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

[redacted]

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DATE: DEC 2 1 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which 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 arts, specifically as an actress, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

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 for the petitioner asserts that the director misapplied the relevant standard of proof in evaluating the petitioner. Counsel further asserts that the director overlooked critical information that that the petitioner submitted, the petitioner met additional regulatory criteria than the director recognized in his decision, and that the director failed to consider the totality of the evidence in making the final merits determination.

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.*; 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.[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)).

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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[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).

II. ANALYSIS

A. Evidentiary Criteria[2]

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 204.5(h)(3)(i).

The director determined that the petitioner met this regulatory criterion. To establish her eligibility under 8 C.F.R. § 204.5(h)(3)(i), the petitioner submitted documentary evidence to show that she: (1) [redacted] for her work in [redacted]

The AAO finds that the two nominations do not meet the plain language requirements of 8 C.F.R. § 204.5(h)(3)(i). The regulation only specifies prizes or awards and do not include mere nominations. Furthermore, while the petitioner's 2003 Alberta Film and Television Award for Best Actress constitutes an award, there is insufficient evidence in the record to establish that it is a nationally or internationally recognized, as required by the regulatory language. The record includes information from the wesite [redacted], the sponsoring organization for [redacted]. However, the webpage only provides background information regarding AMPIA and its role in the industry and does not include any specific information about [redacted]. In the statement accompanying the I-140 visa petition, counsel stated that the award is known throughout [redacted] However, the record does not include independent evidence showing that [redacted] Television Award is nationally recognized. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *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)(i) requires evidence of "prizes" and "awards" in the plural, which 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.[3]

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

[3] *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

Consequently, the AAO withdraws the director's finding with regard to this criterion and concludes that the petitioner failed to satisfy the regulatory requirements.

> *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.* 8 C.F.R. § 204.5(h)(3)(ii).

The petitioner originally submitted evidence relating to this criterion with her Form I-140, and the petitioner submits documents relating to membership on appeal. However, the director found that the petitioner failed to satisfy the requirements of the regulation in his denial, and while the petitioner submitted evidence relating to membership, she does not specifically challenge the director's adverse finding on appeal. Consequently, the AAO concludes that the petitioner has abandoned her claim regarding this criterion. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005) citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at *9 (E.D. N.Y. Sept. 30, 2011).

> *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.* 8 C.F.R. § 204.5(h)(3)(iii).

The petitioner submitted various articles as qualifying evidence under 8 C.F.R. § 204.5(h)(3)(iii). The published material submitted for consideration includes:

[redacted]

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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).

[redacted]

While the petitioner submitted a significant number of articles as qualifying evidence under the regulation, a thorough review indicates that the evidence does not meet the plain language requirements under 8 C.F.R. § 204.5(h)(3)(iii).

As an initial matter, the regulations specifically require that the published material be "about the alien." Items 1-12 from the above numbered list center on events or projects, in which the petitioner was involved. The articles often mention the petitioner briefly, but they are not focused on the petitioner and are about the event or the project.

A review of the record further reveals that item 13, while specifically listed in the appeal brief as an article "discussing the introduction of [the petitioner] as a main character in the popular television series *Mentors*," has not actually been submitted with the rest of the articles. Therefore, the AAO must disqualify it for consideration under the regulations.

Items 14-20 are comprised of one article from *The Edmonton Journal* and articles from the *Wetaskiwin Times Advertises* that appear to be about the petitioner. Nonetheless, to fully meet the requirements of the regulation, the articles must also appear 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 the appeal brief, counsel assserts that the director overlooked critical information presented by the petitioner, resulting in an incorrect application of the stanadard of review for several criteria. Specifically, counsel maintains that the director concluded that no corroborative evidence was submitted as to whether the publication appeared in major media as it can be judged by the size of its circulation base or influence in which the publication appeared. Counsel, however, states that the petitioner provided circulation figures and information on all of the publications mentioned in her petition.

The petitioner provided circulation information about [redacted] that was partly based on information gathered from Statistics Canada and the 2006 Census. The circulation information reflects that [redacted] with a total circulation of 11,317, which appears to be consistent with a locally distributed paper. As for [redacted] in the initial submission of evidence along with the I-140 visa petition, the petitioner solely submitted information and circulation numbers from *Wikipedia*. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.[4] *See Lamilem Badasa v. Michael Mukasey,* 540 F.3d 909 (8th Cir.

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

2008). On appeal, petitioner submits a one page document titled [redacted] which includes some information about the publication. Critically, the document does not include the source or citation of the background information and appears to largely reiterate the contents from the previously submitted *Wikipedia* article. Furthermore, in the appeal brief, counsel for the petitioner states that "*The Edmonton Journal* (italics added) is one of the largest daily newspapers in Alberta, Canada with a weekly circulation of over 830,000." However, as noted above, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. After considering the information and circulation numbers the petitioner submitted about the two papers that published articles about the petitioner, the AAO affirms the director's conclusion that the petitioner failed to submit independent and probative corroborating evidence about the publications to sufficiently establish they are major media.

For all of the above reasons, the AAO finds that the petitioner failed to establish this regulatory criterion.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.* 8 C.F.R. § 204.5(h)(3)(vii).

The director determined that the petitioner established this criterion. The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *See Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Accordingly, the AAO withdraws the director's finding with regard to this criterion and concludes that the petitioner failed to satisfy the regulatory requirements.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

> 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 December 14, 2012, a copy of which is incorporated into the record of proceeding.

The AAO affirms the director in finding that the petitioner established 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.* 8 C.F.R. § 204.5(h)(3)(ix).

The petitioner submitted various types of documentary evidence to demonstrate a high salary in relation to others in the field. The evidence included, but is not limited to, copies of contracts from specific series or roles, comparative information from the occupational employment statistics for actors, as well as the 2010 occupational outlook handbook, copy of an Actra Contract, earnings statements from Talent Partners, copies of 2009 W-2s from various employers, and copies of 2008 W-2s from various employers.

As an initial matter, the AAO finds no error in the director's decision to disqualify the contract from [redacted] On appeal, counsel asserts USCIS has imposed a standard beyond what is required by the regulations in failing to accept the [redacted] contract, which was only signed by one party, as evidence of high remuneration. The AAO agrees with the director that a contract signed only by one party cannot demonstrate that an agreement was actually executed to pay the petitioner at the proposed rate. Therefore, it is not probative or credible evidence of a high salary or other significantly high remuneration.

The AAO also observes that the director's rejection of [redacted] contract was not the most critical factor in the director's ultimate conclusion that the petitioner in this instance failed to meet the requirements under 8 C.F.R. § 204.5(h)(3)(ix). Counsel, in the appeal brief, states that in the submitted documents are "clear facts showing that [the petitioner] has regularly commanded an hourly rate of well over $100.00 per hour for her work as an actor." While some of the pay stubs in the record show a clear hourly wage, other documents, particularly the financial documents for the work the petitioner performed in the U.S., fail to show the hourly wage. The petitioner has failed to otherwise establish the hourly wage. Therefore, the AAO affirms the director's conclusion that USCIS is unable to make a determination regarding the overall rate the petitioner was paid based on financial documentation in the record.

Moreover, the AAO also affirms the director's finding that average salary information is not an appropriate basis for meeting the requirements of the regulation; the evidence must demonstrate that a petitioner's salary places them at the very top of their field rather than simply above average in their field. 8 C.F.R. § 204.5(h)(2). In a field, such as acting, where individuals at the top of the field earn extraordinarily high earnings relative to everyone else, merely showing that an individual's salary is above the median or average for the field would be insufficient to meet the plain language requirements of the regulations. The petitioner, instead, must present evidence of objective earnings data showing that she has earned a "high salary" or "significantly high remuneration" in comparison with those performing similar work during the same time period. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary

versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N.D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

Consequently, the AAO concludes that the petitioner failed to satisfy the requirements for this criterion.

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.* 8 C.F.R. § 204.5(h)(3)(x).

The director did not make a specific finding with regard to this criterion in the denial because the director noted in the December 29, 2011 RFE that the petitioner had not provided any evidence for this criterion. The director specifically requested in the RFE, evidence of box office receipts, sales receipts for audio or video recordings to show success in the performing arts, and other relevant evidence. The record reveals that in the petitioner's RFE response, the petitioner generally suggested that documentation of awards, nominations, and an article that referenced a "sold out" show, constituted evidence for this criterion and failed to submit box office or sale receipts of audio or video records. As an initial matter, the "sold out" crowd was at the Reynolds Alberta Museum. As the petitioner has not submitted documentation regarding the available number of seats in this venue, there is insufficient evidence in the record to make a finding regarding the petitioner's commercial success as it relates to the "sold out" show. Similarly, the petitioner has failed to demonstrate that she is responsible for the popularity of the other projects in which she has been involved.

On appeal, counsel argues that the director incorrectly states in the RFE that the petitioner failed to provide evidence for this criterion and maintains that the petitioner "has been unjustly denied the opportunity to satisfy the Service's requirements for this criterion because she was not afforded the benefit of a well drafted RFE that clearly indicated any deficiencies in the originally submitted documentation." On appeal, the petitioner has included as evidence the same documentation showing that the petitioner was involved in specific projects that have garnered recognition and awards. However, the documentation submitted on appeal, like the previously submitted evidence that purported to meet the requirements under this criterion, does not include "evidence of commercial success in the performing arts, as shown by box office receipts or record, cassette, compact disk or video sales." 8 C.F.R. § 204.5(h)(3)(x).

The petitioner in this instance has not satisfied the plain language of the regulations and failed to submit the type of evidence that is specifically required under 8 C.F.R. § 204.5(h)(3)(x). The petitioner has had multiple opportunities to submit the requested evidence and the director's RFE provided sufficient notice of the type of documentation that was required. In instances where the petitioner was notified of the types of evidence that are required to demonstrate eligibility and was afforded the opportunity to provide the evidence prior to the issuance of an adverse decision, new eligibility claims will not be considered on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Accordingly, the AAO concludes that the petitioner failed to satisfy the requirements for this regulatory criterion.

B. Summary

In light of the above, the petitioner has not submitted the requisite evidence under at least three of the evidentiary categories for which evidence must be submitted to meet the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. Nevertheless, we will review all of the evidence in the aggregate as part of our final merits determination.

C. 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." 8 C.F.R. § 204.5(h)(3). *See Kazarian*, 596 F.3d at 1119-20.

The record reflects that the petitioner has had early success as a child actress and participated in several popular projects in Canada. And as the lead actress, the petitioner had a leading role in the success of those projects. The record reveals that some of those roles in Canada also resulted in local and regional media coverage, as well as nominations and an award. While these acknowledgments suggest that the petitioner may have garnered some distinction in comparison to her peers, those endeavors, significantly, did not meet the plain meaning requirements of the regulatory criteria for awards or for published material. *See* 8 C.F.R. § 204.5(h)(3)(2),(iii).

Furthermore, section 203(b)(1)(A) of the Act requires that an alien demonstrate "sustained" acclaim. The record reveals that after the petitioner's transition to the U.S. and work in non-child roles, the petitioner appears to have worked regularly in television shows and advertisements. However, those roles, unlike the child roles in Canada, have not resulted in critical acclaim, awards, or generated any national, or even local, media exposure. The evidence of the petitioner's more recent work is not persuasive evidence of sustained national or international acclaim.

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.

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.

Review of the record, however, does not establish that the petitioner has distinguished herself as an actress to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence indicates that the

petitioner is a talented actress who has potential to repeat her earlier successes in the U.S. market, but is not persuasive that the petitioner's achievements set her significantly above almost all others in her field. 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 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.