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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

B2

[redacted]

DATE: NOV 0 3 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska 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 business. The director determined that the petitioner had not established the requisite extraordinary ability through extensive documentation and 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 the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's 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 of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective 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 appeal, counsel argues that the petitioner has demonstrated a qualifying one-time achievement and that he meets the categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(iii), (v), (viii), and (x). For the reasons discussed below, the AAO will uphold the director's decision.

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.* and 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that an alien demonstrate his or her sustained acclaim and the recognition of his or her achievements in the field. Such acclaim and achievements must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through meeting at least three of the following ten categories of evidence:

> (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
>
> (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
>
> (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;
>
> (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
>
> (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
>
> (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
>
> (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
>
> (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
>
> (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

> (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

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)). The court also explained the "final merits determination" as the corollary to this procedure:

> If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at 1119-20.

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 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 Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

II. Analysis

This petition, filed on August 27, 2009, seeks to classify the petitioner as an alien with extraordinary ability in business as an "authority on increasing vertical jumping ability." In Part

[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).

5 of his Form I-140, Immigrant Petition for Alien Worker, the petitioner listed his "Occupation" as "CEO/President." Under part 6 of the form, "Basic Information about the proposed employment," the petitioner listed his "Job Title" as "Chief Executive Officer" and "Nontechnical Description of Job" as "Complete oversight of company: budgets, marketing." At the time of filing, the petitioner was [redacted]. The petitioner states:

> In relation to my work in vertical jump and athletic performance; I intend on continuing as sole owner and [redacted] and developing the growth in sales of my world-renowned *Double Your Vertical Leap* v3.0 system, in addition to the consulting work I do with coaches, trainers and athletes.

A. Major, internationally recognized award

Initially and again on appeal, counsel argues that petitioner's discovery of the Uncompromised Performance Number (UPN) algorithm, a method for athletes to plot and predict their performance increases, is a qualifying one-time achievement. Counsel states: "Like Albert Einstein's famous discovery of $E=MC^2$, Petitioner has achieved international recognition with his formulaic discovery of the UPN." 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 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3) requires the alien's receipt of a major, internationally recognized "award." The petitioner has not established that his development of the UPN algorithm equates to his receipt of a major, internationally recognized "award."[2]

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. Given Congress' intent to restrict this category to "that small percentage of individuals who have risen to the very top of their field of endeavor," the regulation permitting eligibility based on a one-time achievement must be interpreted very narrowly, with only a small handful of awards qualifying as major, internationally recognized awards. *See* H.R. Rep. 101-723, 59 (Sept. 19, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 1990 WL 200418 at *6739. Given that the House Report specifically cited to the Nobel Prize as an example of a one-time achievement, examples of one-time awards which enjoy major, international recognition may include the Pulitzer Prize, the Academy Award, and an Olympic Medal. The regulation is consistent with this legislative history, stating that a one-time achievement must be a *major, internationally recognized* award. 8 C.F.R. § 204.5(h)(3). The selection of Nobel Laureates, the example provided by Congress, is reported in the top media internationally regardless of the nationality of the awardees, is a familiar name to the public at large,

[2] The petitioner's UPN algorithm will be further addressed under the category of evidence at 8 C.F.R. § 204.5(h)(3)(v).

and includes a large cash prize. While an internationally recognized award could conceivably constitute a one-time achievement without meeting all of those elements, it is clear from the example provided by Congress that the award must be internationally recognized in the alien's field as one of the top awards in that field.

In light of the above, the petitioner has failed to demonstrate evidence of a qualifying one-time achievement.

B. Evidentiary Criteria

The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(h)(3).[3]

> *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.*

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.[4]

The petitioner submitted photocopies of pages from the April 2008 and December 2008 issues of *Slam* magazine and the October 2008 issue of *Golf Digest*. None of this material includes articles about the petitioner. Rather, the petitioner submitted advertisements in *Slam* and *Golf Digest* for his Vertical Leap MasterClass Seminar Series and for the nutritional supplement Adenotrex. The Adenotrex advertisements in *Slam* and *Golf Digest* do not mention the petitioner by name or discuss his involvement as a creator of the nutritional supplement. For example, the advertisement in *Golf Digest* identifies [redacted] Chief of Biochemistry at [redacted] and his "Unit of Five Elite Biochemists" as the creators of Adenotrex. Further, the advertisement in *Slam* mentions only '[redacted]' as the "Marketing Director" for Elite Performance Laboratories and an online review submitted by the petitioner identifies '[redacted]' as the '[redacted]' and '[redacted]' Additional material submitted by the petitioner from www.adenotrex.com identifies '[redacted]' The

[3] The petitioner does not claim to meet or submit evidence relating to the categories of evidence not discussed in this decision.

[4] Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about the alien." It cannot be credibly asserted that the preceding advertisements are "about" the petitioner. *See, e.g., Accord Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). Moreover, paid advertisements, which are not the result of independent journalistic reportage, do not meet the plain language requirements of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(iii). The petitioner's initial evidence included general information about Harris Publications, but there is no evidence showing that this company publishes *Slam* or *Golf Digest.* According to the *Slam* magazine covers submitted by the petitioner, *Slam* is published by "Source Interlink Media," not Harris Publications. In response to the director's request for evidence, the petitioner submitted circulation information for *Slam* magazine from *Wikipedia*, an online encyclopedia. Regarding information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.[5] *See Lamilem Badasa v. Michael Mukasey,* 540 F.3d 909 (8th Cir. 2008). Accordingly, the AAO will not assign weight to information for which *Wikipedia* is the source. In this case, there is no documentation (such as reliable circulation evidence) showing that the petitioner has been the subject of journalistic coverage in professional or major trade publications or other major media.

The petitioner submitted multiple anecdotal reviews posted on his company's website at [redacted] discussing his vertical leap enhancement system. The petitioner also submitted material from [redacted] promoting [redacted] "Jump Experts" jump enhancements compilation program of which the petitioner was a contributor. There is no evidence showing that the preceding websites qualify as major trade publications or other major media, or that the preceding promotional material meets the remaining requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

The petitioner submitted an April 9, 2009 article entitled "[The petitioner] [redacted] By [the petitioner] Reviewed – Increased That Vertical Jump Lately?" by [redacted] posted at http://enzinearticles.com. According to the internet printouts submitted by the petitioner, the April

[5] Online content from *Wikipedia* is subject to the following general disclaimer:

> WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . *Wikipedia* cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on October 12, 2011, copy incorporated into the record of proceedings.

9, 2009 article had "been viewed 230 time(s)" and the October 27, 2007 article had "been viewed 1499 time(s)" as of August 13, 2009. The petitioner has not established that such limited numbers of views are indicative of a significant level of internet readership. Further, there is no documentation showing that [redacted] qualifies as a form of major media.

The petitioner's response to the director's request for evidence included a promotional brochure for the Hollywood Slim System that identifies the petitioner as a member of its Board of Advisors and discusses his qualifications. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires the submission of "[p]ublished material about the alien in professional or major trade publications or other major media" including "the title, date, and author of the material." The aforementioned promotional brochure does not meet these requirements.

In light of the above, the petitioner has not established that he meets this criterion.

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

The petitioner submitted letters of support from experts in the field discussing the significance of his original contributions in the fitness and health industry. The experts' statements do not merely reiterate the regulatory language of this criterion, they clearly describe how the petitioner's contributions are both original and of major significance in the field. For example, [redacted]s at the time he signed the letter, describes how he has applied the petitioner's original training methodologies in his own work stating:

> As a customer of [the petitioner's] for a number of years now, I find his insights on increasing vertical jump and explosive power to be highly unique and immediately effective, such that I have incorporated many of these unprecedented philosophies into the structure of how we develop workouts for our athletes.
>
> * * *
>
> Therefore, it is not to be taken lightly that I consider [the petitioner] to be one of the very few references that I look to, to help ensure that the Patriots remain on the cutting edge when it comes to our Strength and Conditioning protocols and the resulting on-field performance.
>
> In fact, in my professional opinion, [the petitioner] is the leading expert with specific regard to increasing vertical jumping ability, which is a very important aspect of performance enhancement.

[redacted] states: "I have known [the petitioner] for a number of years and have witnessed the

amazing results athletes have realized from using his unique training procedures and methodology."

[redacted] describes the petitioner's successful products stating:

> Significant of these include: launching v2.0 of [the petitioner's] *Double Your Vertical Leap* system to $100,000 in sales within 24 hours and launching [the petitioner's] *Performance Inner Circle* online seminar/coaching group in 2008 to 1,000 registrants within 48 hours.
>
> I, along with the numerous vendors, clients and professional athletes and coaches I work with, commonly consider [the petitioner] to be the world's premier expert when it comes to increasing vertical jumping ability . . . .

The AAO notes that the record does not include documentary evidence (such as audited financial statements) to support [redacted] claim that the petitioner's *Double Your Vertical Leap* system generated $100,000 in sales within 24 hours. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

[redacted] states that he is a founding Vice-President of Experimental and Applied Sciences (EAS.com), a published and best-selling author of *ABSolution* and *Strength For Life*, founder and CEO of Phillips Performance Nutrition, and a world-leading nutrition expert. [redacted] further states:

> Not only do I consider [the petitioner] to be without peer when it comes to knowledge of increasing vertical leaping ability, I also consider his *Double Your Vertical Leap* system to be an unprecedented contribution to the sports performance world, obscure as this tiny niche may seem to the casual sports observer. The truth is, vertical leaping ability is the single best determiner of athletic performance and, therefore, increasing it is vital to all athletes. When it comes to this, [the petitioner] is #1.

[redacted], author [redacted], and a contributor to *Men's Fitness* magazine, states:

> I am certainly not alone in regarding [the petitioner] to be nothing less than a pioneer when it comes to revolutionizing the way that athletes of today see performance enhancement. This is due largely to his discovery and development of his Uncompromised Performance Number algorithm and his *Double Your Vertical Leap* software. In addition to this, he is also considered a pioneer of fitness marketing and, as a forerunner in the online world, has personally advised me in the growth of my own online business, also.

> In my expert opinion, it is self-evident that [the petitioner's] contribution to the fitness industry and athletic performance enhancement is unprecedented.

[redacted] states that he is a "world-renowned, best-selling and award-winning fitness author, industry professional and life-coach." [redacted] further states:

> Having reviewed his software product, I can say without hesitancy that the *Double Your Vertical Leap* system is absolutely second-to-none – no guesswork and no B.S. theories. In my professional opinion, it is a groundbreaking work because it allows an athlete to predictably improve, and it is the first system or regime to do that.

The record reflects that the petitioner's original training methodologies are being widely applied throughout his field. Leading experts have acknowledged the value of the petitioner's work and its major significance in the fitness and health industry. Accordingly, the petitioner has established that he meets this criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

Counsel initially argued that the petitioner performed in a leading or critical role as an Athletic Advisor for Elite Performance Laboratories, LLC, creators of Adenotrex. The petitioner submitted promotional material about Adenontrex in magazine advertisements and posted at www.adenotrex.com. The promotional material from [redacted] identifies [redacted] as "Chief of Biochmistry" [sic], and the petitioner as "Athletic Performance Advisor" for Elite Performance Laboratories, LLC. As previously discussed, the advertisement in *Slam* magazine identifies [redacted] as the "Marketing Director" for Elite Performance Laboratories and an online review submitted by the petitioner identifies [redacted] as the "Creator of Adenotrex" and "President, Elite Performance Laboratories." The online promotional material from [redacted] states that the petitioner was hired to "test and prove" Adenotrex and that he assisted with the first testing group of fifty athletes ages 13-50. The petitioner also submitted a letter of support from [redacted] stating:

> I have come to know [the petitioner] over the course of the past three years doing business with him.
>
> * * *
>
> I have formulated two products under the direction of [the petitioner], namely *Hollywood Slim System* and *Adenotrex*, both for Elite Performance Laboratories, LLC.
>
> * * *

> Working alongside [the petitioner], I have been impressed with the measured way he has developed the marketing of each of these products and there is no doubt in my mind that the commercial success of Adenotrex and the forthcoming launch of [redacted] is due to [the petitioner's] unique vision, his leadership talents, marketing wizardry and his extraordinary ability as a businessman.

While the petitioner may have consulted and advised Elite Performance Laboratories, LLC on the development and testing of its [redacted] products, there is no evidence demonstrating that his role was leading or critical for Elite Performance Laboratories, LLC. At issue is whether the petitioner performed in a leading or critical role for the company as a whole rather than limited to projects for two of the company's products. Not every employee who performs competently for an organization or establishment meets this criterion. The petitioner's evidence does not demonstrate how his position as advisor differentiated him from the other employees at Elite Performance Laboratories, LLC, let alone the company's leadership such as its [redacted], and President. For example, there is no organizational chart or other evidence documenting how the petitioner's position fell within the company's general hierarchy. The evidence submitted by the petitioner does not establish that he was responsible for Elite Performance Laboratories' success or standing to a degree consistent with the meaning of "leading or critical role." Further, there is no documentary evidence showing that Elite Performance Laboratories, LLC has earned a distinguished reputation in relation to other companies in the nutritional supplements industry. Regarding the online promotional material and advertisements featuring Elite Performance Laboratories' products, USCIS need not rely on self-promotional material. *See Braga v. Poulos,* No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media).

Initially and again on appeal, counsel asserts that the petitioner has performed in a leading or critical role as "the owner and [redacted] in Australia and [redacted]" The petitioner submitted corporate registration documents for [redacted] dated March 4, 2008, a Business Plan for [redacted] "2008 Business Activity Review," and "2009-2012 Financial Projections" for the [redacted], but there is no documentary evidence showing that [redacted] have earned a distinguished reputation in relation to other companies in the health and fitness industry. As previously discussed, USCIS need not rely on self-promotional material. *Id.* Counsel points to the letters of support from [redacted] and others praising the petitioner and the success of his original products. These letters focus on the petitioner's individual talents and the fitness products he created rather than the reputation of [redacted] The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires evidence that the petitioner has performed in a leading or critical role for "organizations or establishments" that have a distinguished reputation. At issue here is whether the preceding companies are organizations or establishments that have a distinguished reputation. Without documentary evidence showing that [redacted] have earned a distinguished reputation, the petitioner has not established that he meets this criterion.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

Counsel asserts that the petitioner meets this regulatory criterion based on his commercial success in business. The AAO notes that the petitioner works in the health and fitness industry rather than "in the performing arts." The plain language of this regulatory criterion clearly indicates that it applies to "the performing arts." The ten categories of evidence in the regulations are designed to cover different areas; not every criterion will apply to every occupation. Accordingly, the petitioner does not meet the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(x). Nevertheless, in the interest of thoroughness, the AAO will address the evidence submitted by the petitioner for this regulatory criterion.

The petitioner initially submitted corporate registration documents for [redacted] dated March 4, 2008, a Business Plan for [redacted], "2008 Business Activity Review," and "2009-2012 Financial Projections" for the [redacted]c. The petitioner also submitted online promotional material for his products including online reviews. The documentation submitted by the petitioner did not include reliable documentary evidence (such as federal corporate tax returns or audited financial statements) demonstrating that he achieved commercial successes as shown by sales of his products as of the petition's August 27, 2009 filing date.

In response to the director's request for evidence, the petitioner submitted Credit Card Merchant Statements from September 2009 through December 2009, Bank of America bank statements from 2009, and "Monthly Income Projection" statements for [redacted]c. dated May 2009 to April 2012. The AAO notes that the Credit Card Merchant Statements from September 2009 through December 2009, the Bank of America bank statements from September 2009 and later, and the "Monthly Income Projection" statements for [redacted] dated September 2009 to April 2012 reflect earnings that post-date the petition's August 27, 2009 filing date. A petitioner, however, must establish eligibility 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 Commr. 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 we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Accordingly, the AAO will not consider sales or income generated after August 27, 2009 in this proceeding.

Regarding the "Monthly Income Projection" statements for the [redacted]. dated May 2009 to August 2009, these statements are income projections and do not constitute evidence of actual sales or earnings. With regard to the Bank of America bank statements for the [redacted], the January 2009 statement reflected credits of $23,598.21 and an ending balance of $26,585.63, the February 2009 statement reflected credits of $20,128.37 and an ending balance of $34,807.28, the March 2009 statement reflected credits of $25,055.52 and an ending balance of $31,897.76, the April 2009 statement reflected credits of $29,883.50 and an ending balance of

$32,792.24, May 2009 statement reflected credits of $22,952.88 and an ending balance of $33,998.98, the June 2009 statement reflected credits of $37,167.09 and an ending balance of $44,794.95, the July 2009 statement reflected credits of $27,294.47 and an ending balance of $33,516.40, and the August 2009 statement reflected credits of $21,996.67 and an ending balance of $27,708.43. The petitioner does not explain how these monthly amounts demonstrate commercial successes or differentiate his company from the numerous other corporations and small businesses that generate sales revenue. Further, there is no documentary evidence showing that the preceding amounts demonstrate commercial success in relation to the plethora of products sold in the health and fitness industry. Regardless, the petitioner's field is not in the performing arts as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x).

In light of the above, the petitioner has not established that he meets this criterion.

Summary

In this case, the AAO concurs with the director's determination that the petitioner has failed to demonstrate his receipt of a major, internationally recognized award, or that he meets at least three of the ten categories of evidence that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3). A final merits determination that considers all of the evidence follows.

C. Final Merits Determination

The AAO will next conduct 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," 8 C.F.R. § 204.5(h)(2); 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." Section 203(b)(1)(A) of the Act; 8 C.F.R. § 204.5(h)(3). *See also Kazarian,* 596 F.3d at 1119-20. In the present matter, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in the AAO's discussion of the categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(iii), (viii), and (x).

In regard to the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(iii), all of the petitioner's submissions were deficient in at least one of the regulatory requirements such as not including a date or an author, not being about the petitioner, or not being accompanied by evidence that they were published in major media. There is no documentation showing that the petitioner has been the subject of journalistic coverage in major trade publications or other major media. The documentation submitted by the petitioner is not indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of his field.

Regarding the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(v), the AAO acknowledges the letters of support from experts describing how the petitioner's training

methodologies are both original and of major significance in the field. While such letters can provide important details about the significance of the petitioner's work, they cannot form the cornerstone of a successful extraordinary ability claim. The statutory requirement that an alien have "sustained national or international acclaim" necessitates evidence of recognition beyond the alien's immediate acquaintances and business collaborators. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Moreover, USCIS may, in its discretion, use as advisory opinions 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 from experts supporting the petition 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 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the experts' 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 that one would expect of business executive who has sustained national or international acclaim at the very top of the field.

With regard to the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(viii), the petitioner has not established that he has performed in a leading or critical role for organizations that have a distinguished reputation. The documentation submitted by the petitioner is not indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of his field.

In regard to the documentation submitted for the category of evidence 8 C.F.R. § 204.5(h)(3)(x), there is no reliable documentary evidence showing that the petitioner has achieved commercial successes in "the performing arts" or business as shown by high sales of his products as of the petition's August 27, 2009 filing date. The petitioner does not explain how the monthly amounts in the [redacted] bank statements demonstrate commercial successes or differentiate his company from the numerous other corporations and small businesses that generate sales revenue. Further, there is no documentary evidence showing that his company has generated high sales or an unusual amount of profitability in relation to the numerous other established companies that offer products in the health and fitness industry. The documentation submitted by the petitioner is not indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of his field.

In this case, the petitioner has not established that his achievements at the time of filing were commensurate with sustained national or international acclaim as a business executive in the health

and fitness industry, or being among that small percentage at the very top of the field of endeavor. Merely demonstrating that the petitioner has started a small business enterprise or actively promoted his products online is not useful in setting the petitioner apart from other business executives through a "career of acclaimed work." H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). That page (59) also says that "an alien must (1) demonstrate sustained national or international acclaim in the sciences, arts, education, business or athletics (as shown through extensive documentation)..." The conclusion we reach by considering the evidence to meet each category of evidence at 8 C.F.R. § 204.5(h)(3) separately is consistent with a review of the evidence in the aggregate. Ultimately, the evidence in the aggregate does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

III. Conclusion

Review of the record does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.