U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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[redacted]

DATE: SEP 29 2011 OFFICE: TEXAS 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:

SELF-REPRESENTED

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, Texas Service Center, on August 24, 2010, 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. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his 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.

In the director's decision, he determined that the petitioner met the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The director further determined that the petitioner failed to meet the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii) and the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). On Form I-290B, Notice of Appeal or Motion, the petitioner briefly contested the published material criterion and the high salary criterion and indicated that "[e]vidence . . . will be provided." The petitioner also argued that the director "was required to apply a comparative analysis of [the] petitioner's evidence" regarding the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). Finally, the petitioner indicated that a brief would be submitted to the AAO within 30 days. However, as of the date of this decision, approximately 12 months later, the AAO has received nothing further. Accordingly, the record is considered complete as it now stands.

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 the petitioner demonstrate his or her sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the 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.*

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).

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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).

Id. at 1119.

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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

II. Analysis

A. Evidentiary Criteria

This petition, filed on December 28, 2009, seeks to classify the petitioner as an alien with extraordinary ability as a chef. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3). [2]

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

The director determined that the petitioner established eligibility for this criterion based on the petitioner's receipt of a single award, 2007 – 2008 Annual Tourism's Best Chef Award, from the Government of India, Ministry of Tourism. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized *prizes* or *awards* for excellence in the field of endeavor [plural emphasized]." While the AAO agrees with the director that the "Annual Tourism's Best Chef Award" is a lesser nationally recognized award for excellence in the field of endeavor, the petitioner's receipt of this single award is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). As such, the AAO must withdraw the findings of the director for this criterion.

Section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires more than one prize or award. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context,

[2] The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

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).

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor." The burden is on the petitioner to establish every element of this criterion. As the petitioner only demonstrated that he won a single nationally recognized award for excellence, he failed to meet the plain language of this regulatory criterion requiring more than one prize or award. Therefore, the AAO withdraws the findings of the director for this criterion.

Accordingly, the petitioner failed to establish that he meets this criterion.

> *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.*

On appeal, the petitioner argues that "[t]he publications referencing the petitioner/beneficiary herein are well-known and highly circulated publications in India." Again, while the petitioner indicated that "[e]vidence of circulation will be provided," the petitioner failed to submit any documentary evidence on appeal.

A review of the record of proceeding reflects that the petitioner submitted the following documentation:

1. [redacted]
2.
3.
4.
5.

6. [redacted]

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished 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." 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.[3] Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that "[s]uch evidence shall include the title, date, and author of the material, and any necessary translation."

Regarding item 1, the petitioner failed to include the author of the blurb pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Furthermore, the blurb is about dining at [redacted] Articles that are not about the petitioner do not meet this regulatory criterion. *See, e.g., 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). In addition, the petitioner failed to indicate where the blurb was published, so as to establish that it was published in a professional or major trade publication or other major media.

Regarding item 2, the brief article is about the International Chef's Day and 6th Chef Awards rather than about the petitioner relating to his work. The article mentions the petitioner only one time indicating that he moved from the area.

Regarding item 3, the petitioner failed to include the title and author of the article pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, although the article is about the petitioner relating to his work, the petitioner failed to indicate where it was published, so as to demonstrate that it was published in a professional or major trade publication or other major media.

Regarding item 4, the petitioner failed to include the title and author of the blurb pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Furthermore, the blurb is merely an announcement for the petitioner's book rather than published material about the petitioner relating to his work. Moreover, the petitioner failed to indicate where it was published, so as to demonstrate that it was published in a professional or major trade publication or other major media.

[3] 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.

Regarding item 5, the petitioner failed to include the author of the snippet pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Further, the snippet is an announcement of the 2007 – 2008 National Tourism Awards rather than published material about the petitioner relating to his work. The petitioner is mentioned only one time as being a finalist.

Regarding item 6, the book is not about the petitioner relating to his work. Rather, the cookbook "offers a cornucopia of culinary delights" in which the book features recipes from numerous chefs. While the cookbook features a section of the petitioner's [redacted] the fact remains that the cookbook is not about the petitioner relating to his work. Moreover, the petitioner failed to demonstrate that *Savvy Cookbook* is a professional or major trade publication or other major media. Although the petitioner submitted a screenshot from www.sirindia.com reflecting an advertisement for the cookbook, an advertisement is not about the petitioner relating to his work and does not demonstrate that the publication was professional, a major trade publication or major media.

In addition, on Form I-290B, the petitioner argues:

> The culinary arts field has not been highly regarded by the media, based on general perception and public policy of an Indian "Class" system, until recent years. Before then, it was placed on the lower portion of the totem pole. Hence, the focus on the food or the business rather than the food preparer. Recent years have seen the rise of this area of the arts after adopting and following western ways of capitalism merged with that of a socialist system. As such, the Director was required to apply a comparative analysis of [the] petitioner's evidence regarding criteria number "(iii)" pursuant to 8 CFR 204.5(h)(4).

The petitioner failed to submit any documentary evidence supporting his assertions about the focus of the media in India. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Moreover, the petitioner failed to indicate what evidence should be comparatively analyzed and how the evidence is comparable to the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(iii). Furthermore, the regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the following regulation categories. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. The AAO further acknowledges that the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish the [petitioner's] eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence

submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x). The petitioner's statement acknowledging that the Indian media has focused on "food preparers" in "[r]ecent years," further undermines his argument regarding comparable evidence.

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation as a chef cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner claimed eligibility for four of the ten criteria at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Moreover, although the petitioner failed to claim these additional criteria, the AAO finds that a chef could participate as a judge of the work of others pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv) and that a chef could make original contributions of major significance pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v). The petitioner provided no documentation as to why these provisions of the regulation would not be appropriate to the profession of a chef. Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished 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." The burden is on the petitioner to establish eligibility for every element of this criterion. In this case, the petitioner's documentary evidence fails to reflect published material about the petitioner relating to his work in professional or major trade publications or other major media.

Accordingly, the petitioner failed to establish 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.*

The director determined that the petitioner established eligibility for this criterion based on his role at [redacted]. Based on a review of the record of proceeding, the AAO must withdraw the director's determination for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment.

As evidence of his leading or critical role at [redacted] the petitioner submitted a letter from [redacted], Personnel Manager, who stated that the petitioner served as the executive head of the cooking department, chef de parte, sous-chef, and head chef. The petitioner submitted no other documentary evidence. The AAO is not persuaded that every head chef who files an alien of extraordinary petition automatically establishes eligibility for this criterion. The submission of a self-serving letter that simply indicates the job title is insufficient

to establish eligibility for this criterion. In other words, it cannot be determined from the petitioner's job title alone that his role is leading or critical. The petitioner failed to submit, for example, documentary evidence comparing the roles of the petitioner to the other employees at [redacted] that would indicate the petitioner's roles were leading or critical. There is no documentary evidence differentiating the petitioner from other employees at [redacted] so as to establish that he performed in a leading or critical role.

Further, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. at 500 n.2 (BIA 2008).

Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for *organizations* or *establishments* that have a distinguished reputation [plural emphasized]." Therefore, even if the petitioner established that he performed in a leading or critical role for [redacted] which he clearly did not, the petitioner only submitted evidence pertaining to his role with one establishment, in which the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires leading or critical roles in more than one organization or establishment. Therefore, the AAO withdraws the determination of the director for this criterion.

Accordingly, the petitioner failed to establish that he meets this criterion.

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.*

On Form I-290B, the petitioner argues that the director's "interpretation . . . is clearly erroneous, and as such, is based upon an overly burdensome, impermissive [sic] application of the regulations to the facts, requiring reversal of the denial of the immigrant petition."

The petitioner submitted a letter from [redacted] who stated that the petitioner's "[s]alary *will* be [redacted] per annum with company offered benefits [emphasis added]." The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires the "[e]vidence that the alien *has commanded* a high salary or other significantly high remuneration for services, in relation to others in the field [emphasis added]." In this case, the petitioner failed to submit any documentary evidence demonstrating that he has commanded a salary, let alone a high salary, prior to the filing of the petition. [redacted] offer of paying the petitioner's salary at some time in the future does not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix). Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 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 USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. The AAO notes that even though the petitioner demonstrated that he worked for [redacted] and was approved for an O-1 nonimmigrant petition to work for Indian Express, the petitioner failed to submit any evidence of his actual earnings from Bukhara Restaurant or Indian Express, such as Forms W-2, Wage and Tax Statements.

Notwithstanding the above, the petitioner also submitted a screenshot from www.flcdatacenter.com reflecting that the Level 4 Wage (fully competent) for chefs and head cooks in the New York, NY area was $65,291. However, median regional wage statistics do not meet the regulatory requirement. As such, the petitioner failed to establish that his anticipated salary is significantly high in relation to other chefs and head cooks as a whole and not limited to the New York and surrounding areas. Similarly, the petitioner submitted a screenshot from www.bls.gov reflecting that national wages for chefs and head cooks in the 90th percentile was [redacted] in May 2008. However, the petition was filed on December 28, 2009. Therefore, the most recent wage statistics from the Bureau of Labor Statistics at the time of the filing of the petition was May 2009 in which the national wages for chefs and head cooks in the 90th percentile was [redacted] While the screenshots reflect that the petitioner's offered salary was barely in the 90th percentile, the AAO is not persuaded that the petitioner's purported salary was high when 10% of others in the field made more than the petitioner's offered salary.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires "[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field." The petitioner failed to submit sufficient documentary evidence establishing his actual earnings, and that he has commanded a high salary in relation to others in the field consistent with the plain language of this regulatory criterion.

Accordingly, the petitioner failed to establish that he meets this criterion.

B. Final Merits Determination

In accordance with the *Kazarian* opinion, the AAO must 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." *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). *See also Kazarian,* 596 F.3d at 1115. The petitioner did not meet the plain language for any of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many of the

[4] See http://www.bls.gov/oes/2009/may/oes351011.htm. Accessed on September 20, 2011, and incorporated into the record of proceeding.

deficiencies in the documentation submitted by the petitioner have already been addressed in the AAO's preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating the AAO's final merits determination, the AAO must look at the totality of the evidence to conclude the petitioner's eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner was awarded the [redacted] the petitioner had his name mentioned in snippets and blurbs, the petitioner has been employed as head chef at [redacted], and the petitioner has been offered employment in the United States. However, the personal accomplishments of the petitioner fall far short of establishing that he "is one of that small percentage who have risen to the very top of the field of endeavor" and that he "has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." *See* 8 C.F.R. § 204.5(h)(2), 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 regulation at 8 C.F.R. § 204.5(h)(3) provides that "[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." The petitioner's evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), therefore, depends 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).

The AAO cannot ignore that the statute requires the petitioner to submit "extensive documentation" of his sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. 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). The petitioner's claim of eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) based on a single award and for the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) based on a role with a single establishment, as well as the submission of a single reference letter, is not consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. 8 C.F.R. § 204.5(h)(3). Moreover, the petitioner failed to include the title, author, and/or publication of the material for the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The AAO notes that the majority of the documentary evidence merely mentioned the petitioner and was not published material about the petitioner relating to his work. The lack of published material about the petitioner relating to his work fails to reflect that he "is one of that small percentage who have risen to the very top of the field of endeavor." *See* 8 C.F.R. § 204.5(h)(2). Furthermore, the petitioner claimed eligibility for the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix) without submitting any evidence of his

actual earnings. The AAO is not persuaded that such evidence equates to "extensive documentation" and is demonstrative of this highly restrictive classification. The truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) citing *Matter of E-M-* 20 I&N Dec. 77, 80 (Comm'r 1989).

The evidence of record falls short of demonstrating the petitioner's sustained national or international acclaim as a chef. The regulation at 8 C.F.R. § 204.5(h)(3) requires "[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and this his or her achievements have been recognized in the field of expertise." While the petitioner submitted documentation demonstrating that he has won an award and has been mentioned in publications, the documentary evidence is not consistent with or indicative of sustained national or international acclaim.

USCIS has long held that even athletes performing at the major league level do not automatically meet the statutory standards for immigrant classification as an alien of "extraordinary ability." *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994); 56 Fed. Reg. at 60899. In *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

> [T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

The court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable. Likewise, it does not follow that the petitioner who has not offered any evidence that distinguishes him from others in his field, should necessarily qualify for approval of an extraordinary ability employment-based visa petition. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor."

The conclusion the AAO reaches 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 that small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The petitioner seeks a highly restrictive visa classification, intended for individuals at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. In this case, the petitioner has not established that his achievements at the time of filing the petition were commensurate with sustained national or international acclaim, or that he was among that small percentage at the very top of the field of endeavor.

III. O-1 Nonimmigrant Admission

The petitioner was granted O-1 nonimmigrant status from April 12, 2009 to February 25, 2011. However, while USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of the alien, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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).

IV. 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.

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.