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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:

NOV 27 2013

Office: TEXAS SERVICE CENTER

FILE:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability as a dermatologist. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate “sustained national or international acclaim” and present “extensive documentation” of his or her 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, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific 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.

The director found that the petitioner established eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) and the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi). However, the director determined that the petitioner failed to establish eligibility for the one-time achievement pursuant to the regulation at 8 C.F.R. § 204.5(h)(3), the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x).

In counsel’s brief submitted on appeal, counsel concurs with the director’s favorable determinations regarding the awards criterion and the scholarly articles criterion but contests the director’s decision regarding only the original contributions criterion. Counsel did not contest the additional findings of the director or offer further arguments for the one-time achievement, the membership criterion, the artistic display criterion, the leading or critical role criterion, and the commercial successes criterion. Therefore, these issues are abandoned. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal).

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 ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

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)).

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 this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

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).

A. Evidentiary Criteria²

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 established 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.” However, a review of the record of proceeding does not reflect 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)(i). For the reasons outlined below, the director’s decision for this criterion will be withdrawn.

The director based his decision on the petitioner’s receipt of the best poster at the [REDACTED] from [REDACTED] in Bangkok, Thailand. Although the petitioner submitted evidence of the award and a screenshot reflecting that the conference was sponsored by the [REDACTED] in conjunction with the [REDACTED] the petitioner did not submit any documentary evidence establishing that the best poster award is a nationally or internationally recognized award for excellence in the field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). Submitting evidence of the petitioner’s receipt of an award is insufficient to meet this criterion unless the petitioner demonstrates that the award is nationally or internationally recognized for excellence in the field.

Moreover, even if the petitioner were to submit supporting documentary evidence showing that the [REDACTED] award is a nationally or internationally recognized award, which he has not, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires more than one nationally or internationally recognized prize or award. In this case, the director based his decision on the petitioner’s receipt of only one award. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of “letter(s).” Thus, the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS’ ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for “a” bachelor’s degree or “a” foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

Furthermore, the record of proceeding reflects that the petitioner submitted several appreciation documents regarding his rank in classes and on examinations. For example, the petitioner submitted an appreciation plaque acknowledging his second rank in the [REDACTED] an appreciation letter acknowledging his third rank in the field of medicine for academic year 1998-1999, and a document regarding his second rank at the [REDACTED] of Medical Sciences. However, academic study is not a field of endeavor, but training for a future field of endeavor. As such, academic awards and scholarships, student awards, postdoctoral fellowships, and financial aid awards cannot be

² On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

considered nationally or internationally recognized prizes or awards in the petitioner's field of endeavor. Moreover, the petitioner did not submit any documentary evidence beyond the awarding entities to demonstrate that the academic awards are recognized nationally or internationally for excellence in the field of endeavor.

As discussed, the plain language of this regulatory criterion specifically requires that the petitioner's prizes or awards be nationally or internationally recognized for excellence in his field. In this case, the petitioner did not demonstrate receipt of more than one award and that such award is tantamount to nationally or internationally recognized prizes or awards for excellence in the field of endeavor. As such, the director's decision for this criterion is withdrawn.

Accordingly, the petitioner does not meet this criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

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)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." Here, the evidence must be reviewed to see whether it rises to the level of original scientific or scholarly-related contributions "of major significance in the field." The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

The director indicated in his decision that the petitioner submitted evidence of four patents, but the petitioner did not establish that any of the patents had significant impact in his field. Although the petitioner submitted evidence of the registration of the patents/inventions, the petitioner did not submit any documentary evidence demonstrating the impact or influence on the field, so as to establish that they are contributions of major significance in the field. Moreover, a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 n. 7, (Comm'r 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* A patent recognizes the originality of the idea, but it does not demonstrate that the petitioner made a contribution of major significance in the field through his development of this idea. The petitioner did not establish that any of his patents/inventions have been of major significance in the field. On appeal, counsel did not contest the decision of the director or offer any additional documentation regarding this issue. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d at 1228 n. 2; *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *9 (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal).

The director also indicated that the petitioner claimed to have published 21 articles, but the petitioner did not submit any evidence detailing the significant impact of the articles on the field. The record of proceeding reflects that the petitioner submitted screenshots from [REDACTED] indicating the petitioner's authorship of 18 articles, and [REDACTED] indicating the petitioner's authorship of 31 articles. The screenshots from [REDACTED] does not indicate any citation history; however the screenshots from [REDACTED] indicate that the petitioner's work has been cited 48 times with the highest cited article having 11 citations, and 20 of the petitioner's articles have never been cited. While the number of total citations is a factor, it is not the only factor to be considered in determining the petitioner's eligibility for this criterion. Generally, the number of citations is reflective of the petitioner's original findings and that the field has taken some interest to the petitioner's work. However, it is

not an automatic indicator that the petitioner's work has been of *major significance in the field*. Here, the petitioner's citations are not reflective that his work has been of major significance in the field. Furthermore, the petitioner did not submit any documentary evidence demonstrating that his articles have been unusually influential, such as articles that discuss in-depth the petitioner's findings or credit the petitioner with influencing or impacting the field. The petitioner's documentary evidence is not reflective of having a significant impact on the field. Again, counsel did not contest the decision of the director or offer any additional documentation regarding this issue on appeal. See *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d at 1228 n. 2; *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *9 (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal).

Finally, the director indicated that the petitioner claimed to have authored five books, and that one book, [REDACTED] was "selected as [a] major university book in 18th course of selected university books in 2008." The director determined that the petitioner did not submit any evidence regarding the meaning of the book's selection for the 18th course and whether or not the book is currently being used. On appeal, counsel submitted four letters regarding [REDACTED]

At the outset, at the initial filing of the petition, the petitioner submitted his curriculum vitae that reflected he was the co-author of two books [REDACTED] and was the main author for three books [REDACTED]. However, the petitioner submitted evidence of only two books [REDACTED]. The record contains no evidence of the three other books. 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'l Comm'r 1972)). In addition, the petitioner indicated on his curriculum vitae that [REDACTED] were "Under Development." There is no evidence indicating that the books were published at the time the petition was filed. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

Although the petitioner submitted a translation of the cover of the [REDACTED] evidencing his authorship, the petitioner did not submit any documentary evidence regarding the impact or influence of the book in the field, so as to demonstrate a contribution of major significance in the field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v). Submitting a sample of the petitioner's work is insufficient to meet the plain language of this regulatory criterion without documentary evidence demonstrating that his book has been of major significance in the field.

Regarding [REDACTED] the only book referenced by counsel on appeal, the translation of the book cover reflects that the petitioner is credited with cooperating with the book rather than authoring the book. The petitioner did not demonstrate that he participated as an author of the book or that his cooperation on the book is tantamount to authorship. Further, the petitioner did not submit any evidence explaining the nature or extent of the petitioner's cooperation with the book, so as to indicate that the book is the petitioner's original contribution. Moreover, the four letters submitted on appeal do not reflect that the book has been of major significance in the field. For example, letters from [REDACTED] and Dr. [REDACTED] stated that the book was selected as a "major university book in 46th course of selected university books in 2012" and "is really useful for every general practitioner dealing with dermatologic

problems.” In addition, letters from Dr. [REDACTED] of Medical Sciences, stated that he has benefited from the book and is teaching from it. The letters do not overcome the director’s original concerns regarding the significance of the 18th course, as well as the current claim of 46th course. Although the book may be used by two universities, as well as personally by Dr. [REDACTED], the petitioner has not established that the book is widely used by dermatologists throughout the field. Rather, the book’s influence is limited to two universities for use by prospective dermatology students.

Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff’d in part* 596 F.3d 1115 (9th Cir. 2010). Further, USCIS may, in its discretion, use as advisory opinion 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 of support from the petitioner’s personal contacts is not presumptive evidence of eligibility; USCIS may 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). Thus, the content of the writers’ statements and how they became aware of the petitioner’s reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance.

Even if the petitioner established that the book equates to an original contribution of major significance in the field, which he has not, the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires more than one original contribution of major significance in the field. On appeal, counsel only claimed the petitioner’s eligibility for this criterion based on a single contribution, the petitioner’s “co-authorship” of [REDACTED]

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires “[e]vidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.” Without additional, specific evidence showing not only the originality of the petitioner’s work but that the work has been unusually influential, widely applied throughout his field, or has otherwise risen to the level of contributions of major significance, the petitioner did not establish that he meets the plain language of this regulatory criterion.

Accordingly, the petitioner did not meet this criterion.

Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media.

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)(vi) requires “[e]vidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media.” 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)(vi).

Accordingly, the petitioner meets this criterion.

B. Summary

The petitioner did not satisfy the antecedent regulatory requirement of three types of evidence.

III. INTENT TO CONTINUE TO WORK IN THE UNITED STATES

While not addressed by the director in his decision, 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.

A review of the record of proceeding reflects that the petitioner did not submit any documentary evidence demonstrating that he intends to come to the United States to continue work in his area of expertise as a dermatologist. The petitioner did not submit, for example, any prospective job letters or contracts or evidence detailing how he would obtain employment, whether he has any contacts, or whether his experience qualifies him for any particular position. The petitioner's filing of an employment-based petition is insufficient to demonstrate a detailed plan of his intention to continue to work in his area of expertise.

Accordingly, the petitioner did not establish by clear evidence that he intends to come to the United States to continue in his area of expertise pursuant to section 203(b)(1)(A)(ii) of the Act and the regulation at 8 C.F.R. § 204.5(h)(5).

IV. 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.

Even if the petitioner had 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[ir] 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. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.³ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

³ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains 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* 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).

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NON-PRECEDENT DECISION

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The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

In visa petition proceedings, it is the petitioner's burden to 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.