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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: JUL 17 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

If you believe the 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in the 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 an executive producer in the film industry. 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)(i), (iii), (v), (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
> > >
> > > (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.*

[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.

The petitioner submitted a January 26, 2008 press release from [redacted] listing the numerous awards distributed at the SFF. Page 4 of the nine-page press release states: "The Audience Awards are presented to both a dramatic and documentary film in four Competition categories as voted by [redacted]. The Audience Award: Dramatic was *presented to THE WACKNESS, directed by Jonathan Levine.*" [Emphasis added.] The preceding SFF press release identifies Jonathan Levine, but it does not state that the petitioner received an Audience Award. On appeal, the petitioner submits a July 3, 2008 article in the *New York Sun* entitled [redacted] The article states: [redacted] who won the Audience Award at this year's Sundance Film Festival . . . ." [Emphasis added.] The petitioner also submits a January 30, 2008 posted at www.screendaily.com stating: [redacted] proves that he can handle character-driven drama, albeit still of the teen variety, in his second film [redacted] The audience winner at Sundance last week . . . ." [Emphasis added.] The petitioner's appellate submission also includes a January 27, 2008 article posted at Premiere.com entitled "Sundance Film Festival: 2008 awards" stating: "In the main Dramatic Competition the winner was [redacted] . . . . It's a startlingly accomplished second feature by *Jonathan Levine* . . . ." [Emphasis added.] The petitioner also submits an article entitled "An independent vote for 'The Wackness'" stating: "'The Wackness,' helmed by *Jonathan Levine* and which also stars [redacted] was the winner of this year's Sundance Audience Award." [Emphasis added.] None of the preceding articles specifically identify the petitioner as the recipient of the SFF Audience Award. In addition, the petitioner submits a photograph of the 2008 SFF "Audience Award: Dramatic" trophy presented to [redacted] but there is no documentary evidence demonstrating that the petitioner, rather than [redacted] received this trophy.

The petitioner submitted a June 30, 2008 article posted online at Firstshowing.net entitled [redacted] The article states: [redacted] was awarded the audience award for narrative feature this past Sunday at the Los Angeles Film Festival." [Emphasis added.] The petitioner also submitted a June 30, 2008 article posted [redacted] The article states: "Audience Award for Best Narrative Feature: [redacted] [Emphasis added.] In addition, the petitioner submitted a July 1, 2008 article posted [redacted] The article states: [redacted] won the audience award for narrative feature directing . . . ." [Emphasis added.] On appeal, the petitioner submits a July 1, 2008 article in

[2] On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

[redacted] finds work after [redacted] The article states: [redacted] whose coming-of-age dramedy [redacted] took home an audience award at the recent Los Angeles Film Festival, has set up two new projects." [Emphasis added.] None of the preceding articles state that the petitioner received the Audience Award at the Los Angeles Film Festival (LAFF).

The petitioner submitted an August 18, 2008 news release posted on the website of the [redacted] The article states that [redacted] won the audience award for most popular feature," but there is no documentary evidence showing that the petitioner himself received the award.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires documentation of "the alien's receipt" of nationally or internationally recognized prizes or awards. The SFF Audience Award, the LAFF Audience Award, and the MIFF Audience Award were presented to [redacted] rather than to the petitioner himself. While the petitioner was among the multiple producers of *The Wackness*, there is no documentary evidence specifically identifying him as a recipient of the preceding three awards. Further, the petitioner did not submit evidence demonstrating the national or international *recognition* of the LAFF and the MIFF audience awards. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this case, there is no documentary evidence showing that the LAFF and the MIFF audience awards have garnered a significant level of recognition beyond the context of the film festivals in which they were presented and therefore are commensurate with nationally or internationally recognized awards for excellence in the field. Accordingly, the petitioner has not established that he meets this regulatory 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.*

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. 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. 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]

The petitioner submitted an article [redacted] & [the petitioner]" that counsel asserts was published in *The Hollywood Reporter*, but the submitted article bears no

[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.

indicia of its publication in that particular magazine. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Regardless, the date of the article was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Further, the petitioner failed to submit documentary evidence (such as circulation data) showing that *The Hollywood Reporter* is a "major" trade publication or some other form of "major" media.

The petitioner submitted a movie review of [redacted] petitioner. 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 the movie review of *The Wackness* is "about" the petitioner. Further, the date of the article was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, there is no circulation evidence showing that *Women's Wear Daily* qualifies as a "major" trade publication or some other form of "major" media.

The petitioner submitted an August 2007 article in *The Hollywood Reporter* entitled "6 light up for Occupant's 'Wackness.'' The article is not about the petitioner as it fails to even mention his name. Further, as previously discussed, there is no circulation evidence showing that *The Hollywood Reporter* is a "major" trade publication or some other form of "major" media.

The petitioner submitted a movie review of *The Wackness* in *BBook.com* entitled "Two for the Road," but the article does not even mention the petitioner. Further, the date of the article was not included as required by the plain language of this regulatory criterion. In addition, there is no documentary evidence showing that *BBook.com* qualifies as a "major" trade publication or some other form of "major" media

The petitioner submitted a July 3, 2008 movie review of *The Wackness* in the *New York Times* entitled "Summer of '94, With Boy, Girl, Love and Dope Sales," but the article is not about the petitioner as it fails to even mention his name.

The petitioner submitted an article entitled "'Wackness' packed," but the article only briefly mentions the petitioner. Further, the date of the article and the name of the publication were not identified as required by this regulatory criterion. In addition, there is no evidence showing that the article was published in a professional or major trade publication or some other form of major media.

The petitioner submitted a captioned photograph entitled "Mary-Kate & Ben go 'Wacky,'" but the date of the material and the name of the newspaper or magazine in which the photograph was displayed were not identified. Further, the petitioner does not appear in the photograph and he is not mentioned in the accompanying caption. The plain language of this regulatory criterion requires "published material about the alien" including "the title, date and author of the

material." The preceding captioned photograph does not meet the preceding requirements. Moreover, there is no circulation evidence showing that the photograph appeared in a professional or major trade publication or some other form of major media.

The petitioner submitted a July 28, 2008 article in *USA Today* entitled "Big-name films fail to find buyer audience," but the article is not about the petitioner as it fails to even mention his name.

The petitioner submitted a March 3, 2008 article entitled [redacted] and it does not even mention the petitioner. Further, the name of the publication in which the article appeared was not identified as required by this regulatory criterion. In addition, there is no evidence showing that the article was published in a professional or major trade publication or some other form of major media.

The petitioner submitted a July 29, 2007 article in the *Los Angeles Times* entitled [redacted] The 27-paragraph article only briefly mentions the petitioner's name once stating: [redacted] [the petitioner] assembled a business plan to produce low budget genre films, which would be financed by outside investors and then sold to various distributors." The AAO cannot conclude that the preceding article is "about" the petitioner. Instead, the article is about the "low-budget" horror film *All the Boys Love Mandy Lane* and the film's "on-again, off-again journey to a release date."

The petitioner submitted an article in [redacted] entitled "Trio Trust," but the date and the author of the material were not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Further, there is no evidence showing that this arts publication from the petitioner's alma mater, the University of Southern California, qualifies as a form of major media.

The petitioner submitted a July 17, 2007 article [redacted] but the article only briefly mentions the petitioner and it is not about him. Further, there is no circulation evidence showing that *Screen Daily* is a "major" trade publication or some other form of "major" media.

The petitioner submitted an April 25, 2007 article posted [redacted] but the article only briefly quotes the petitioner and it is not about him. Further, the petitioner failed to submit documentary evidence (such as readership data) showing that *Journal Sentinel Online* qualifies as a form of "major" media.

The petitioner submitted a September 11, 2006 article posted at www.cinematical.com entitled "TIFF Review: All the Boys Love Mandy Lane," but the movie review is not about the petitioner and it fails to even mention his name. Further, there is no showing that www.cinematical.com is a "major" trade publication or some other form of "major" media.

The petitioner submitted a March 20, 2009 article entitled "Can the cast of 'Peep World' get any better?" The article is not about the petitioner as it fails to even mention his name. Further, the

name of the publication in which the article appeared was not identified as required by this regulatory criterion. In addition, there is no evidence showing that the article was published in a professional or major trade publication or some other form of major media.

The petitioner submitted a February 8, 2007 type-written article entitled "'Peep' show for Occupant, Himmelstein film set to start this summer" bearing the *Variety* magazine logo, but the submitted material bears no indicia of its actual publication. Further, the article is primarily about [redacted] and only mentions the petitioner's name in passing. In addition, the petitioner failed to submit documentary evidence showing that *Variety* is a "major" trade publication or some other form of "major" media.

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 petitioner submitted letters of support from [redacted] Automatik; [redacted] at International Creative Management talent agency; [redacted] of Sony Pictures Classics; and [redacted] at Creative Artists Agency. The preceding references discuss their collaborations with the petitioner, but they fail to provide specific examples of how the petitioner's original work has substantially impacted the filmmaking industry, has significantly influenced the work of other producers in the field, or otherwise equates to original contributions of "major significance" in the field. Vague, 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 reference letters 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 references' 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 film producer who has made original contributions of major significance in the field.

There is no documentary evidence showing that the petitioner's co-involvement in the production of a few low-budget films equates to original artistic contributions of major

significance in the filmmaking industry. In the director's decision, she determined that the petitioner failed to demonstrate the "major significance" of his contributions. 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." [Emphasis added.] Here, the evidence must be reviewed to see whether it rises to the level of original 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 director discussed the specific evidence submitted for this regulatory criterion and found that the petitioner failed to establish his eligibility.

On appeal, counsel does not specifically challenge the director's analysis of the documentary evidence submitted for this criterion or offer additional arguments. Instead, counsel states: "With regard to criteria (v) and (x), [the petitioner] respectfully refers the Service again to the extensive evidence in the original submission and in the reply to the Service's request for evidence ('RFE')." While counsel's appellate brief expresses general disagreement with the director's findings, it does not point to any specific error in the director's analysis on this issue and offers no directed argument to focus the AAO on a particular area for review. Given the absence of a specific discussion regarding the issue contested, the AAO considers this issue to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, 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 AAO affirms the director's finding that the petitioner's evidence meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

> *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 co-produced a few low-budget films 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 motion picture industry. In response to the director's request for evidence, the petitioner submitted documentation from [redacted] amounted to $3,175,469 from July 3, 2008 (release date) to October 23, 2008 (close date). In comparison, information submitted by the petitioner from *Variety*'s website shows, for example, that Sony's *Hancock* had grossed $103.9 million in the United States and another $78.5 million overseas in less than one week after its opening in July 2008. The AAO further notes that the petitioner has not demonstrated that the level of success of *The*

Wackness was attributable to himself rather than the film's writer, director, and experienced actors.

The petitioner failed to submit evidence of box office receipts or DVD sales for any of his other films as documentation of their commercial success. Even if the AAO were to conclude that *The Wackness* enjoyed commercial success relative to other motion picture films and that such success was based on the petitioner's specific individual contribution, which the AAO does not, 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)(x) requires evidence of "commercial successes" in the plural. 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. 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). Therefore, submitting evidence limited to the commercial success of a single motion picture film does not meet the plain language requirements of this regulatory criterion.

The director found that the evidence submitted by the petitioner failed to demonstrate his "commercial success relative to others involved in similar pursuits in the performing arts." On appeal, counsel does not specifically challenge the director's analysis of the documentary evidence submitted for this criterion or offer additional arguments. Instead, counsel states: "With regard to criteria (v) and (x), [the petitioner] respectfully refers the Service again to the extensive evidence in the original submission and in the reply to the Service's request for evidence ('RFE')." While counsel's appellate brief expresses general disagreement with the director's finding, it does not point to any specific error in the director's analysis on this issue and offers no directed argument to focus the AAO on a particular area for review. Given the absence of a specific discussion regarding the issue contested, the AAO considers this issue to be abandoned. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885, at *9. 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.

C. Prior O-1 Nonimmigrant Visa Status

The record reflects that the petitioner was the beneficiary of an approved O-1 nonimmigrant visa petition for an alien of extraordinary ability in the arts. Although the words "extraordinary ability" are used in the Act for classification of artists under both the nonimmigrant O-1 and the first

preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, "The term 'extraordinary ability' means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction." The O-1 regulation reiterates that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the petitioner's receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Further, the AAO does not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each petition must be decided on a case-by-case basis upon review of the evidence of record.

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 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of the alien'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*, No. 98-2855, 2000 WL 282785, *1, *3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.[4] 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.

[4] 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).