



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

JUL 28 2015

FILE #:



PETITION RECEIPT #:

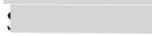


IN RE:

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:

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Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the Immigrant Petition for Alien Worker (Form I-140), 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, 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 individuals 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 previously submitted documentation and asserts that he meets at least three of the regulatory categories of 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 is 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. FIELD OF EXPERTISE

Although not addressed in the director’s decision, as a preliminary matter, we must clarify the petitioner’s field of expertise. 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 Part 6 of Form I-140, the petitioner left blank all of the questions regarding basic information about the proposed employment including his job title and job description. Moreover, in the petitioner’s cover letter submitted at the initial filing of the petition, the petitioner indicated that he “has worked as a painter and professor in the field of Fine Art[s],” and that he is a “leading artist in the field of Fine Art[s].” Although not required, the petitioner also submitted U.S. Department of Labor, Application for Alien Employment Certification (Form 750) in which the petitioner indicated that he was seeking employment in the United States as a painter and lecturer. In addition, the petitioner submitted a letter entitled, “Detailing Job Plan to Work in the United States,” stating that he would continue to do printing paint work, and that he would apply for a faculty position at the Department of Arts, California State University Fullerton in or around February 2014. Finally, the petitioner submitted documentary evidence for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), and the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii). All of the petitioner’s documentary evidence pertained to the petitioner’s experience as a painter rather than as a lecturer or professor.

In response to the director's request for evidence (RFE), the petitioner submitted a second letter entitled, "Detailing Job Plan to Work in the United States," stating that he "plan[s] to hold exhibition[s] two or three times per year with other artists in the United States, and if possible, [he] would like to teach for persons who have [an] interest in [the] Arts." Although the petitioner submitted additional documentation regarding the awards criterion and the artistic display criterion, the documentation related to his profession as an artist rather than as a lecturer or professor.

In addition to requiring that the petitioner must have sustained national or international acclaim, the statute and regulations require that the petitioner seek to continue work in his area of expertise in the United States. See sections 203(b)(1)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1153(b)(1)(A)(i) and (ii), and 8 C.F.R. §§ 204.5(h)(3) and (5). Although a fine arts painter and a fine arts teacher share knowledge of the arts, the two rely on very different sets of basic skills. Thus, a painter and instructor are not the same area of expertise. This interpretation has been upheld in federal court. In *See Lee v. Ziglar*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

It is reasonable to interpret continuing to work in one's "area of extraordinary ability" as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee's extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

Id. at 918. The court noted a consistent history in this area. In the present matter, there is no evidence showing that the petitioner has sustained national or international acclaim through his achievements as a lecturer, professor, or teacher. Although we acknowledge the possibility of a petitioner's extraordinary ability in more than one field, such as a painter and as a painting instructor, the petitioner, however, must demonstrate "by clear evidence that the alien is coming to the United States to continue work in the area of expertise." See the regulation at 8 C.F.R. § 204.5(h)(5).

Based on the petitioner's submitted documentation, we will review the record to determine whether the petitioner is an "alien of extraordinary ability" as a painter. If the petitioner intended to seek classification as an "alien of extraordinary ability" as a professor or lecturer, he did not submit any documentation for any of the criteria pertaining to that occupation. Ultimately, the petitioner must satisfy the regulation at 8 C.F.R. § 204.5(h)(3) through his achievements as a painter and continue to work in his area of expertise in the United States as a painter.

II. 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 individual's sustained acclaim and the recognition of the individual'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").

IV. ANALYSIS

A. Evidentiary Criteria¹

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

The director determined that the petitioner did not establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires “[d]ocumentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.” Moreover, it is the petitioner’s burden to establish that the evidence meets every element of this criterion. Not only must the petitioner demonstrate his receipt of prizes and awards, he must also demonstrate that those prizes and awards are nationally or internationally recognized for excellence in the field of endeavor, which, by definition, means that they are recognized beyond the awarding entity.

The petitioner submitted documentary evidence establishing that he received:

1. An accepted prize at the 14th [REDACTED] in 1995;
2. An excellent prize at the 8th [REDACTED] in 1994; and
3. An excellent prize at the 9th [REDACTED] in 1996.

Regarding item 1, the petitioner submitted a letter from [REDACTED], [REDACTED], who stated that [REDACTED] has held the Grand Art Exhibition of Korea since 1982, and all fine artists around the world are eligible to present their works. [REDACTED]’s letter, however, does not provide any evidence demonstrating that the accepted prize is a nationally or internationally recognized prize for excellence in the field of endeavor. Moreover, the petitioner did not submit any independent, objective evidence regarding the accepted prize, so as to establish that it is nationally or internationally recognized for excellence consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). As such, the petitioner did not establish that his receipt of the accepted prize meets the plain language of this regulatory criterion.

Regarding items 2 and 3, the petitioner submitted a letter from [REDACTED], [REDACTED], who stated that [REDACTED] is an international competition that any art director, artistic designer, painter, photographer, typographer, and etc. working anywhere can participate in the competition and

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. As previously discussed, the petitioner submitted no evidence that he meets any of the criteria as an instructor or lecturer.

provided the evaluation criteria for the prizes. The letter does not indicate whether the prize is nationally or internationally recognized for excellence. Furthermore, the petitioner did not submit any other documentary evidence demonstrating that the excellent prize is nationally or internationally recognized for excellence. Therefore, the petitioner did not establish that his receipt of the excellent prizes meet the plain language of this regulation at 8 C.F.R. § 204.5(h)(3)(i).

Again, the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires that “[d]ocumentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.” Simply submitting evidence of the petitioner’s receipt of prizes and awards is not sufficient to meet this criterion unless the petitioner submits evidence establishing that the prizes and awards are nationally or internationally recognized for excellence in the field. Although the petitioner submitted evidence of his receipt of three prizes or awards, he did not submit sufficient documentary evidence demonstrating that his prizes or awards are nationally or internationally recognized for excellence in the field.

Accordingly, the petitioner did not establish that he meets this criterion.

Evidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The director determined that the petitioner established eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence 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.” A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

Accordingly, the petitioner established that he meets this criterion.

Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases.

The director determined that the petitioner did not establish eligibility for this criterion because “[t]he petitioner has not provided any supporting evidence to prove that the artistic exhibitions have raised the [petitioner] to the very top of the field of endeavor.” The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires “[e]vidence of the display of the alien’s work in the field at artistic exhibitions or showcases.” In accordance with *Kazarian* 596 F.3d at 1122, the status or reputation of the artistic exhibitions or showcases is not relevant in the first step of the two-part

review.² Instead, the petitioner must submit evidence establishing that his work has been displayed at artistic exhibitions or showcases. In this case, the petitioner submitted documentation reflecting that his work was displayed at various artistic exhibitions and showcases such as the [REDACTED] Gallery, [REDACTED] Gallery, and [REDACTED]. Therefore, we withdraw the findings of the director for this criterion.

Accordingly, the petitioner established that he meets this criterion.

B. 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.

V. CONTINUE TO WORK IN THE AREA OF EXPERTISE

Although not addressed by the director in his decision, the petitioner did not establish his intent to continue to work in his area of expertise in the United States as required by section 203(b)(1)(A)(ii) of the Act and 8 C.F.R. § 204.5(h)(5). We maintain *de novo* review of all questions of fact and law. See *Soltane v. United States Dep't of Justice*, 381 F.3d at 145.

Section 203(b)(1)(A)(ii) requires that the petitioner “seeks to enter the United States to continue work in the area of extraordinary ability.” The regulation at 8 C.F.R. § 204.5(h)(5) states:

Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

As previously discussed, the petitioner submitted a letter at the initial filing of the petition and in response to the director’s RFE that indicated that he would hold two or three exhibitions per year with other artists. According to the regulation at 8 C.F.R. § 204.5(h)(5), the petitioner must submit “clear evidence” and his statement must detail his plans on how he intends to continue his work in the United States. The petitioner’s letters, however, lack specific information to establish his plans to continue to work in his field of expertise. The petitioner’s letters do not provide any details such

² If the petitioner had submitted the requisite evidence under at least three evidentiary categories, the second step would have been a final merits determination that would have considered the status or reputation of the artistic exhibitions or showcases to determine whether the petitioner is one of that small percentage who has risen to the very top of the field of endeavor, that he has sustained national or international acclaim, and that his achievements have been recognized in the field of expertise.

as where and when he intends to hold his exhibitions; the names of any galleries or festivals that would be interested in displaying his work; and the names of other artists with whom he intends to display his work. The petitioner did not submit any other documentation, such as letters from prospective employers or any evidence of prearranged commitments such as contracts, reflecting that he is coming to the United States to continue work in the area of expertise. Although the petitioner indicated that he would like to teach, the petitioner has not shown that his field of expertise is as an instructor rather than as a painter. *See Lee v. Ziglar*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise).

For the reasons discussed above, the petitioner has not submitted “clear evidence” that he intends to continue in his area of expertise in the United States pursuant to section 203(b)(1)(A)(ii) of the Act and the regulation at 8 C.F.R. § 204.5(h)(5).

VI. 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.³

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

³ We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep’t of Justice*, 381 F.3d at 145. 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).

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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.