

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  
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Services

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[Redacted]

DATE: **JAN 10 2012** Office: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

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 \$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, California Service Center, denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO on a motion to reconsider. The AAO will dismiss the motion.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O) as an alien with extraordinary ability in the arts. The petitioner requests that the beneficiary be granted O-1 classification for a period of three years so that he may perform in the United States as a trumpet player.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary qualifies as an alien of extraordinary ability in the arts. The director determined that the petitioner failed to establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), and submitted evidence to satisfy only one of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which three must be met to establish eligibility.

The AAO dismissed the appeal, concluding that the submitted evidence failed to satisfy any of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which three must be satisfied to establish the beneficiary's eligibility for the requested classification. The AAO further found that, although required by regulation and specifically requested by the director, the petitioner failed to submit a copy of its contract with the beneficiary, as required by 8 C.F.R. § 214.2(o)(2)(ii)(B), prior to the adjudication of the petition. The AAO, citing *Matter of Soriano*, 29, I&N Dec. 764 (BIA 1988) and *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988), declined to consider the sufficiency of the evidence submitted for the first time on appeal. Finally, the AAO determined that the petitioner failed to satisfy evidentiary requirements applicable to petitioning agents pursuant to 8 C.F.R. § 214.2(o)(2)(iv)(E).

The matter is now before the AAO on motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In addition, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." The petitioner's motion does not contain this statement.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion does not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this reason.

Even if the petitioner had complied with the requirements at 8 C.F.R. § 103.5(a)(1)(iii)(C), the petitioner has not established that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy.

The instant motion consists of counsel's 11-page brief, the majority of the content of which is derived directly and verbatim from counsel's appellate brief. The purpose of a motion to reopen or motion to reconsider is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, the AAO's review in this matter is limited to the narrow issue of whether the petitioner has documented sufficient reasons, supported by citations to appropriate statutes, regulations or precedent decisions, to warrant the reconsideration of the AAO's decision to dismiss the petitioner's appeal on March 10, 2011. The AAO previously conducted a *de novo* review of the entire record of proceeding, an appellate decision was issued, and the deficiencies were expressly stated in the AAO's 20-page decision.

Furthermore, counsel does not address the additional grounds for denial set forth in the AAO's decision dated March 10, 2011, specifically, the petitioner's failure to satisfy the evidentiary requirement at 8 C.F.R. § 214.2(o)(2)(ii)(D) and evidentiary requirements applicable to agents as petitioners at 8 C.F.R. § 214.2(o)(2)(iv)(E). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See 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).

Counsel's sole specific objection to the AAO's decision pertains to its employment of a two-part approach to adjudication set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9<sup>th</sup> Cir. March 4, 2010). Similar to the regulations governing this nonimmigrant classification, the regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. *Cf.* 8 C.F.R. § 204.5(h)(3).

Specifically, the *Kazarian* 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 \*6 (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." 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 \*3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination. The final merits determination analyzes whether the evidence is consistent with the statutory requirement of "extensive documentation" and the regulatory definition of "extraordinary ability."

In this matter, the AAO determined that the evidence submitted failed to satisfy 8 C.F.R. § 214.2(o)(3)(iv)(A) or at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). Specifically, the AAO determined that the evidence failed to satisfy the plain regulatory language of any one of these criteria. The first part of the *Kazarian* analysis, as set forth above, simply requires the application of the regulatory requirements to the evidence provided. The AAO's decision, at pages 5 to 16, discusses in considerable detail each piece of evidence submitted and why the evidence submitted fails to satisfy any of the applicable regulatory criteria. Counsel has neither addressed any of the deficiencies discussed therein nor claimed that the AAO's decision would have been favorable to the petitioner if *Kazarian* had not been applied.

Counsel's objections to *Kazarian* are as follows:

The court in *Kazarian* analyzed the regulations governing employment-based *immigrant* worker visa petitions filed under the first-preference category for individuals filed an application for "aliens of extraordinary ability." Although they may be similar in nature, there is a separate set of regulations which govern the criteria that must be met by a nonimmigrant worker seeking designation as an alien of extraordinary ability in the arts. See 8 CFR 214.2(o)(3)(iv)(A) and 8 CFR 214.2(o)(3)(iv)(B).

\* \* \*

Although similar in nature, there are two distinct sets of regulations governing immigrant and nonimmigrant workers of extraordinary ability. Because the court in *Kazarian* does not directly address the eligibility criteria for designation as an O-1 nonimmigrant of extraordinary ability, it is readily distinguishable from the case at bar and should not have been employed by the AAO in deciding the Petitioner's appeal.

(Emphasis in original.)

Counsel further asserts that "*Kazarian* essentially holds that a petitioner claiming extraordinary ability need not submit extraordinary evidence to prove that he or she is a person of extraordinary ability." As an example, counsel states that "[i]f one of the evidentiary criteria requires a showing of scholarly publications, the petitioner need not establish that the scholarly publications themselves are also extraordinary in order to qualify." Counsel notes that this a "circular argument, which *Kazarian* appropriately shot down." Counsel does not contend that

such "faulty reasoning" was employed by the AAO in adjudicating the petitioner's appeal. A review of the AAO's decision reflects that it did not evaluate the importance or significance of the evidence, beyond the plain language of the regulations.

The AAO finds counsel's arguments with respect to *Kazarian* unpersuasive. Although immigrant and nonimmigrant petitions for aliens of extraordinary ability are governed by different statutes and regulations, Congress intended for the same extraordinary ability standard to apply to both the O-1 nonimmigrant and first preference immigrant classifications. The legislative history for the enabling statute states: "Extraordinary ability (O Visas) - The bill's definition of aliens of extraordinary ability requires sustained national or international acclaim. This definition is identical to that for the comparable category of priority workers for permanent immigration. Thus, the same extensive documentation in support of a claim for status will be required." H. Rep. No. 101-723 (Sept. 19, 1990).

Based on this clear congressional intent, the AAO must consistently apply the extraordinary ability standards to appeals in both the nonimmigrant and immigrant extraordinary ability classifications.

Further, the AAO finds that the *Kazarian* evaluation complements the original intended approach for the O-1 classification. The drafters of the 1994 O-1 final rule made clear that the evidentiary criteria were not the "standard" for adjudicating a petition. The legacy Immigration and Naturalization Service (INS) drafters stated that: "[t]he evidence submitted by the petitioner is not the standard for the classification, but merely the mechanism to establish whether the standard has been met." 59 FR 41818 (August 15, 1994). The supplemental information further stated that "[t]he mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification." *Id.* at 41820.

Therefore, the AAO finds that the application of *Kazarian* to adjudication of O-1 nonimmigrant petitions is proper. In this matter, under *Kazarian*, the AAO was not required to conduct the "final merits determination" step of the two-part analysis, as the evidence submitted failed to meet at least three of the six criteria applicable to aliens of extraordinary ability in the arts. If the AAO had foregone the analysis of the evidence in the aggregate in the brief section of its decision titled "Final Merits Determination," the dismissal of the appeal was still mandated by the regulations governing the O-1 nonimmigrant classification. The petition was not approvable as it did not contain evidence of the beneficiary's extraordinary ability required by 8 C.F.R. § 214.2(o)(3)(iv)(A) or (B); evidence of a contract between the petitioner and the beneficiary as required by 8 C.F.R. § 214.2(o)(2)(ii)(D); or evidence required in support of petitions filed by agents pursuant to 8 C.F.R. § 214.2(o)(2)(iv)(E).

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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 motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion is dismissed.