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FILE:

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EAC 04 081 51253

Office: VERMONT SERVICE CENTER

Date: MAR 01 2006

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maig Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont 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 in the arts. The director determined that the petitioner had not established the sustained national or international acclaim requisite to classification as an alien of extraordinary ability and denied the petition on January 18, 2005. The petitioner timely submitted a Form I-290B, which was rejected by Citizenship and Immigration Services (CIS) because the submitted check was incorrectly completed. Counsel resubmitted the Form I-290B with a second check, but CIS then rejected the Form I-290B as untimely filed. On appeal, the petitioner submits a copy of the original check, which shows no errors. We find that the petitioner's Form I-290B was rejected in error and was timely filed on February 17, 2005. However, counsel's claims and the additional evidence submitted on appeal do not overcome the deficiencies of the petition and the appeal will be dismissed for the reasons discussed below.

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

(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.

Specific supporting evidence must accompany the petition to document the "sustained national or international acclaim" that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international acclaim through evidence of a "one-time achievement (that is, a major, international recognized award)." *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.* However, the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), or under 8 C.F.R. § 204.5(h)(4), must depend on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

In this case, the petitioner seeks classification as an alien with extraordinary ability in the arts as a graphic artist. We address the evidence submitted and counsel's contentions in the following discussion of the regulatory criteria relevant to the petitioner's case. Counsel does not claim that the petitioner is eligible under any criteria not discussed below.

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

The petitioner submitted documentation of the following accomplishments as evidence of her eligibility under this criterion: The petitioner's solo exhibition at the Exhibit A gallery in New York City was included in a list of shows in the January 26 to February 1, 2000 edition of *Village Choices*, a weekly guide published by the *Village Voice*. The *Village Voice* is a New York City regional newspaper and the record contains no evidence that inclusion in *Village Choices* is a nationally recognized prize or award. On appeal, counsel claims that the *Village Voice* is "the leading arts and culture weekly newspaper and internet web site" and that "[r]ecognition by the *Village Voice* is a major national award." The record contains no documentation of the national circulation of the *Village Voice*, the *Village Choices* selection criteria, or any other evidence to support counsel's claims. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submitted an excerpt from the catalogue of "Graphic Front," the "Tokyo Urban Art Projects Nippon Graphic Exhibition 1991 Final," which lists her as one of several artists to receive a "Runner-Up Award." The record contains no evidence regarding the competitiveness, significance and national or international recognition of this exhibition and its awards. On appeal, counsel states, "As Tokyo is the cultural . . . center of Japan, an award in a major exhibit in Tokyo is comparable to an award in a similar exhibition in New York City, which is the national cultural center of the United States." Again, the record does not support counsel's claims and the unsupported assertions of counsel do not constitute evidence. *Obaigbena*, 19 I&N Dec. at 534; *Laureano*, 19 I&N Dec. 1; *Ramirez-Sanchez*, 17 I&N Dec. at 506.

The record contains another catalogue excerpt from the 1991 Exhibition of Japanese Illustration, which includes an image of one of the petitioner's prints. The catalogue states that this annual exhibition is devoted to promoting "promising artists" and that for the 1991 exhibition, 95 pieces were chosen from 2,195 entries. The catalogue further states that the exhibition will be shown at various venues in Japan as well as in Spain and the former Soviet Union. According to the catalogue, 17 prizes were awarded to exhibiting artists. The submitted evidence does not show that the petitioner received any of those prizes. On appeal, counsel states that the petitioner's selection to participate in this exhibition reflects "national recognition of her significant artistic achievements." Even if the petitioner received national recognition through this 1991 exhibition, her inclusion in one national show 13 years prior to the filing of her petition does not demonstrate the requisite sustained acclaim.

On appeal, counsel further contends that the petitioner's receipt of an Asian Student's Scholarship from the School of Visual Arts in New York City evidences her eligibility under this criterion. The record contains no primary evidence of the petitioner's receipt of this scholarship. Even if properly documented, however, the scholarship would not meet this criterion. Scholarships, fellowships and other forms of student financial aid do

not satisfy this criterion because they support academic study or research and only other students – not established professionals in the applicable field – compete for such funding.

The record does not demonstrate that the petitioner has received any nationally or internationally recognized awards for excellence in her field that are consistent with the requisite sustained national or international acclaim. Accordingly, the petitioner does not meet this criterion.

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

As evidence of her eligibility under this criterion, the petitioner submitted copies of one newspaper article, one press release, two advertisements for the petitioner's solo exhibitions, four listings of exhibitions including the petitioner in a gallery guide, and one printout from the website of a gallery that represents her work. None of these documents discuss the petitioner's work in any depth and the materials do not reflect sustained national or international acclaim for the petitioner's work.

The advertisements, press release and gallery website printout do not satisfy this criterion because they are promotional materials produced by the curators or galleries themselves and are not independent media coverage of the petitioner's work that reflects national or international acclaim. The inclusion of the exhibitions of the petitioner's work in the listings of the New York edition of *Gallery Guide* also do not meet this criterion. The record contains no documentation of the editorial guidelines for *Gallery Guide* or any other evidence that inclusion in the guide reflects national or international acclaim, rather than the exhibitors' own unsolicited submission of the show information to the guide.

The single newspaper article submitted also fails to meet this criterion. The article was published in the November 6, 2003 edition of *Waterfront Journal* and is entitled "Artists' Slide Night Gets Inside Local Art." The article discusses this monthly event at the Jersey City Museum in New Jersey. The feature-length article includes only the following, brief mention of the petitioner's work: "We met so many new artists from the neighborhood like [the petitioner], whose colorful installations incorporate silk screen images on high tech materials like plastic and vinyl." The record is also devoid of any evidence that the *Waterfront Journal* is a nationally circulated newspaper, publication in which might reflect national acclaim.

On appeal, counsel submits copies of two articles from the September 5 and October 17, 2004 editions of the *New York Times* that include photographs of the petitioner's work. We cannot consider this evidence because it arose after the petition was filed. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See 8 C.F.R. § 103.2(b)(12), *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, counsel further claims that the petitioner meets this criterion through her work as the "art director/designer of several high-end art publications which were outlined and enclosed with the original submission at Tab G. She has also been acclaimed for her work on corporate publications through the awards which she received." The record contains no evidence of such work by the petitioner. Exhibit G submitted with the petitioner's Form I-140 is a recommendation letter from [REDACTED] Director of Goliath Visual Space, who discusses the petitioner's artistic prints and her participation in an exhibition at Goliath. The record

contains no evidence that the petitioner has worked as a commercial art director or designer and counsel's statements are apparently unrelated to this case.

The record contains no evidence of published materials about the petitioner's work in professional, major trade publications or other major media in a manner reflective of sustained national or international acclaim. Accordingly, the petitioner does not meet this criterion.

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

The petitioner did not initially claim eligibility under this criterion. On appeal, counsel claims that the submitted recommendation letters evidence the petitioner's major contributions to her field. The record contains support letters from seven artists and art professionals who have worked with the petitioner or are otherwise familiar with her work. While such letters provide relevant information about an alien's experience and accomplishments, they cannot by themselves establish the alien's eligibility under this criterion because they do not demonstrate that the alien's work is of major significance in his or her field beyond the limited number of individuals with whom he or she has worked directly. Even when written by independent experts, letters solicited by an alien in support of an immigration petition carry less weight than preexisting, independent evidence of major contributions that one would expect of an alien who has sustained national or international acclaim. Accordingly, we review the letters as they relate to other evidence of the petitioner's contributions.

an artist familiar with the petitioner's work, states:

[The petitioner's] approach to printmaking is truly unique, including particularly her understanding of light and color. [The petitioner] works to create art for the sake of art and her works are the product of unbridled imagination and passion. This is an extremely rare quality in our age of commercialization of the arts. [The petitioner's] works combine superb mastery of the newest technology with a naïve and pure quality, resulting in prints of the highest artistic level.

While Ms. favorably describes the petitioner's work, the record contains no corroborative evidence that the petitioner's allegedly unique approach to printmaking has received significant recognition as making a major contribution to her field in a manner consistent with national or international acclaim.

, the owner of the Exhibit A gallery in New York City, states that he met the petitioner when she was a graduate student and subsequently sold one of her installations. Mr. explains that his gallery has presented two solo exhibitions of the petitioner's work and included the petitioner in two group exhibitions at the gallery. Mr. states:

To my knowledge . . . there is noone [sic] doing what [the petitioner] is doing right now. I can also tell you that on technical level [sic] there are a mere handful who could even attempt to achieve her quality of printmaking. Her installation work is another thing altogether, limited only by the financial resources that can be applied to her creativity. Her work is certain to be copied and appropriated but she will always remain a genuine original. This status alone compels me to assert that she is a major artist who will not merely greatly contribute to her field but will actually establish a new field in contemporary printmaking.

Mr. [REDACTED] attests to the unique aspects and technical quality of the petitioner's work, but the record contains no evidence that these aspects of the petitioner's work have been recognized as making major contributions to her field in a manner consistent with the requisite sustained acclaim. In fact, Mr. [REDACTED] intimates that the petitioner is an emerging artists who will greatly contribute to her field in the future, rather than an artist who is already recognized for her contributions of major significance to her field.

[REDACTED], Associate Curator at the Jersey City Museum, states that the petitioner was included in a benefit exhibition at the Jersey City Museum and will be included in a future group exhibition at the museum. Mr. [REDACTED] states:

Blending physics, mathematics, biology, design, chaos theory, and even a bit of popular culture, [the petitioner's] work is not only original but also very engaging to any audience, even those who may not necessarily like contemporary art. . . . [The petitioner] forms part of a group of important, New York artists who are interested in the crossing of science and art As such, her work contributes greatly to this expanding and developing movement in contemporary art. Indeed, her work will contribute to the field by exploring the dialogue of art and science through her unique works that incorporate geometric forms, motion, repetition, and patterning into their expression.

Mr. [REDACTED] also notes that "[a]s a woman, in particular, [the petitioner's] work is critical because there are few women artists who are working with the ideas she broaches in her work." In closing, Mr. [REDACTED] Alvarado states that the petitioner is "important to the continued development of the art community here in New Jersey. . . . Her contributions are needed in order to ensure the continued excellence in aesthetic production in the state and in our local community." Mr. [REDACTED] explains that the petitioner "stands head and shoulders above most of her peers in this state."

The record contains no independent evidence to support Mr. [REDACTED] assertions that the petitioner is part of a distinct group of New York artists or that her work has [REDACTED] making major contributions to a particular movement in contemporary art. Moreover, Mr. [REDACTED] letter discusses the petitioner's contributions on a regional level and does not indicate that the petitioner has achieved sustained national or international acclaim for her work.

[REDACTED] Chairperson of Associate Degree Programs at Pratt Institute in New York City, states that he is the petitioner's colleague and supervisor at the Pratt Institute where the petitioner is a printmaking instructor. Mr. [REDACTED] states that the petitioner "has already demonstrated that she is an extraordinarily talented artist as evidenced by exhibitions at leading galleries in the United States." In particular, Mr. [REDACTED] explains that after he saw the petitioner's work in "Plastic Fantastic!" at the Exhibit A gallery, he invited her to participate in "The Broome Street Gallery Holiday Invitational Exhibition," organized by the New York Artists Equity Association. Mr. [REDACTED] also notes that the petitioner is a "very conscientious, dedicated and caring instructor" and "is a strong role model for young artists." Despite Mr. [REDACTED] praise, the record contains no corroborative evidence that the petitioner's participation in the two exhibitions he mentions garnered significant recognition in her field or that she has made major contributions to the field of printmaking instruction.

[REDACTED] a professional artist, printmaker and teacher, explains that she met the petitioner when the petitioner was a student at the School of Visual Arts. Ms. [REDACTED] states that the petitioner's work "is outstanding, and sets a lofty standard of excellence for others to follow. Her printmaking technique is practically flawless, and her imagination remarkable." Ms. [REDACTED] favorably describes the aesthetic qualities and effects of the

petitioner's work, but the record does not corroborate that these aspects of the petitioner's work have made major contributions to her field in a manner consistent with sustained national or international acclaim.

Ms. [REDACTED] of Goliath Visual Space in Brooklyn, New York, states that the petitioner participated in a group show entitled "Symbiotic Dialogue" at Goliath in 2001. Ms. [REDACTED] states:

[The petitioner's] prints attracted the most attention at the exhibition. Her work shows exceptional intelligence, creativity and resourcefulness. She is one of the most talented artists we have shown. She brings to her work emotionality and at the same time outstanding technical quality; she masterfully combines the technological and organic to create unique masterpieces that stand out among the rest. The rare capacity to stretch, to engage, and to freeze time are present in [the petitioner's] works.

The record contains no corroborative evidence that the petitioner's work exhibited in "Symbiotic Dialogue" received significant critical acclaim, influenced other artists, or otherwise made a major contribution to her field.

Ahn Behrens, an art dealer and arts columnist for the *Waterfront Journal*, states that when she went to write the aforementioned article about Artists' Slide Night at the Jersey City Museum, Ms. [REDACTED] "was so impressed by [the petitioner's] high tech works; she was one of only three artists [Ms. [REDACTED] mention in [her] column." Ms. [REDACTED] explains that the petitioner's work is "cutting-edge and original. It fits in, yet stands out, rising like cream to the top of the New York art market. . . . Among the best in her field, I believe she has much to contribute." As noted above under the third criterion, Ms. [REDACTED] article in the *Waterfront Journal* only briefly mentions the petitioner and does not discuss her artwork in any depth. The record also does not show that the *Waterfront Journal* is a nationally circulated newspaper or a professional arts journal. The record is also devoid of any corroborative evidence that the petitioner's work is at the top of the New York art market, as Ms. [REDACTED] claims.

Ms. [REDACTED], Mr. [REDACTED], Mr. [REDACTED] and Mr. [REDACTED] all stress the significance of the petitioner's two solo exhibitions at the Exhibit A gallery in New York City given the extreme competitiveness of the New York art world. Yet the record contains no evidence that the petitioner's solo shows were critically acclaimed, influenced other artists or otherwise made contributions of major significance to the petitioner's field. As discussed above under the first criterion, the record contains no independent evidence regarding the significance of the inclusion of the petitioner's solo show, "Creation" in one edition of *Voice Choices*. While the record documents the petitioner's participation in numerous exhibitions, the record is devoid of any evidence that any of the petitioner's work in these exhibitions was reviewed in major art journals or other art media or has otherwise received significant recognition in her field that reflects sustained national or international acclaim. Accordingly, the petitioner does not meet this criterion.

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The record documents the display of the petitioner's work in two solo exhibitions at Exhibit A gallery in New York City in 2000 and 2002 and 13 group exhibitions in New York, New Jersey and Japan between 1991 and 2003. However, duties or activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself. Frequent display of an artist's work is intrinsic to his or her profession and the regulation requires that evidence under this criterion demonstrate sustained national or international acclaim, not simply document an alien's continued activity in his or her field.

In our discussion of the first, third and fifth criteria, we noted that the petitioner received a runner-up award at a national exhibition in Japan in 1991; that her solo exhibition at the Exhibit A gallery in New York City was included in a list of shows in the January 26 to February 1, 2000 edition of *Voice Choices*; and that her work received a brief, favorable mention in an article in the November 6, 2003 edition of *Waterfront Journal*. While these accomplishments document the petitioner's continued activity in her field, they do not establish that she has displayed her work in a manner reflective of sustained national or international acclaim.

On appeal, counsel claims that the petitioner's "works have been displayed at some of the leading graphic gallery's [sic] in the Metropolitan New York area," but cites only the submitted recommendation letters to support this contention. The record contains no independent evidence of the reputation or national or international standing of the venues that have exhibited the petitioner's work.

On appeal, counsel also cites the petitioner's participation in recent and planned exhibitions as evidence of her eligibility under this criterion. As noted above under the third criterion, we cannot consider the articles about the "Jersey (New)" exhibition from the *New York Times* because they were published after the petition was filed. Similarly, the petitioner's planned participation in future exhibitions cannot satisfy this criterion. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. Accordingly, the petitioner does not meet this criterion.

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

In her brief accompanying the Form I-140, counsel claimed the petitioner met this criterion through her participation in solo and group exhibitions at various venues in New York City. On page five of her initial brief, counsel listed seven of "the most significant group exhibitions" in which the petitioner participated. Four of these exhibitions were held at the gallery of the School of Visual Arts when the petitioner was an undergraduate and graduate student, not an established artist. Even if the record established the distinguished reputation of the other venues that have exhibited the petitioner's work, which it does not, the petitioner's participation in shows of limited duration does not demonstrate that she performed a leading or critical role for the venues as a whole. For example, although the petitioner may be represented by Exhibit A, the record does not demonstrate that the exhibition of her work has brought significant commercial or critical success to the gallery, or that the petitioner herself, through her role as an artist represented by Exhibit A, has won significant critical acclaim or wide recognition in her field in a manner consistent with sustained national or international acclaim.

In her initial brief, counsel also claimed that the petitioner met this criterion through her work as a printmaking instructor at the Pratt Institute in New York City. The petitioner submitted an appointment letter evidencing her employment as a visiting instructor at Pratt in 2003 and an excerpt from a 2003 Pratt newsletter which notes that the petitioner, who was a "visiting instructor," had displayed her work at a group exhibition at the Exhibit A gallery. In his letter, Mr. [REDACTED] describes the petitioner as a very conscientious, dedicated and caring instructor, but he does not state that she performs a leading or critical role for the Pratt Institute as a whole. The record also contains no independent evidence that the Pratt Institute has a distinguished reputation. The evidence submitted does not satisfy this criterion and counsel does not reassert the petitioner's eligibility under this category on appeal.

In her initial brief, counsel claimed that the petitioner's exhibition record in the United States and Japan should be considered as comparable evidence of her eligibility. Pursuant to the regulation at 8 C.F.R. § 204.5(h)(4), comparable evidence may be submitted when the criteria at 8 C.F.R. § 204.5(h)(3) "do not readily apply to the beneficiary's occupation." Counsel has not explained and documented why the regulatory criteria at 8 C.F.R. § 204.5(h)(3) do not apply to the petitioner's profession. To the contrary, the record in this case shows that at least four criteria readily apply to a visual artist such as the petitioner and we have addressed the petitioner's exhibition record in our discussion of the first, third, fifth and seventh criteria. Accordingly, there is no need to invoke the comparable evidence provision of 8 C.F.R. § 204.5(h)(4) in this case.

Below and on appeal, counsel claims that the petitioner's receipt of O-1 nonimmigrant classification should be persuasive evidence of her eligibility for immigrant classification as an alien with extraordinary ability. The regulations do not support counsel's contention. Although the words "extraordinary ability" are used in the Act for both the nonimmigrant O-1 classification and the first preference employment-based immigrant classification, the applicable regulations define the terms differently for each classification. The O-1 regulation explicitly states that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear regulatory distinction between these two classifications, the petitioner's receipt of O-1 nonimmigrant classification is not persuasive evidence of her eligibility for immigrant classification as an alien with extraordinary ability.

On appeal, counsel further contends that the director's denial of the petition without prior issuance of a request for additional evidence (RFE) contravenes established policy and basic due process. To support her claim, counsel cites *Matter of Shen*, 16 I&N Dec. 612 (BIA 1978), an unpublished AAO decision, and section 103.2(g) of the Citizenship and Immigration Services (CIS) Operating Instructions. None of these sources buttress counsel's claim. *Matter of Shen* concerned a district director's denial of a family-based immigrant visa petition filed by a mother on behalf of her biological child under section 203(a)(2) of the Act. The district director denied the petition due to the petitioner's failure to establish that the beneficiary was in fact her child through primary evidence. The Board noted that Taiwanese household registration extracts were official records comparable to birth certificates in their ability to establish a mother and child relationship and remanded the case to the district director to afford the petitioner the opportunity to submit additional evidence such as further household registration extracts or an explanation of why such evidence was unavailable. *Shen* is clearly distinguishable on both legal and factual grounds from the petitioner's case. The petitioner seeks eligibility under entirely different statutory and regulatory provisions than those at issue in *Shen*. Moreover, the director denied the petition based on the evidence submitted, not for lack of one crucial document such as the household registration extract referenced in *Shen*.

Counsel's reliance on an unpublished AAO decision is similarly misguided. Pursuant to 8 C.F.R. § 103.4(c), designated and published decisions of the AAO are binding precedent on all CIS employees in the administration of the Act. However, unpublished decisions have no such precedential value.

Counsel's citation of CIS Operating Instruction 103.2(g) is also inapposite. The portion of section 103.2(g) cited by counsel states:

Unless information or evidence is classified, an applicant or petitioner must be advised, before a decision is rendered, of any derogatory information or evidence of which he is unaware and which is being considered as a basis for denial; and he must be given an opportunity to rebut such information or evidence and present evidence in his own behalf before the decision is made.

This instruction explains CIS' duty under the regulation at 8 C.F.R. § 103.2(b)(16)(i) and is clearly inapplicable to this case. Nonetheless, counsel has quoted this portion of the instruction in a disingenuous manner by omitting the words "derogatory information" and "of which he is unaware." The director did not base his decision on any derogatory information or evidence of which the petitioner was unaware. Rather, the director determined that the submitted evidence did not establish the petitioner's eligibility.

The relevant regulation also does not support counsel's claim that the director should have issued an RFE. The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* However, the director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation.

Furthermore, even if the director committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. Counsel has submitted additional evidence on appeal, but these documents arose after the petition was filed and cannot be considered. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. On appeal, counsel has submitted no additional evidence of the petitioner's eligibility at the time of filing and does not specifically state what evidence would have been submitted in response to an RFE. Hence, it would serve no useful purpose to remand this case simply to afford the petitioner the opportunity to present additional evidence. Finally, the record contains no evidence that the petitioner suffered substantial prejudice such that the director's failure to issue an RFE would amount to a procedural due process violation. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge).

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his or her field. The evidence in this case indicates that the petitioner is an accomplished and promising graphic artist. However, the record does not establish that, at the time of filing, the petitioner had achieved sustained national or international acclaim as an artist placing her at the very top of her field. She is thus ineligible for classification as an alien with extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), and her 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.