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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: AUG 2 4 2012 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:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner seeks classification as an "alien of extraordinary ability" in the sciences and arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A) as a scientific filmmaker and creator of the Imagine Science Film Festival.[1] 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 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 asserts that the petitioner meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(iii) – (v), (vi), (vii), 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

[1] According to information on the Form I-140, Immigrant Petition for Alien Worker, the petitioner was last admitted to the United States on November 13, 2010 as an F-1 nonimmigrant student.

> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[2] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

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[2] 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).

II. ANALYSIS

A. Evidentiary Criteria[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 an October 2008 article in *Village Voice* [redacted]" but there is no circulation evidence showing that [redacted] qualifies as a form of major media. Further, the article in [redacted] does not even mention the petitioner. The petitioner also submitted a two-page December 4, 2009 article in [redacted] and a two-page November 4, 2010 article in [redacted] to love science films," but these two articles only mention the petitioner in passing. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about the alien." *See, e.g., Accord Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1,*7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). *Compare* 8 C.F.R. § 204.5(i)(3)(i)(C), which requires evidence "about the alien's work." It cannot be credibly asserted that any of the preceding articles are "about" the petitioner.

The petitioner submitted an article from the "News Archives" webpage of [redacted] for the Advancement of Science entitled [redacted] Imagine Science Film [redacted]e" and an article entitled "[redacted] [the petitioner]" posted on [redacted] internet blog, but the date of the articles was not provided as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Further, there is no documentary evidence showing that the preceding internet sites qualify as professional or major trade publications or other major media.

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

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[3] On appeal, the petitioner does not claim to meet any of the regulatory 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.

> *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 specification for which classification is sought.*

The petitioner submitted a February 17, 2011 letter purportedly written by [redacted] but the letter was not signed. Without [redacted] signature on the letter, his statements lack any evidentiary force. The unsigned letter from [redacted] states:

> For a decade and a half I have supported a national film program that includes grants to the nations' six leading film schools as well as to the [redacted]
>
> * * *
>
> [The petitioner] has played a unique role in several aspects of our program. He has been a reviewer of proposals whose expertise as a scientist and filmmaker gives him a unique perspective. For this reason he was also chosen as one of a half dozen leading national representatives to serve on our prestigious Film Advisory Board and to evaluate the first decade of our program while making recommendations about the future.

The limited information provided in the unsigned letter from [redacted] does not identify the specific proposals reviewed by the petitioner, their dates of completion, or the names of the proposals' authors. Merely submitting a letter claiming that the petitioner reviewed proposals without specifying the work he judged is insufficient to establish eligibility for this criterion. Further, the petitioner failed to submit documentary evidence of his participation on the [redacted] or documentation showing his specific recommendations. 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)). Moreover, if testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). In this instance, there is no documentary evidence of the petitioner's participation in a formal judging capacity for [redacted] Foundation, either on a panel or individually as specified at 8 C.F.R. § 204.5(h)(3)(iv). Regardless, as the preceding letter from [redacted] is unsigned, it has no evidentiary value.

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

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

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." Here, the evidence must be reviewed to see whether it rises to the level

of original scientific or artistic contributions "of major significance in the field." The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

The petitioner submitted various letters of support as evidence for this regulatory criterion. In evaluating the reference letters, the AAO notes that letters containing mere assertions of widespread acclaim and vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field. [redacted], solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. Furthermore, 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 a filmmaker or research scientist who has made original contributions of major significance in the field.

[redacted]P) at New York University (NYU), states that he "offered [the petitioner] a position as an adjunct faculty member in the MAP for the Fall 2009" and discusses the petitioner's teaching responsibilities at NYU. [redacted] comments that the petitioner "has a rare combination of skills as a research scientist, a film maker, and an effective communicator of science to the public." Assuming the petitioner's skills and background are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 (Comm'r 1998). In order to establish eligibility for this regulatory criterion, the petitioner must establish that his skills and expertise have already resulted in original contributions of major significance in the field.

The petitioner's Ph.D. [redacted], discusses the petitioner's original scientific contributions stating:

> [The petitioner's] thesis work has been extremely innovative in the laboratory. Pushed by his creative leaps and his desire to explore science as a visual narrative, [the petitioner] developed early into his doctoral curriculum novel tools for studying cell morphology and behavior. [The petitioner] arrived in my lab with a very singular project and with strong ambitions. He decided to develop his artistically coated methods for cell visualization allowing him to perform a genetic screen and identify a novel complex involved in neurodegeneration. In January 2011, his novel technique for cell visualization was published [redacted] imaging of photoreceptor apoptosis and development in Drosophila." In his Ph.D. thesis work, [the petitioner] also focused on the role of anti-oxidant proteins and specifically an iron metabolism complex known as ferritin in protecting neurons from damage. Currently in publication submission phase, [the petitioner's] work on ferritin in Drosophila will undoubtedly help us better understand the causes of devastating neurodegenerative disorders.

[redacted] asserts that the petitioner's article entitled [redacted] imaging of photoreceptor apoptosis and development in Drosophila" was published in January 2011, but the copy of the article submitted by the petitioner does not support [redacted] statement. The unpublished copy submitted by the petitioner is marked "UNCORRECTED PROOF" and "ARTICLE IN PRESS." Further, the "ARTICLE INFO" section states "Available online XXXX" and does not indicate the "Volume" or "Issue" of *Developmental Biology* in which the article appeared. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

With regard to [redacted] comments regarding petitioner's research publications, the regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). The AAO will not presume that evidence relating to or even meeting the scholarly articles criterion is presumptive evidence that the petitioner also meets this criterion. Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for authorship of scholarly articles and original contributions of major significance, USCIS clearly does not view the two as being interchangeable. To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria. Publications are not sufficient evidence under 8 C.F.R. § 204.5(h)(3)(v) absent evidence that they were of "*major* significance." *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reaffirmed its holding that the AAO did not abuse its discretion in finding that the alien had not demonstrated contributions of major significance. 596 F.3d at 1122. Thus, there is no presumption that every research article is an original contribution of major significance; rather, the petitioner must document the actual impact of his article. Here, the petitioner has failed to submit an extensive citation history for his articles or other documentary evidence showing that his work is majorly significant to his field. Further, [redacted] does not provide specific examples of how the petitioner's original findings have been

applied by other researchers in the field or otherwise equate to scientific contributions of major significance in the field.

While the petitioner's Ph.D. thesis work is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any doctoral thesis or postdoctoral research, in order to be accepted for graduation, publication, presentation, or funding, must offer new and useful information to the pool of knowledge. It does not follow that every scientist who performs original research that adds to the general pool of knowledge has inherently made a contribution of "major significance" to the field as a whole. In this instance, there is no documentary evidence indicating that the petitioner's work is extensively cited by independent researchers or otherwise constitutes an original contribution of major significance in the field.

Regarding the petitioner's original artistic contributions, [redacted] states that the petitioner "launched in October 2008 the first ever full-fledged science film festival in New York called the Imagine Science Film Festival."

[redacted] states:

> Currently [the petitioner] is hard at work on a full-length feature film [redacted]" the story of Calvin Bridges, a legendary geneticist and unsung hero of the 20th century, whose interest in science was matched only by his obsession with women. Combining his interests in science and film, [the petitioner] has also founded the Imagine Science Film Festival, whose goal is to showcase films with a unique focus on science and scientists.

There is no evidence showing that the petitioner's film [redacted] had been completed, released, or distributed at the time of filing the petition on May 4, 2011. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Regardless, there is no documentary evidence showing that the film "The Fly Room" is an original contribution of "major significance" in the field.

[redacted]
states:

> I have known [the petitioner] for roughly three years. He is today an absolutely unique and invaluable "resource" to both the worlds of science and cinema. . . . [The petitioner] has come up with the largest and most important "showcase" for their work with the Imagine Science Film Festival which he has created. There is a great need for him to be allowed to continue to develop this hugely successful film festival he has created.

[redacted]
contributing author [redacted], states:

> I know [the petitioner] through his work with the Imagine Science Film Festival, for which I have served as a judge. . . . [The petitioner] has created a unique cultural institution, a program that brings to New York a great number of creative filmmakers from around the world who are united in bringing science to film. . . . Imagine Science Films has been the subject of major media coverage, and it has won sponsorship from *Nature*, the world's leading science journal.

The preceding letters from [redacted] identify the petitioner as the creator and founder of [redacted] and discuss the significance of the festival. The petitioner also submitted articles about the festival in *Village Voice* and in renowned scientific journals such as *Science* and *Nature*. Accordingly, the AAO finds that the petitioner's creation of the Imagine Science Film Festival constitutes an original contribution of major significance in the field. The record, however, does not establish that the petitioner is responsible for any other original contributions of major significance in the field. The AAO notes that the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "*contributions* of major significance" (emphasis added) in the plural. The use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials). Thus, the plain language of this regulatory criterion requires evidence of more than one original contribution of major significance in the field. Without additional, specific evidence of more than one qualifying original contribution, the petitioner has not established that he meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

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

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

The petitioner submitted a copy of a single article he coauthored entitled "Two-color in vivo imaging of photoreceptor apoptosis and development in Drosophila," but there is no reliable evidence of its date of publication in *Developmental Biology*. As previously discussed, the

unpublished copy submitted by the petitioner is marked "UNCORRECTED PROOF" and "ARTICLE IN PRESS." Further, the "ARTICLE INFO" section states "Available online XXXX" and does not indicate the "Volume" or "Issue" of *Developmental Biology* in which the article appeared. Even if the petitioner had submitted evidence showing that the preceding article had been published at the time of filing the petition on May 4, 2011, which he has not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires the petitioner's "authorship of scholarly *articles* in the field, in professional or major trade *publications* or other major *media*" (emphasis added) in the plural. As previously discussed, the use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Therefore, as the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires evidence of the petitioner's authorship of scholarly *articles* in more than one publication, his authorship of a single published article in *Developmental Biology* does not meet the plain language requirements of this regulatory criterion.

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

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.*

The petitioner submitted an internal program synopsis from University College Dublin (UCD) outlining plans for UCD Science Cinema to partner with the petitioner and his company [redacted] to develop a program of content for the [redacted] in July 2012. The [redacted] post-dates the petition's May 4, 2011 filing date. As previously discussed, 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. Accordingly, the AAO will not consider the petitioner's work at the July 2012 [redacted] in this proceeding. Regardless, neither the petitioner nor counsel has specifically identified the petitioner's art work that was on display at the [redacted] or explained how assisting in the development of the festival equates to display at a visual art exhibit. Further, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires evidence of exhibitions and showcases in the plural. As previously discussed, the use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. The petitioner has not submitted documentary evidence of more than one event prominently featuring him as the artist whose work is being exhibited or showcased.

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

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

This regulatory criterion focuses on volume of sales and box office receipts as a measure of the petitioner's commercial success in the performing arts. Therefore, the mere fact that the petitioner has produced or directed a film would be insufficient, in and of itself, to meet this regulatory criterion. The evidence must show that the volume of sales and box office receipts reflect the petitioner's commercial success relative to other filmmakers in the performing arts. In

this case, the petitioner has failed to submit documentary evidence of "sales" or "receipts" showing that he has achieved commercial successes in the performing arts. Accordingly, the petitioner has not established that he meets this regulatory criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.[5] Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122.

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

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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[5] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).