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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 0 4 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 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 employment-based immigrant visa petition was denied by the Director, Texas Service Center. The director dismissed a subsequent motion to reconsider. The matter 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. 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.

On Form I-290B, Notice of Appeal or Motion, counsel indicated in Part 2 that he was filing an appeal and his "brief and/or additional evidence will be submitted to the AAO within 30 days." Counsel dated the appeal on November 26, 2012. As of this date, over four months later, the AAO has received nothing further. Accordingly, the record is considered complete as it now stands.

Furthermore, in counsel's cover letter, he requested an oral argument before the AAO but provided no explanation for the need of an oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Further, USCIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

Moreover, in Part 3 of Form I-290B, counsel claims that the director "defined the field of endeavor overly narrowly" and "[s]ince denial incorrectly categorized Beneficiary as a 'researcher,' relevant evidence was discounted as being outside the field."

At the initial filing of the petition, the petitioner listed the beneficiary's occupation in Part 5 of Form I-140, Immigrant Petition for Alien Worker, as an executive director of clinical research. Moreover, the petitioner indicated in Part 6 that the beneficiary would be responsible for leading clinical research operations from protocol development to final research results. On October 28, 2011, in the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the director indicated that "[t]he beneficiary intends to work as an executive director in the field of

health care business." On February 6, 2012, in the director's denial of the petition, the director indicated that the petitioner sought to classify the beneficiary as an alien of extraordinary ability as an "executive and manager." In fact, the director's decision never referred to the beneficiary as a researcher. Furthermore, the director's decision never discounted or dismissed any of the petitioner's evidence because it related to the beneficiary as an executive and manager rather than solely as a researcher. On motion, counsel raised the same argument that he now makes on appeal. In the director's dismissal of the motion, the director indicated that the documentary evidence reflects that the beneficiary is a researcher, and the evidence fails to show how the beneficiary's work as a researcher classifies him as an alien of extraordinary ability as an executive and manager.

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, internationally 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)).

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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) and 8 C.F.R. § 204.5(h)(3)(vi).

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. The director evaluated the documentary evidence and determined whether the documentary evidence met the plain language of the claimed categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x) pursuant to *Kazarian*. There is no evidence to support counsel's assertions that the director discounted or dismissed any of the petitioner's evidence because he regarded the beneficiary as a researcher rather than as an executive director of clinical research. Similarly, the director did not narrow the beneficiary's field and determine that the beneficiary was unable to meet a criterion because the documentary evidence related to another field. Counsel cited no example in the director's decision to support his assertions. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984).

Again, the director evaluated the documentary evidence and determined whether the documentary evidence met the plain language of the claimed categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x). Specifically, the director determined that the petitioner established that the beneficiary met the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv). However, the director thoroughly analyzed the documentary evidence and determined that the petitioner failed to establish that the beneficiary met the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), and the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). The director also indicated that the petitioner failed to submit any evidence regarding the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x), and as the beneficiary is not a visual artist, the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii) did not apply to the beneficiary's occupation.

In Part 3 of Form I-290B, counsel makes brief references to a few of the petitioner's documents but makes no reference or submits any additional arguments regarding the membership criterion, the published material criterion, the scholarly articles criterion, and the high salary criterion. The AAO, therefore, considers these issues to be 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 to the AAO).

On appeal, counsel claims that the director disregarded a letter from [redacted] and claims that "[t]his expert letter was not even addressed in the Denial notice." On the contrary, in the director's discussion under the original contributions criterion on page 8, the director specifically referred to [redacted] letter. In fact, the director quoted from [redacted] letter:

> What makes [the beneficiary's] accomplishment so unique has been his ability to not only expand his [redacted] model, but also to provide an organizational structure that others *might* use in Maryland and across the country. His [redacted] model makes perfect sense for many states and local communities to use as a map to show how to create such a model. [The beneficiary's] contributions to the [redacted] model is one in which others *could* follow his lead in building an [redacted] where ever it might be needed.

(Emphasis added).

The director summarized [redacted] letter, along with the other letters, and determined that they did not explain how the beneficiary's role as an executive director has impacted the field as a whole but rather the beneficiary's employer and southern Maryland. Moreover, the letters did not state how the beneficiary's concepts were being implemented by other [redacted] throughout the nation or internationally, so as to demonstrate an original 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).

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 AAO concurs with the director's assessment of the petitioner's letters, including [redacted] letter, submitted on behalf of the beneficiary. Moreover, [redacted] indicated that the beneficiary's [redacted] model *might* or *could* be used in the field. Furthermore, [redacted] stated that the beneficiary's "work in Maryland *may* help lead the way for others to replicate his work throughout the United States [emphasis added]." A petitioner cannot file a petition under this classification based on the expectation of future eligibility. Given the descriptions in terms of future applicability and determinations that may or may not occur at a later date, it appears that the significance of the beneficiary's [redacted] model, while original, has yet to be determined. [redacted] appears to speculate on the impact of the beneficiary's model in the field at some unknown point in the future. Eligibility must be established at the time of filing the petition. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. 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. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. at 114, that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. The assertion that the beneficiary's work will likely be influential is not adequate to establish that his work has already been recognized as a major contribution in the field.

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). USCIS is, however,

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 beneficiary'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 beneficiary'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.

For the reasons discussed in the director's decision for the original contributions criterion, as well as the discussion above, the petitioner failed to establish that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

On appeal, counsel further claims that the director discounted the beneficiary's leading and/or critical role as [redacted] However, the director thoroughly and effectively analyzed the petitioner's claims and documentary evidence and determined that the petitioner did not submit independent information about [redacted] and failed to demonstrate that [redacted] has a distinguished reputation. Moreover, the petitioner failed to submit official documentation from the appropriate authority establishing that the beneficiary performed in a leading or critical role. Counsel offers no argument on appeal that demonstrates error on the part of the director based upon the record that was before him. While the director determined that the beneficiary's position with [redacted] did not meet the plain language at 8 C.F.R. § 204.5(h)(3)(viii), counsel provided no argument explaining why the director's finding was in error; instead counsel simply restated a finding of the director.

Even if the petitioner were to submit supporting documentary evidence showing that the beneficiary's role with [redacted] meets the elements of this criterion, which it 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)(viii) requires a leading or critical role in more than one organization or establishment with a distinguished reputation. 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 AAO can infer that 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).

For the reasons discussed in the director's decision for the leading or critical role criterion, as well as the discussion above, the petitioner failed to establish that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

The petitioner failed to satisfy the antecedent regulatory requirement of three types of evidence. 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.[2] Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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.

[2] 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, 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).