

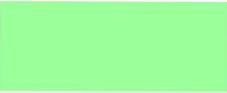
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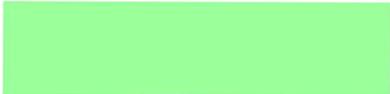
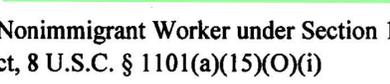
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

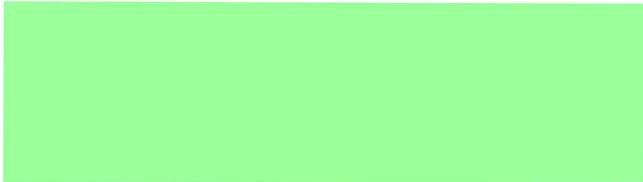


Date: **FEB 06 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office ("AAO") on appeal. The AAO will dismiss the appeal.

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 the petitioner may employ the beneficiary as an artist in residence, to teach ceramics courses and display her work at exhibitions.

The director denied the petition, finding that the petitioner had 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), or any of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision is incorrect as a matter of law and policy and is arbitrary and capricious. Counsel contends that the evidence submitted meets the evidentiary requirements set forth at 8 C.F.R. § 214.2(o)(3)(iv)(A) and five of the evidentiary requirements set forth at 8 C.F.R. 214.2(o)(3)(iv)(B).

I. The Law

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part:

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts.

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the 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 at 8 C.F.R. § 214.2(o)(3)(iv) states, in pertinent part:

Evidentiary criteria for an O-1 alien of extraordinary ability in the arts. To qualify as an alien of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

- (A) Evidence that the alien has been nominated for, or the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or
- (B) At least three of the following forms of documentation:
 - (1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;
 - (2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;
 - (3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;
 - (4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;
 - (5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or
 - (6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or

- (C) If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(iii) provides:

The evidence submitted with an O petition shall conform to the following:

- (A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.
- (B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

The decision of U.S. Citizenship and Immigration Services (USCIS) in a particular case is dependent upon the quality of the evidence submitted by the petitioner, not just the quantity of the evidence. The 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. 59 Fed Reg at 41820.

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 580 F.3d 1030 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 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).

Instead of parsing the significance of evidence as part of the initial inquiry, 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 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

The court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet two of the criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

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. 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.

The AAO finds the *Kazarian* court's two-part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). Therefore, 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 *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner has failed to submit evidence that satisfies three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence.

II. Discussion

The sole issue addressed by the director is whether the petitioner submitted evidence to establish that the beneficiary satisfies the evidentiary criterion at 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).

The beneficiary, a ceramics artist and instructor, is a native and citizen of Japan who was last admitted to the United States in F-1 practical training status. The petitioner, which is described as an educational arts facility, filed the petition on September 4, 2009. The director subsequently issued a request for additional evidence ("RFE"), to which the petitioner promptly responded.

A. The Evidentiary Criteria

If the petitioner establishes through the submission of documentary evidence that the beneficiary has been nominated for or has been the recipient of, significant national or international awards or prizes in the particular field pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The regulation lists an Academy Award, an Emmy, a Grammy, or a Director's Guild award as examples of qualifying significant awards or prizes.

The petitioner claimed that the beneficiary is eligible for this classification based on her receipt of five awards. The petitioner stated that the applicant's work titled [REDACTED] was selected for exhibition at the [REDACTED]. The petitioner asserted that the beneficiary received an award when three of her sculptures were selected for purchase for the [REDACTED]. The petitioner stated that the [REDACTED] awarded \$1000 to the beneficiary to create eight to ten sculptures. In 2009, the [REDACTED] awarded the applicant \$2000 to exhibit an original work. Finally, in 2009, the Artist

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Trust awarded the applicant a grant of \$1500 for the purchase of professional-quality camera and gear. While the evidence indicates that the beneficiary is talented and has received grants and awards, there is no evidence that the awards are internationally recognized or equivalent to that listed at 8 C.F.R. § 214.2(o)(3)(iv)(A).

Therefore, the petitioner must establish the beneficiary's eligibility under at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). Counsel indicates that the beneficiary satisfies the criteria at 8 C.F.R. 214:2(o)(3)(iv)(B)(1), (2), (3), (4) and (5). The remaining criterion will not be discussed.

(1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements

Counsel for the petitioner indicated that the beneficiary meets this criterion based on her past and prospective employment as a resident artist and ceramics instructor for the petitioner, [REDACTED]. According to their contract, the beneficiary is a "critical member" of their teaching staff and she will teach once or twice a week for three hours at a time.

The mission of [REDACTED] is to develop and promote excellence in the ceramic arts. [REDACTED] goal is to provide a professional facility in an educational atmosphere for the enhancement of skills in the medium of class. This is achieved by providing studio space, classes, professional workshops, lectures, community programs, and a gallery dedicated to the sale and exhibition of ceramic works.

The director determined and the AAO agrees, that the petitioner did not provide sufficient evidence to establish that the beneficiary has and will play a lead, starring or critical role for [REDACTED]

Additionally, the petitioner stated that the beneficiary has been and will be employed at the [REDACTED] Washington, teaching classes and exhibiting her work. The evidence does not establish that the beneficiary has and will play a lead, starring or critical role for [REDACTED]

The plain language of this criterion requires the petitioner to support its assertions regarding the beneficiary's lead or starring role in events or productions with a distinguished reputation by submitting evidence including critical reviews, advertisements, publicity releases, publications, contracts, or endorsements. The petitioner has submitted no such evidence that would establish the beneficiary's leading, critical or starring role in these productions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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. Comm'r. 1972)).

Based on the foregoing discussion, we concur with the director's conclusion that this criterion has not been met.

- (2) *Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications.*

The petitioner provided a list of published articles that somehow relate to the beneficiary's work. The petitioner listed exhibition catalogues, monthly magazines, blogs, and the [REDACTED]

The petitioner failed to establish that any of these publications are major publications. The petitioner indicated that the [REDACTED] is a part of [REDACTED]. The petitioner failed to provide information as to the [REDACTED] circulation, so the AAO cannot discern whether it is a major newspaper, as required by the regulation. Exhibition catalogues are distributed only to art exhibition viewers. The petitioner indicated that the beneficiary was featured in a book titled [REDACTED] and in a magazine titled [REDACTED]. At page 21 of [REDACTED] one of the beneficiary's sculptures is featured. [REDACTED] other artists' work was featured in the book. The petitioner provided no information about the book's distribution. The petitioner provided a partial copy of [REDACTED] which featured [REDACTED] students' work, including one of the beneficiary's. Again, no information was provided as to the magazine's circulation. The petitioner failed to establish that the articles document the beneficiary's national or international recognition for her achievements and that the items were published by major media.

Based on the foregoing discussion, we concur with the director's conclusion that this criterion has not been met.

- (3) *Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials.*

Counsel asserts that the beneficiary has performed in lead, starring or critical roles for a number of art galleries, including [REDACTED] among others.

In a testimonial, [REDACTED] co-owner of [REDACTED] wrote that he showcased the beneficiary's work in a solo exhibition and that the public response was overwhelmingly positive. He further indicated that he intended to feature the beneficiary's work in an upcoming solo exhibition. Counsel for the petitioner asserts that the beneficiary played a lead role in solo exhibitions. But an exhibition is not an organization or establishment.

[REDACTED] of the [REDACTED] wrote that he exhibited the beneficiary's work at the 2008 [REDACTED] and intended to exhibit her work again in 2009. He provided a copy of a flyer for the exhibition, showing that the beneficiary was one of six artists selected to show their work. The petitioner failed to establish that [REDACTED] has a distinguished reputation.

The petitioner stated that the beneficiary was one of 11 artists chosen from 178 applicants to exhibit at [REDACTED] in the 2009-2010 season. The petitioner failed to establish that [REDACTED] has a distinguished reputation.

The petitioner indicated that the beneficiary had and would exhibit work and teach at [REDACTED] and at [REDACTED]. The petitioner failed to establish that these organizations enjoy a distinguished reputation.

The petitioner submitted a list of publications about the beneficiary's work, however, none related to the beneficiary's work at the above-listed organizations. Instead, the articles related to several exhibitions, including several held at the [REDACTED] where the beneficiary was a student.

The AAO agrees with the director in finding that the petitioner failed to establish that the beneficiary has and will serve as lead, starring or critical role for any of these entities and failed to demonstrate that any of the galleries or museums have a distinguished reputation.

For the foregoing reasons, the petitioner has not submitted evidence to meet the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

(4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications

Counsel indicates that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) based on her "critically acclaimed success." Counsel cites three examples of such success. Counsel states that [REDACTED] commissioned the beneficiary to create a piece for display at the company's offices in Redmond, Washington. Second, counsel asserts that the beneficiary meets this criterion because her work was one of several selected from more than 1500 submissions to be part of the [REDACTED]. Third, the beneficiary was awarded a grant to create 8 to 10 ceramic sculptures for the [REDACTED].

Regardless, the petitioner did not submit evidence of these commercial or critical successes in the form of published evidence from trade journals, major newspapers or other publications, as required. The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) requires the petitioner's commercial or critically acclaimed successes to be "evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications." The petitioner has not submitted any relevant evidence pertaining to this criterion.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)).

For the foregoing reasons, the petitioner has not submitted evidence that satisfies the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4).

- (5) *Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements.*

The petitioner submitted several letters from experts in the beneficiary's field. A letter from [REDACTED] a Montana artist, states:

[The beneficiary] is also a valuable asset to the cultural community in the [REDACTED] and has been a very effective teacher at [REDACTED] where her classes focus on drawing on pots, a tradition that has long roots in her native Japan. Her many accomplishments since her graduation . . . are quite impressive, and I will have you refer to her resume for specifics. She has the capability to contribute greatly to the arts in this country.

Professor [REDACTED], writes: "[The beneficiary's] works possesses [sic] an uncanny ability to resonate with viewers at many levels. The broad scope of her work in subject matter as well as style and technique is extremely impressive for one so young. [The beneficiary] is gifted in her mastery of the medium."

[REDACTED] a professor of ceramic art at the [REDACTED] wrote: "While there are many artists working in ceramics today, [the beneficiary's] work stands out in her sensitive handling of the clay, and in her use of drawing, paint, wood, and other materials in combination with the clay . . ."

[REDACTED] at the [REDACTED] writes: "Following graduation, [the beneficiary] immediately established a studio and has garnered the attention of critics, art dealers and collectors. The work she is making is truly unique and the support that she has already received from our leading arts organizations . . . is quite an accomplishment at this early stage of her career."

While the AAO recognizes that the individuals who provided letters hold a very high opinion of the beneficiary's talent as an artist, the submitted testimonials do not satisfy the plain language of the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5). Few of the persons providing testimonials have clearly indicated their knowledge of the beneficiary's achievements. Rather, the majority of them opine that the beneficiary is a talented artist, without specifically addressing her achievements or recognition in the field.

Based on the foregoing, the petitioner has not submitted evidence that satisfies the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5).

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III. Conclusion

The documentation submitted in support of a claim of extraordinary ability in the field of arts must clearly establish that the beneficiary is prominent to the extent that she could be considered renowned, leading or well-known in her field.

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 consideration of the evidence in the context of a final merits determination. However, as discussed above, the petitioner failed to establish eligibility under any of the criteria found under the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B). The AAO will not conduct a final merits determination.

For the above-stated reasons, the petitioner has not established the beneficiary's eligibility pursuant to the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), and the petition may not be approved.¹

The petition will be denied and the appeal dismissed for the above stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

¹ The AAO maintains *de novo* review. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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).