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

U.S. Citizenship and Immigration Services

B2

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 03 2010
SRC 09 059 52439

IN RE: Petitioner:
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:

[redacted]

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 $585. 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 seeks to classify the beneficiary as an "alien of extraordinary ability" pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established that the beneficiary enjoys the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. Specifically, the director noted that the petitioner had not submitted any of the initial required evidence for the classification sought.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserted that the standards at 8 C.F.R. § 204.5(h)(3) do not apply to the beneficiary's occupation as a stone cutter and setter, that training rather than a Ph.D. is required for the position and that there is a shortage of workers skilled in this occupation. The petitioner submitted affidavits from the president of the petitioning company and advertisements for the beneficiary's occupation. Subsequently, on June 3, 2009, counsel requested additional time to submit additional documents from the beneficiary's country of birth, affidavits, further documentation relating to the beneficiary's occupation and training, a "review" of the alien employment certification approval from the State of New Jersey and evidence relating to the beneficiary's work in the United States. Counsel did not explain how any of this evidence would relate to the classification sought. On June 18, 2009, the AAO afforded counsel until July 20, 2009 to submit additional evidence. As of this date, more than 13 months later, this office has received nothing further. As such, the appeal will be adjudicated based on the record before the director and the evidence submitted with the Form I-290B, Notice of Appeal or Motion.

I. Law

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

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

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

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

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

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

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

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the following ten categories of evidence.

(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(iii) 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;

(iv) 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 specialization for which classification is sought;

> (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
>
> (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
>
> (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
>
> (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
>
> (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
>
> (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

> If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise."

[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

> 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at 1119-20.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In 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).

II. Analysis

A. Evidentiary Criteria

Initially, the petitioner submitted a Form ETA 750 filed by the petitioner in behalf of the beneficiary and certified by the Department of Labor. Counsel did not initially explain how the beneficiary qualifies for the classification sought and the petitioner did not submit any of the evidence relating to the categories set forth at 8 C.F.R. § 204.5(h)(3)(i) through (x), quoted above.

On appeal, the petitioner submits two affidavits from [redacted] of the petitioning company. [redacted] describes the difficulty of finding someone with the beneficiary's skills and experience, asserts that the company does not need "a college graduate, or a PHd" and asserts that the petitioner's advertisement for the beneficiary's position reflects more experience than other advertisements for stonemasons. The petitioner submits a job advertisement for a stonemason that specifies no experience requirements and the advertisement the petitioner submitted to the Department of Labor reflecting a requirement for three years of experience.

The regulation at 8 C.F.R. § 204.5(h)(4) permits the submission of "comparable" evidence where the standards set forth at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the alien's occupation. The fact that college education is not required for the occupation is not determinative as to whether the standards at 8 C.F.R. § 204.5(h)(4), none of which relate to education, are readily applicable. Moreover, section 203(b)(1)(A) of the Act includes aliens of extraordinary ability in the arts and athletics, fields which do not typically require college education.

Even assuming the standards at 8 C.F.R. § 204.5(h)(3) are not readily applicable to stone cutters and setters, the petitioner has not explained why an advertisement demonstrating that the position is a skilled worker position as defined at section 203(b)(3)(A)(i) of the Act, a lesser classification than the

one sought, constitutes comparable evidence of extraordinary ability and national or international acclaim.

The claimed shortage of workers with the beneficiary's skills is also not comparable evidence of the beneficiary's extraordinary ability or acclaim. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *New York State Dep't of Transp*, 22 I&N Dec. 215, 221 (Comm'r. 1998). In fact, the petitioner obtained a certified alien employment certification (ETA 750) from the Department of Labor in behalf of the beneficiary. A certified Form ETA 750, required for all aliens qualifying under section 203(b)(3) of the Act and most aliens qualifying under section 203(b)(2) of the Act (advanced degree professionals and aliens of exceptional ability), is not comparable evidence of the beneficiary's eligibility for the higher classification sought pursuant to section 203(b)(1)(A) of the Act.[2] Ultimately, the Form ETA establishes only that the Department of Labor accepted that the petitioner had been unable to find a U.S. worker who is able, willing, qualified and available to fill the position and has no relevance as to whether the beneficiary enjoys national or international acclaim, the statutory standard in this matter. Section 203(b)(1)(A) of the Act.

Summary

In light of the above, the petitioner has not submitted the requisite evidence under at least three of the evidentiary categories for which evidence must be submitted to meet the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. Nevertheless, we will review the evidence in the aggregate as part of our final merits determination.

B. Final Merits Determination

In accordance with the *Kazarian* opinion, we must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2); 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)(3). *See Kazarian,* 596 F.3d at 1119-20.

We reiterate that the fact that the beneficiary's position qualifies as a skilled worker position and that the Department of Labor certified a Form ETA 750 in the beneficiary's behalf does not establish that the beneficiary is one of that small percentage who have risen to the very top of his field or that he enjoys sustained national or international acclaim or that his achievements have been recognized in the field of expertise. In fact, the record contains no evidence that anyone in the field other than the

[2] Section 203(b)(2) of the Act has a provision that allows USCIS to waive the alien employment certification requirement in the national interest. This waiver, however, does not suggest that actually obtaining the normally required alien employment certification from the Department of Labor is indicative of extraordinary ability or national or international acclaim.

beneficiary's employer is aware of his work.

III. Conclusion

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

Review of the record, however, does not establish that the beneficiary has distinguished himself as a stonemason 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 his field. The evidence indicates that the petitioner demonstrated to the Department of Labor that it was unable to find a U.S. worker that was able, willing, qualified and available for the beneficiary's position, but is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field or that he enjoys national or international acclaim. Therefore, the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.