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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

[redacted]

B3

Date: APR 30 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 is an institution of higher education/university. It seeks to classify the beneficiary as an outstanding professor or researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary permanently in the United States as a professor of piano. The director determined that the petitioner had not established that the beneficiary had attained the outstanding level of achievement required for classification as an outstanding professor or researcher. In addition, the director found that the record lacks the actual job offer issued by the petitioner to the beneficiary, pursuant to 8 C.F.R. § 204.5(i)(3)(iii). Finally, the director noted that the petitioner had not submitted any of the required initial evidence to establish its ability to pay the proffered wage.

On appeal, the petitioner submits a brief and additional evidence. For the reasons discussed below, the AAO concurs with the director that the record fails to establish that the beneficiary enjoys international recognition. Specifically, the petitioner has submitted qualifying evidence under only one of the required regulatory criteria, judging the work of others pursuant to 8 C.F.R. §§ 204.5(i)(3)(i)(D). Therefore, the evidence submitted by the petitioner has failed to establish that the beneficiary satisfies the antecedent regulatory requirement of two types of evidence. 8 C.F.R. § 204.5(i)(3)(i).

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):
>
> * * *
>
> (B) Outstanding professors and researchers. -- An alien is described in this subparagraph if --
>
> (i) the alien is recognized internationally as outstanding in a specific academic area,
>
> (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
>
> (iii) the alien seeks to enter the United States --

> (I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
>
> (II) for a comparable position with a university or institution of higher education to conduct research in the area, or
>
> (III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

II. Qualifying Employer

A. Job Offer

The regulation at 8 C.F.R. § 204.5(i)(3)(iii) provides that a petition must be accompanied by:

> An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:
>
> (A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;
>
> (B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or
>
> (C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

On Part 6 of the petition, the petitioner does not indicate that the job would be permanent or full time. [redacted] of the petitioner's School of Creative and Performing Arts, signed the petition. In three initial letters, all dated September 9, 2010, the filing date of this petition, [redacted] states that from the spring of 2008 through December 2008 the beneficiary was employed on a part-time basis as an adjunct professor of music earning approximately $14,000. He states that since January 2009, the beneficiary "has been volunteering to serve the university free of charge." He also states that it is his intention to appeal for funding of a full-time faculty position for the beneficiary in the near future. He further states that when the beneficiary receives "her work permit, it is my expectation that her salary . . . will be $14,000 to $18,000" based upon what she was

receiving from the petitioner in 2008. In a letter dated April 8, 2011, [redacted] states that he has submitted a new job description for approval by the petitioner, "for a full-time instructor's position at a salary of $30,000 per year" for a collaborative pianist, for which position he believes the beneficiary "would receive the most favorable support". On appeal, [redacted] states that, as of June 2011, the full-time instructor position "is awaiting final approval from the Louisiana Board of Regents," and that it is his intention to hire the beneficiary for the position. From the documentation submitted by the petitioner, it is clear that, as of the date of filing this petition, the petitioner has not made an actual offer of employment to the beneficiary. [redacted] confirms only an intention to hire the beneficiary on a permanent basis at some future date. These assertions do not constitute a legally binding job offer, permanent or otherwise. The lack of a permanent job offer from the petitioner to the beneficiary is sufficient grounds for denial of this petition.

B. Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The petitioner did not initially address this issue. Thus, the director concluded that the petitioner had not established its ability to pay the proffered wage. The AAO notes that the petitioner indicated that it employs over 800 individuals and listed a budget of over $28,500,000 on the Form I-140 petition. The proffered wage as stated on the petition is $500 per week. On appeal, the petitioner submits a statement from its financial officer, as required. The petitioner need only demonstrate that it was paying the proffered wage or that it had the ability to do so as of the priority date, in this case September 9, 2010. The petitioner was not paying the proffered wage as of that date, since, according to the petitioner's representative on appeal, the beneficiary "has been volunteering to serve the university free of charge" since January 2009. Regardless, the AAO finds the petitioner has established its ability to pay the proffered wage stated on the petition. Therefore, this part of the director's decision will be withdrawn.

III. International Recognition

The regulation at 8 C.F.R. § 204.5(i)(3)(i) states that a petition for an outstanding professor or researcher must be accompanied by "[e]vidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition." The regulation lists

the following six criteria, of which the beneficiary must submit evidence qualifying under at least two.

> (A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;
>
> (B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;
>
> (C) Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;
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> (D) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;
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> (E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or
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> (F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under a similar classification set forth at section 203(b)(1)(A) of the Act. *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. 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.[1] 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)).

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[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) (comparable to 8 C.F.R. § 204.5(i)(3)(i)(D)) and 8 C.F.R. § 204.5(h)(3)(vi) (comparable to 8 C.F.R. § 204.5(i)(3)(i)(F)).

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.[2] While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning persuasive to the classification sought in this matter. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian.* As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. *See* 8 C.F.R. 103.3(a)(1)(iv); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (recognizing the AAO's *de novo* authority).

IV. Analysis

A. Evidentiary Criteria[3]

This petition, filed on September 9, 2010, seeks to classify the beneficiary as a professor or researcher who is recognized internationally as outstanding in her academic field. The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(i)(3)(i).

> *Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field*

The petitioner submitted evidence that the beneficiary received the following awards: Phi Mu Alpha Sinfonia Fraternity Outstanding Faculty Member Award (2009); Ministry of Education and Science of Slovak Republic – round I of the 2nd Annual International Piano Competition, Kosice (1994); Ministry of Education and Science of Slovak Republic – round II of the 2nd Annual International Piano Competition, Kosice (1994); Silver Medal in Young People's Interpretation Competition, School for Gifted Children of Jan Cikker in Banska, Bystrica (1995); and, Ministry of Education and Science of Slovak Republic – round I of the 4nd Annual International Piano Competition, Kosice (1996).

It is significant that the *proposed* regulation relating to this classification would have required evidence of a major *international* award. The final rule removed the requirement that the award be "international," but left the word "major." The commentary states: "The word "international" has been removed in order to accommodate the *possibility* that an alien might be recognized internationally as outstanding for having received a major award that is not international." (Emphasis added.) 56 Fed. Reg. 60897-01, 60899 (Nov. 29, 1991.)

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[2] The classification at issue in *Kazarian,* section 203(b)(1)(A) of the Act, requires qualifying evidence under three criteria whereas the classification at issue in this matter, section 203(b)(1)(B) of the Act, requires qualifying evidence under only two criteria.

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

Thus, the standard for this criterion is very high. The rule recognizes only the "possibility" that a *major* award that is not international would qualify. Significantly, even lesser international awards cannot serve to meet this criterion given the continued use of the word "major" in the final rule. *Compare* 8 C.F.R. § 204.5(h)(3)(i) (allowing for "lesser" nationally or internationally recognized awards for a separate classification than the one sought in this matter).

Regarding the beneficiary's receipt of the Phi Mu Alpha Sinfonia Fraternity Outstanding Faculty Member Award (2009), the AAO finds that this award is not evidence of international recognition in the field, but, rather, an achievement in comparison with the beneficiary's fellow faculty members.

Regarding the beneficiary's receipt of awards from Ministry of Education and Science of Slovak Republic – round I and II of the 2nd Annual International Piano Competition, Kosice (1994) and Ministry of Education and Science of Slovak Republic – round I of the 4nd Annual International Piano Competition, Kosice (1996), the beneficiary received honorary mention for participation in these competitions when she was 13 and 15 years old, respectively. On appeal, the petitioner submitted documentation that the international piano competitions in Kosice are now part of the European Union of Music Competition for Youth (EMCY), an umbrella organization for music competitions across Europe. This additional evidence does not address whether the beneficiary's inclusion was based upon outstanding achievement in the academic field, rather than achievement in comparison with fellow students. Although these competitions are stated as being international, regardless, we find that these awards, for "honorary mention" based upon participation in several piano competitions, without evidence that such inclusion was based upon outstanding achievement in the academic field, are not indicative of international recognition in the field and do not, therefore, constitute major awards.

Regarding the beneficiary's receipt of the Silver Medal in Young People's Interpretation Competition, School for Gifted Children of Jan Cikker in Banska, Bystrica (1995), we do not find that the beneficiary's second place award in a school competition, without evidence that such inclusion was based upon outstanding achievement in the academic field rather than achievement in comparison with fellow students, is indicative of international recognition in the field. Therefore, we do not find that this award constitutes a major award.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(i)(3)(i)(A).

> *Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation*

The petitioner submitted several published articles that briefly mention the beneficiary's name as a piano accompanist, while also discussing the work of other artists. The regulation at 8 C.F.R. § 204.5(i)(3)(i)(C) requires evidence of published material about the beneficiary's work. In

addition, published material which refers to the beneficiary's work in discussing recent work in the field generally is not about the beneficiary's work. As such, it cannot be considered published material about the beneficiary's work.

The petitioner also submitted an article mentioning the beneficiary as accompanist to a colleague at the petitioning university. The plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(C) requires that the published material shall include the title, date, and author of the material. However, this article is a university press release that does not include the author of the material.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(i)(3)(i)(C).

Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field

The petitioner submitted evidence that the beneficiary participated as the judge of the work of others in the following events: Piano Rally at Centenary College (2010); Federation of Music Clubs Piano Festival (2010); Sonatina Festival for CPTA (2007); Federation of Music Clubs Piano Festival in Natchitoches (2006); and, Federation of Music Clubs Piano Festival (2004).

This evidence qualifies under the plain language of the criterion set forth at 8 C.F.R. § 204.5(i)(3)(i)(D).

Evidence of the alien's original scientific or scholarly research contributions to the academic field.

As evidence relating to the beneficiary's original scientific or scholarly research contributions to the academic field, the petitioner submitted the following: documentary evidence that the beneficiary has performed hundreds of times as a musical accompanist (including having performed premieres of several works), and has presented dozens of performances, at venues including educational institutions, national/international conferences, and music competitions; and, 18 reference letters (six from the beneficiary's immediate circle of coauthors and collaborators; and, twelve letters of appreciation addressed to the beneficiary from individuals for whom she has acted as accompanist, many of whom are colleagues from the petitioning university). The plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(E) does not require that the beneficiary's contributions themselves be internationally recognized as outstanding. That being said, the plain language of the regulation does not simply require original research, but an original "research contribution." Had the regulation contemplated merely the submission of original research, it would have said so, and not have included the extra word "contribution." Moreover, the plain language of the regulation requires that the contribution be "to the academic field" rather than an individual laboratory or institution.

[redacted] states that she has known the beneficiary since 2002, when the beneficiary became her collaborative pianist during the beneficiary's bachelor's studies at the petitioning university. She states that she, with the

beneficiary as her accompanist, was one of seven finalists in a national string competition. She states that the beneficiary is "a chamber pianist of the highest level."

was the beneficiary's instructor from 2002 to 2005 at the petitioning university. She states that the beneficiary is "in the top 1% of my absolute best students whom I have worked with during my teaching career." She states that since 2006, the beneficiary ". . . has been doing an amazing job almost singlehandedly servicing [as a piano accompanist] the entire Department of Music." She states that since 2002, the beneficiary has been the associate director of the Louisiana International Piano Series, held on the campus of the petitioning university.

states that he has known the beneficiary for nine years, since she was his student at He states that she is a collaborative pianist of high ability.

states that he has known the beneficiary since 2002, when she became a student at the petitioning university. He states that she is a collaborative pianist of "extraordinarily high artistic prowess." He states that the petitioning university has benefitted tremendously from her work.

has written two reference letters. She states that she and the beneficiary were chosen to perform at the International Clarinet Association Conference (ClarinetFest) in Kansas City, which she states is a highly prestigious event for professional clarinetists and their collaborators. She states that the beneficiary is one of the highest caliber collaborative pianists.

states that he has known the beneficiary since 2002, when he states she transferred to the petitioning university as a piano major. He states that he has rarely come across anyone "as genuinely talented in collaborative work" as the beneficiary.

The petitioner has also submitted 12 letters of appreciation addressed to the beneficiary from the following individuals, for whom she has acted as piano accompanist:

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If

testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have been considered above. United States Citizenship & Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as the AAO has done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions of widespread recognition and vague claims of contributions without specifically identifying contributions and providing specific examples of how those contributions have influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.[4] Considering the letters and other evidence in the aggregate, the record does not establish that the beneficiary's skills as a piano accompanist, while excellent and of great benefit to the petitioning university, can be considered a contribution to the field as a whole, so as to be indicative of international recognition in the field.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(i)(3)(i)(E).

Based upon the foregoing, the petitioner has failed to submit evidence that meets two of the criteria that must be satisfied to establish the minimum eligibility requirements for this classification. 8 C.F.R. § 204.5(i)(3)(i).

V. Conclusion

The documentation submitted in support of a claim of outstanding ability must clearly establish that the alien has achieved international recognition.

Had the petitioner submitted the requisite evidence under at least two evidentiary categories, in accordance with the *Kazarian* opinion the next step would be a final merits determination that

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[4] *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).

considers all of the evidence in the context of whether or not the evidence submitted by the petitioner has demonstrated that the beneficiary is recognized internationally as an outstanding professor or researcher in the academic field specified in the petition. 8 C.F.R. § 204.5(i)(3)(i); *see also Kazarian,* 596 F.3d at 1119-20. As the petitioner has not submitted the requisite evidence under at least two evidentiary categories, the appeal will be dismissed on this basis alone. The AAO will not conduct a final merits determination.[5]

For the above stated reasons, considered both in sum and as separate grounds for denial, the petitioner has not established eligibility pursuant to section 203(b)(1)(B) of the Act, and the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[5] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. In any future proceeding on motion or as a result of litigation, the AAO maintains the jurisdiction to conduct a final merits determination as the official who 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).