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

(b)(6)

[redacted]

DATE: FEB 06 2013 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 to classify the beneficiary as an "alien of extraordinary ability" in business, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the beneficiary's 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 beneficiary'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.

The priority date established by the petition filing date is May 14, 2012. On May 24, 2012, the director served the petitioner with a request for evidence (RFE). After receiving the petitioner's response to the RFE, the director issued his decision on August 6, 2012. On appeal, the petitioner submits counsel's brief with no additional documentary evidence. For the reasons discussed below, the AAO upholds the director's ultimate determination that the petitioner has not established the beneficiary's eligibility for the classification sought.

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. Previously Approved O-1 Nonimmigrant Visa

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude the agency from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of beneficiary'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 had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center as the law is clear that an agency is not bound to follow an earlier determination as to a visa applicant where that initial determination was based on a misapplication of the law. *Glara Fashion, Inc. v. Holder*, 11 CIV. 889 PAE, 2012 WL 352309 *7 (S.D.N.Y. Feb. 3, 2012); *Royal Siam v. Chertoff*, 484 F.3d 139, 148 (1st Cir.2007); *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 177 (D.Mass.2000)) (Dkt.10); *Louisiana Philharmonic Orchestra v. INS,* 44 F.Supp.2d 800, 803 (E.D.La.1999), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

B. Evidentiary Criteria[2]

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 director determined that the petitioner submitted evidence sufficient to meet the plain language requirements of this criterion. The AAO affirms the director's determination as it relates to this criterion.

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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.

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

The plain language of this regulatory criterion contains multiple evidentiary elements that the petitioner must satisfy. The first is evidence of the beneficiary's contributions (in the plural) in his field. These contributions must have already been realized rather than being potential, future contributions. The petitioner must also demonstrate that the beneficiary's contributions are original. The evidence must establish that the contributions are scientific, scholarly, artistic, athletic, or business-related in nature. The final requirement is that the contributions rise to the level of major significance in the field as a whole, rather than to a project or to an organization. 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). Contributions of major significance connotes that the beneficiary's work has significantly impacted the field. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner provided several testimonial letters on behalf of the beneficiary. The director determined that the petitioner failed to meet the requirements of this criterion.

Counsel's appellate brief asserts that the petitioner's "formulation and introduction of an unique, innovative and comprehensive underwriting process that evaluates a significant portion of the real estate assets . . . on an asset-by-asset basis to determine whether current valuations are supportable and if the projected cash flow is sustainable for the term of the investment. No other such model exists in the market, and it provides a significant competitive advantage to [the petitioner]." That the petitioner's model provides an advantage to the petitioner over the rest of the field delineates how his contribution is restricted to a single employer and is not a significant contribution to the petitioner's field as a whole.

Counsel also referenced several unpublished AAO decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. The AAO may consider the reasoning within the unpublished decision; however, the analysis does not have to be followed as a matter of law. Furthermore, the unpublished AAO decisions counsel provides date back to 1997, which are not viewed to be in accord with the two-step process outlined within the *Kazarian* decision that directly spoke to expert letters under the contributions criterion.

Counsel further cited to *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994) and *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995). In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. Counsel asserts the *Buletini* decision "held that expert statements respecting the petitioner's

contributions must be fully considered, even if the expert opinions came from people who knew or had worked with the beneficiary." Regarding the contributions criterion, the *Buletini* court was referring to the director's failure to consider all the forms of evidence that the petitioner in that case submitted such as the book he authored, the petitioner's medical dictionary he authored, and the petitioner's study that appeared in the largest circulation newspaper in the petitioner's home nation. *Buletini*, 860 F. Supp. at 1232-1233. These are *forms* of evidence that the *Buletini* court determined the director had failed to consider; the court did not indicate that the director was required to discuss each and every piece of evidence within the record.

Regarding the *Muni* decision, counsel states the court "found that dismissal of expert letters without full consideration was 'clear evidence that [the INS] did not adequately evaluate the facts before it.'" The *Muni* court stated that the appellate authority had "completely ignored" the affidavits. By contrast, in the matter currently before the AAO, the director discussed two of the testimonial letters, and a review of the letters listed as applicable to this criterion within the appellate brief does not reveal any letter or combination of letters that demonstrate the beneficiary's eligibility to meet the requirements of this criterion. When USCIS provides a reasoned consideration to the petition, and has made adequate findings, it will not be required to specifically address each claim the petitioner makes, nor is it necessary for it to address every piece of evidence the petitioner presents. *Morales v. INS*, 208 F.3d 323, 328 (1st Cir. 2000) (citing *Martinez v. INS*, 970 F.2d 973, 976 (1st Cir.1992)); *see also Pakasi v. Holder*, 577 F.3d 44, 48 (1st Cir. 2009); *Kazemzadeh v. U.S. Atty. Gen.*, 577 F.3d 1341, 1351 (11th Cir. 2009).

One letter that the director did not discuss claimed the beneficiary has made original and significant contributions to his field. This letter from Managing Principal of claimed the beneficiary is in the top one or two percent in the commercial mortgage backed securities (CMBS) field. More specifically, asserts that, as part of the joint venture between his company and the beneficiary's employer, the beneficiary developed a valuation model for large pools of mortgages. did not, however, indicate that this valuation model has had a wide impact, or that it has been widely adopted in the beneficiary's field. That the beneficiary developed a successful model that serves as a useful tool for his employer and its partners falls short of demonstrating that the beneficiary has made an original contribution of major significance in his field. also identified the beneficiary's assistance with his work on the as a significant contribution to the field; however, did not describe how the beneficiary's specific work, which may have been used as part of this impacted the beneficiary's field as a whole. He merely stated: "[The beneficiary's] assistance in our research and analysis of the underlying problems and their solutions was instrumental to our efforts." This effort on the beneficiary's part is insufficient to satisfy this criterion's requirements that his work must not have only been original, but that it was also important enough that it changed or impacted his field in a significant manner.

As discussed below, the AAO does not contest that the beneficiary has performed in a leading and critical role for the petitioner. The regulation at 8 C.F.R. § 204.5(h)(3), by including both subparagraphs (v) and (vii), makes clear that performing in such a role is a distinct category of evidence

from making contributions of major significance in the field. In order to meet the contributions criterion, the petitioner must demonstrate the beneficiary's impact in the field as a whole.

The remaining letters praise the beneficiary's unique talents and abilities. Talent and experience in one's field, however, are not necessarily indicative of original business contributions of major significance in the beneficiary's field. An alien must have demonstrably impacted his field in order to meet this regulatory criterion. Such letters do not provide specific examples of how the beneficiary's work has significantly impacted the field at large or otherwise constitutes original contributions of major significance.

The Board of Immigration Appeals (BIA) has stated that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998); *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); see also *Matter of Acosta*, 19 I&N Dec. 211, 218 (BIA 1985)). The Board clarified, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Matter of S-A-*, 22 I&N Dec. at 1332. 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).

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" was insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. The opinions of those in the beneficiary's field are not without weight and have been considered above. While such letters can provide important details about the beneficiary's skills, they cannot form the cornerstone of a successful extraordinary ability claim. 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; *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" but rather is admissible only if it will assist the trier of fact to understand the evidence or to determine a fact in issue). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Thus, the content of the writers' statements and how they became aware of the beneficiary's reputation are important considerations. While letters authored in support of the petition have probative value, they are most persuasive when supported by evidence that already existed independently in the public sphere. Such independent evidence might include but is not limited to letters from independent industry experts with firsthand knowledge of the petitioner's impact in the field, media coverage, and citations to the petitioner's work.

In view of the foregoing, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

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

This criterion contains multiple evidentiary elements the petitioner must satisfy through the submission of evidence. The first is that the beneficiary is an author of scholarly articles (in the plural) in his field in which he intends to engage once admitted to the United States as a lawful permanent resident. Scholarly articles generally report on original research or experimentation, involve scholarly investigations, contain substantial footnotes or bibliographies, and are peer reviewed. Additionally, while not required, scholarly articles are oftentimes intended for and written for learned persons in the field who possess a profound knowledge of the field. The second element is that the scholarly articles appear in one of the following: a professional publication, a major trade publication, or in a form of major media. The petitioner must submit evidence satisfying each of these elements to meet the plain language requirements of this criterion.

The director determined that the beneficiary's articles as a member of the staff of the were not scholarly and, thus, failed to meet the requirements of this criterion. On appeal, counsel relies on *Gülen v. Chertoff*, No. 07-2148, 2008 WL 2779001, at *1, *3 (E.D. Pa. July 16, 2008) for the proposition that "a work becomes scholarly by virtue of its author and its subject matter, not its intended audience." Regardless of whether the articles are scholarly rather than simply journalistic, however, they are not in the beneficiary's field of claimed expertise as required by the plain language of the regulation. As the beneficiary's field relates to mortgage backed securities, so must his authored works be related to this field. Unlike the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the regulation at 8 C.F.R. § 204.5(h)(3)(vi) does not allow for consideration of "allied" fields. The submitted articles relate to the field of architectural design rather than to the beneficiary's field claimed within the petition.

As such, the submitted evidence cannot satisfy the plain language requirements of this criterion.

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

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role's matching duties. A critical role should be apparent from the beneficiary's impact on the organization or the establishment's activities. The beneficiary's performance in this role should establish whether the role was critical for organizations or establishments as a whole. The petitioner must demonstrate that the organizations or establishments (in the plural) have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-Webster's online dictionary defines distinguished as,

"marked by eminence, distinction, or excellence."[3] Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden,* 149 U.S. 304, 306 (1893). Therefore, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or an equivalent reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The AAO withdraws the director's conclusion that the beneficiary did not perform in a leading or a critical role for the petitioner. While the requirement remains that such a role must be performed for an organization as a whole, the testimonial letters submitted on behalf of the beneficiary sufficiently demonstrate that although the beneficiary's roles were executed from subsidiary entities within the impact of his work sufficiently benefitted the organization as a whole to the extent that he has satisfied a portion of this criterion's requirement.

Furthermore, while counsel correctly noted that the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence of performing in "a" leading or critical role, the petitioner must demonstrate that the beneficiary performed such a role for "organizations or establishments" in the plural, which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act; 8 U.S.C. § 1153(b)(1)(A)(i). 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 *1, *12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff,* 2006 WL 3491005 at *1, *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). As the appeal only contests the director's determination relating to and does not put forth any additional organizations or establishments in which the beneficiary purportedly performed in a leading or a critical role, the evidence cannot satisfy the requirements of this criterion.

As such, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

[3] *See* http://www.merriam-webster.com/dictionary/distinguished, accessed on January 29, 2013, a copy of which is incorporated into the record of proceeding.

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

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires the petitioner to submit evidence of a "high salary or other significantly high remuneration for services, in relation to others in the field." Average salary information for those performing work in a related but distinct occupation with different responsibilities is not a proper basis for comparison. The petitioner must submit documentary evidence of the earnings of those in his occupation performing similar work at the top level of the field.[4] The petitioner must present evidence of objective earnings data showing that the beneficiary 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).

The petitioner provided the beneficiary's 2011 Form W-2s, a website printout of the Foreign Labor Certification (FLC) Data Center's Online Wage Library, a report from Pay Governance, and a letter from Director of Human Resources at The director determined that the petitioner failed to meet the requirements of this criterion.

According to the May 4, 2012, letter from in 2011 the beneficiary received the following compensation: a base salary of $184,000; a cash bonus of $100,000; additional cash compensation of more than $43,500; and a long-term award liquidation of more than $410,000. also indicated that the position the beneficiary occupied is Vice President, Real Estate Financial Investment Analysis and Research.

Counsel's appellate brief identifies two purported errors on the director's part. The first is that the director erred by not considering remuneration the beneficiary received beyond his base salary, and the second is that the director went beyond the plain regulatory language requiring the beneficiary's salary or remuneration to be compared with others in the beneficiary's field.

Counsel's position is correct that the regulatory language, which states, "or other significantly high remuneration for services," allows USCIS to consider forms of remuneration beyond the beneficiary's base salary. The director limited his discussion to the beneficiary's base salary when discussing the evidence from the FLC, as the wage analysis from the FLC focuses on wages and salaries and does not

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[4] While the AAO acknowledges that a district court's decision is not binding precedent, the AAO notes that in *Racine v. INS*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated, "[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with . . . the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99."

include other forms of remuneration. Consequently, the inclusion of the beneficiary's additional remuneration would not have been a proper comparison. Furthermore, the FLC Data Center's Online Wage Library relies on the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) wage estimates.[5] The OES program collects data on wage and salary workers in nonfarm establishments in order to produce employment and wage estimates for about 800 occupations. The BLS produces occupational employment and wage estimates for over 450 industry classifications at the national level. The employment data are benchmarked to average employment levels.[6] As the regulation requires "a high salary," average salary information is not a proper basis for comparison. Consequently, the FLC data is not sufficient evidence to demonstrate what constitutes a "high salary" in any field. Thus, as it relates to the director's discussion of the FLC data, he did not commit any error by only comparing the beneficiary's base salary to such data.

Regarding the Pay Governance report, the director did not limit his determination to the beneficiary's base pay. Rather the director concluded that the report compared the beneficiary's salary and remuneration to the "median compensation" of others. A review of the report reveals that the report's compensation figures are based on median compensation data; however, median wage statistics do not meet the requirement of commanding a high salary in relation to others in the field. Therefore, the AAO concludes that the director did not commit an error in determining the evidence on record is insufficient to meet the regulatory requirements.

Consequently, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

C. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types 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 have risen to the very top of the field of endeavor.

Had the petitioner 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 that the beneficiary has attained (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

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[5] http://www.flcdatacenter.com/faq.aspx, accessed on January 29, 2013, a copy of which is incorporated into the record of proceeding.

[6] http://www.bls.gov/oes/oes_emp.htm#estimates, accessed on January 29, 2013, a copy of which is incorporated into the record of proceeding.

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.[7] Rather, the proper conclusion is that the evidence the petitioner submitted on behalf of the beneficiary has failed to satisfy the antecedent regulatory requirement of three types 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; *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[7] 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).