according to the certificate, is nationally or internationally recognized.

The final award the petitioner identifies on appeal is second prize at the “4th NATIONAL CONTEST OF LUTHERIE [REDACTED]”. In response to the RFE, the petitioner submitted a translation that appears to be this competition’s rules from Google Translate, but he did not provide the foreign language document. As such, this evidence has no probative value. Regardless, the translation does not address, in a comprehensive way, the selection criteria for specific awards beyond fees and experience to register for at least two different competitions. Specifically, the document states (grammar and syntax as it appears in the computer-generated translation):

ART. The

May participate in the 5th National Competition of Violin Making ‘ [REDACTED]’ only professional luthiers enrolled their respective Chambers of Commerce.

Registration for the 5th National Competition of Violin Making ‘ [REDACTED]’ is free. May participate in the 4th Competition “Young Luthiers” all members of the [REDACTED] [REDACTED] making both Italians and foreigners or who have graduated in an Italian school by no more than two years. Enrolled at a school of violin making, or those (or Italian foreigners) who have graduated from a school of Italian violin making no more than two years after self-certification, be entitled to a discount on registration fees by 50%.

Even if this document had probative value, it does not establish the selection criteria for the award the petitioner won in [REDACTED] nor does it demonstrate that the award is nationally or internationally recognized.

Consequently, the petitioner has not established that his awards meet the plain language requirements of 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.

This criterion contains three evidentiary requirements the petitioner must satisfy. First, the published material must be about the petitioner and the contents must relate to the petitioner’s work in the field under which he seeks classification as an immigrant. The published material must also appear in professional or major trade publications or other major media. Professional or major trade publications are intended for experts in the field or in the industry. The final requirement is that the petitioner provide each published item’s title, date, and author and if the published item is in a foreign language, the petitioner must provide a translation that complies with the requirements found at 8 C.F.R.

§ 103.2(b)(3). The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

Within the initial filing, the petitioner provided several forms of evidence under this criterion. However, each was in a foreign language and was not accompanied by a certified translation in accordance with the regulation at 8 C.F.R. § 103.2(b)(3). The petitioner did not submit any additional evidence that was about him and relating to his work in the field within his RFE response. The director determined that the petitioner did not meet the requirements of this criterion.

On appeal, the petitioner provides an article from [REDACTED]. The petitioner provides a certified translation of the story, but it does not include the portion bearing his name within the translation. Further, the article is about a competition rather than the petitioner, relating to his work in the field. See *generally Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). Finally, the translation does not include the publication's date nor does it contain any reference to the article's author as required by the regulation. Based on these shortcomings, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

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

Throughout the proceedings before the director, the petitioner did not assert eligibility under this criterion. Nevertheless, the director discussed this criterion within his decision, concluding that the petitioner did not satisfy the criterion's requirements. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. Therefore, the petitioner has abandoned any assertions under this criterion. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, 9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not submitted qualifying evidence under this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

A leading role should be apparent by its position in the overall organizational hierarchy and the role's matching duties. The petitioner has the responsibility to demonstrate that he actually performed the duties listed relating to the leading role. A critical role should be apparent from the petitioner's impact on the organization or the establishment's activities. The petitioner's performance in this role should establish whether the role was critical for the organization or establishment as a whole. The petitioner must demonstrate that the organizations or establishments have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-

Webster's online dictionary defines distinguished as, "marked by eminence, distinction, or excellence."³ Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U.S. 304, 306 (1893). Therefore, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or an equivalent reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

Initially and in response to the director's RFE, which advised that the petitioner had not specified which criteria the evidence satisfies, the petitioner did not address this criterion and the evidence appeared to relate to other criteria. Therefore, the director did not address this criterion in the final decision.

On appeal, the petitioner asserts that he performed in a critical role for his current employer. The evidence sufficiently demonstrates that the petitioner's employer enjoys a distinguished reputation. As evidence of his role for his employer, the petitioner provides three letters from ██████████ President of ██████████. Within the letters dated May 12, 2011 and March 12, 2013, ██████████ indicated that the petitioner is highly gifted and that his abilities and technical skills in making new instruments are extraordinary. Within ██████████ letter dated July 17, 2014 he indicates that he is fortunate to have the petitioner working for his company, that the petitioner brought a vast portfolio of experience with him, and that the petitioner has shown he is one of the people that his company can trust to repair and restore instruments. However, ██████████ does not assert that the petitioner performs in a leading role for ██████████ as demonstrated through his position within the overall hierarchy. Moreover, ██████████ explains that the business has been operating for over 40 years, but does not describe what impact the petitioner's work has had on the company such that his role has been critical for the business. While ██████████ asserts that there is a shortage of luthiers sufficiently trained and experienced to work on valuable stringed instruments, the issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215, 221 (Assoc. Comm'r 1998).

Consequently, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

D. Additional Evidence.

On appeal, the petitioner also identifies his education as qualifying evidence, but he did not specify under which regulatory criterion we should consider this evidence. Nor did he sufficiently describe how such evidence demonstrates his eligibility for this immigrant classification. Notably, a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning constitutes one form of evidence that a petitioner may submit towards a showing of exceptional ability,

³ See <http://www.merriam-webster.com/dictionary/distinguished>, accessed on February 5, 2015, a copy of which is incorporated into the record of proceeding.

as lesser classification than the one the petitioner seeks. 8 C.F.R. § 204.5(k)(3)(ii)(A). The petitioner has not explained why his education is relevant for the higher classification he seeks in this proceeding.

E. Summary

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

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of his or her field of endeavor.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor,” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. § 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. As the petitioner has not done so, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of presenting evidence that satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3) and (4). *Kazarian*, 596 F.3d at 1122. Nevertheless, although we need not provide the type of final merits determination referenced in *Kazarian*, a review of the evidence in the aggregate supports a finding that the petitioner has not demonstrated the level of expertise required for the classification sought.⁴

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. at 128. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁴ We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep’t of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, we maintain the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii); *see also* INA §§ 103(a)(1), 204(b); DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).