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)

DATE: NOV 13 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on April 19, 2013. The petitioner, who is also the beneficiary, appealed the decision to the Administrative Appeals Office (AAO) on May 22, 2013. The appeal will be dismissed.

According to parts 2 and 6 of the September 6, 2012, petition, the petitioner seeks classification as an alien of extraordinary ability in the sciences, specifically, as a software engineer, 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 that the petitioner has not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability as a software engineer.

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; 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)-(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 files a two-page letter and additional supporting documents. Counsel asserts that the petitioner meets the nationally or internationally recognized prizes or awards criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(i), the published material about the alien criterion under 8 C.F.R. § 204.5(h)(3)(iii), the original contributions of major significance criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(v), the authorship of scholarly articles criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(vi), the leading or critical role criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(viii), and the high salary or other significantly high remuneration criterion under the regulation at 204.5(h)(3)(ix).

For the reasons discussed below, the petitioner has not established his eligibility for the exclusive classification sought. Specifically, the petitioner has not submitted qualifying evidence under at least three of the ten regulatory criteria set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x). As such, the petitioner has not demonstrated that he is one of the small percentage who are at the very top in the field of software engineering or that he has sustained national or international acclaim. *See* 8 C.F.R. §§ 204.5(h) (2), (3). Accordingly, the AAO will dismiss the petitioner's appeal.

I. THE 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.

United States 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. 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, internationally recognized award, or through the submission of qualifying evidence under at least three of the ten categories of evidence listed under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the 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 the 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." *Kazarian*, 596 F.3d at 1121-22.

[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 (vi).

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)." *Kazarian*, 596 F.3d 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 case, the AAO affirms the director's finding that the petitioner has not satisfied the antecedent regulatory requirement of presenting at least three types of evidence under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x), and has not demonstrated that he is one of the small percentage who are at the very top in the field of software engineering, or has achieved sustained national or international acclaim. *See* 8 C.F.R. §§ 204.5(h) (2), (3).

II. ANALYSIS

A. Evidentiary Criteria[2]

Under the regulation at 8 C.F.R. § 204.5(h)(3), the petitioner can establish sustained national or international acclaim and that his achievements have been recognized in the field of endeavor by presenting evidence of a one-time achievement that is a major, internationally recognized award. In this case, the petitioner has not asserted or shown through his evidence that he is the recipient of a major, internationally recognized award at a level similar to that of the Nobel Prize. As such, the petitioner must present at least three of the ten types of evidence under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x) to meet the basic eligibility requirements.

> *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).

Counsel asserts for the first time on appeal that the petitioner meets this criterion. In his two-page letter, counsel does not point to specific evidence in the record establishing that the petitioner meets this criterion. The petitioner filed documents for the first time on appeal showing that conference organizers selected the petitioner to attend the [redacted]. Counsel does not explain how this evidence, or any other evidence of record, constitutes nationally or internationally recognized prizes or awards for excellence (in the plural).

Regardless, the AAO will not consider counsel's assertion that the petitioner meets this criterion. In his request for evidence (RFE), the director requested that the petitioner submit evidence showing he

[2] The petitioner does not claim that he meets the regulatory categories of evidence not discussed in this decision.

meets this criterion. In the response to the RFE, neither the petitioner nor counsel submitted such evidence, or even asserted that the petitioner meets this criterion. A petitioner may submit anything in support of an appeal, including new evidence; however, where a Service Center has requested specific evidence in a request for evidence, and the petitioner did not comply with the request, the AAO will not consider that particular evidence on appeal. In other words, where the director has placed a petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766-67 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The petitioner's opportunity to submit the evidence was in response to the director's request for evidence. *Id.*

Accordingly, the petitioner has not submitted documentation of his receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(i).

> *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).

On appeal, counsel asserts that the petitioner meets this criterion. Counsel's basis of appeal is as follows:

> [I]n making reference to "professional publications," the law does not require that such publications be "major." The plain meaning of the relevant regulations distinguishes "professional publication" from "major trade publications" and "major media." The evidence submitted clearly shows that the publications in which the petitioner/beneficiary has published, and in which the petitioner/beneficiary has been featured, are geared towards his fellow professionals, and have been identified by title, date and author. This is all the law requires.

In his response to the director's RFE, counsel stated:

> Attached as Exhibit 9 is a selection of media coverage that the beneficiary has received over the course of his work in his field. The coverage has come from media outlets as diverse as [redacted] and has discussed topics such as advertising revenue for published apps; the ways apps can be rejected by [redacted], and the beneficiary's particular apps.

The evidence in the record does not establish that the petitioner meets this criterion. First, with the exception of the [redacted] the petitioner has not shown that the published material was published in a qualifying publication. The petitioner has submitted published material, including material published on [redacted]

Neither the petitioner nor counsel has submitted sufficient evidence relating to any of the above publications, such as circulation of any online or in print publication or the intended audience of the publication. This is evidence the director requested in the RFE. Although Founder and Software Engineer of states in his December 11, 2012 letter that and are "some of the most widely read blogs among iOS developers," he does not provide any specific information relating to these websites in support of his conclusory statements. USCIS need not accept primarily conclusory assertions. *See 1756, Inc. v. United States Att'y Gen.*, 745 F. Supp. 9, 17 (D.C. Dist. 1990).

On appeal, counsel files a June 13, 2013 letter from Co-Founder and Chief Executive Officer of According to Ms. "[w]hile [the] publications are not necessarily household names outside the computer software development field, [she] can attest that they are important and influential." Ms. however, does not provide any specific information, such as circulation and readership reach, relating to these publications in support of her conclusory statements. As noted, USCIS need not accept primarily conclusory assertions. *See 1756, Inc.*, 745 F. Supp. at 17. On appeal, counsel files an online printout from which notes that according to the is one of five best sites for gamers. This evidence relates to status as a site for gamers. It does not establish that the website is a professional or major trade publication for other software engineers, or show that the website constitutes major media. In addition, the petitioner has not provided a copy of the article. Rather, he has provided a printout from website that includes an excerpt from the article. As such, the director correctly concluded that the petitioner has not shown that the above material submitted was published in professional or major trade publications or other major media.

Second, the articles are not about the petitioner relating to his work as a software engineer, as required by the plain meaning of the criterion. The petitioner has provided articles that mention the petitioner, but they are not about him as relating to his work. For example, in ' ' posted on the article mention's the petitioner's opinion of In " " ' ' and ' ' the article mentions the petitioner's conclusion that is not as lucrative as claimed. Although the article ', posted on both and is about the petitioner, relating to his work, as discussed above, the petitioner has not shown that the article is published in a professional or a major trade publication, other major media.

Third, the director concluded in his decision that although the remaining article in the constitutes published material in major media, the petitioner has not shown that the article, entitled is about him relating to his work, as required by the plain language of the criterion. The director found that "the overarching theme and purpose of the

article are not focused on the [petitioner] as an individual," rather "the article is about the thoughts and impressions of several developers, one of which was the [petitioner]." On appeal, counsel has not specifically challenge this aspect of the director's finding. Accordingly, the petitioner has abandoned this issue, as he did not timely raise it on appeal. *Sepulveda v. United States 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 United States District Court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

Fourth, on appeal, counsel files a number of articles. All but one of them postdates the filing of the petition on September 6, 2012. It is well established that the petitioner must demonstrate eligibility for the visa petition at the time of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). As such, they do not support the petitioner's eligibility for the exclusive classification sought. The remaining article filed on appeal, entitled '. . .," is published on August 25, 2010 in the It is not about the petitioner as relating to his work. In fact, the article does not mention the petitioner by name.

Accordingly, the petitioner has not submitted published material about him in professional or major trade publications or other major media, relating to his work in the field for which classification is sought. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(iii).

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.* 8 C.F.R. § 204.5(h)(3)(v).

On appeal, counsel asserts that the petitioner meets this criterion. Specifically, counsel's basis of appeal is as follows:

> . . . [T]he submitted evidence shows that the petitioner/beneficiary has been instrumental to the success of a company that has attracted considerable attention as a success story unusual even by the standards of Accordingly, the petitioner/beneficiary's contributions to this company are properly considered significant contributions to his field.

The evidence in the record supports counsel's assertion that the petitioner has made contributions to In her March 11, 2013 letter, Ms. states that the petitioner is one of the "top developers" and "his achievements have been widely recognized for their importance in the field." The letter further provides that the petitioner "designed platform from the ground up," "wrote the 'software development kit' that platform relies on to allow companies to insert code into their games to communicate with servers," "designed the infrastructure for handling transactions and purchases between game publishers," and "created the algorithm by which publishers can target the consumers most likely to be receptive to their games." In her June 13, 2013 letter, Ms. states that the petitioner was chosen to give a presentation at the program "due to his

expertise in issues including backend development and protection against piracy." In his February 14, 2013 letter, a Partner at states that the petitioner's "original ad marketplace and ad targeting algorithm . . . alone has realized millions of dollars in revenue for " The letter further notes that the is now integrated on apps spanning over 500 million mobile devices." While these contributions might be significant to one company, the petitioner has not shown that they constitute "contributions of major significance in the field" as a whole, as required by the plain language of the criterion. Although the evidence indicates that is a successful company in the field, the evidence does not indicate that contributions made to one company in a field that encompasses many companies constitute contributions of major significance in the field as a whole. Specifically, the record contains no evidence that the petitioner's work for has impacted the field beyond that company.

The evidence also shows that the petitioner was involved with the development of two popular apps. Specifically, in his January 25, 2013 letter, Engineering Manager for states that the petitioner "was responsible for a number of contributions that were part of the success of "was the first iteration of what ultimately became one of the best-selling video game franchises of all time" and "achieved a number of critical milestones in the mobile gaming industry." According to a June 10, 2013 letter from Product Manager of the petitioner's "was downloaded and updated approximately 500,000 times, it is approximately 10 times more popular than a typical App Store app." The letter further provides that the petitioner "was able to monetize this app at a particularly high rate – in the neighborhood of $100,000. Considering that very few apps realize any kind of significant profit at all, this is a remarkable achievement." The petitioner has not shown that his contributions to these apps, which are two of many successful and popular apps in the field, constitute contributions of major significance in the field as a whole. Specifically, the record contains no evidence of the impact of the petitioner's apps on other app developers.

The Board of Immigration Appeals (the Board) has held 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 cases). The Board has also held, however, "[w]e not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* 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). Vague, solicited letters from colleagues or associates 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).[3] The opinions of experts in the field are not without weight and have been considered. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l*, 19

[3] 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.

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, as this decision has done above, 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"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Matter of Caron Int'l*, 19 I&N Dec. at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). In this case, as discussed, the reference letters submitted do not establish that the petitioner has made any original contribution of major signficance in the field as a whole.

Accordingly, while the petitioner has made contributions to and original contributions in the development of two apps, the petitioner has not presented evidence of his original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field of software engineering. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(v).

> *Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.* 8 C.F.R. § 204.5(h)(3)(vi).

On appeal, counsel asserts that the petitioner meets this criterion.[4] As supporting evidence, counsel points to the petitioner's January 18, 2011 article entitled ' published on and a number of articles published on the petitioner's blog. According to Ms. the petitioner "is a top contributor to] blog" and that the "most significant article that was ever published on [the] blog was written by [the petitioner]." Although the petitioner has authored these articles, he has not shown that the articles were published in professional or major trade publications or other major media. Indeed, the petitioner has provided insufficient evidence showing that blog constitutes a professional or major trade publication or other media. The record lacks evidence relating to the nature, the reach or readership of these websites from an objective source. The online printout relating to chartboost.com's online traffic that the petitioner filed on appeal, is insufficient to show that its blog constitutes a professional or major trade publication or other major media. Similarly, the online printout from showing anonymous individuals discussing the petitioner's article posted on blog is insufficient to show that the blog constitutes a professional or major trade publication or other major media.

[4] In his decision, the director stated the reasons why the petitioner's evidence does not met this criterion. The director appears to have made a typographic error when stating, "As such, the submitted evidence meets this criterion."

On appeal, counsel files a letter from Mr. [redacted] The letter states that the petitioner's blog [redacted] "has had 68,511 visits; 56,930 unique visitors; and 84,019 pageviews . . . . These numbers are very significant in that of the literally hundreds of millions of blogs in existence, only a small percentage have a readership outside of a small handful of people who have close relationships to the blogger." The letter further provides that the petitioner's other blog [redacted] "has had 170,468 unique visitors; 200,483 visits; and 276,745 pageviews . . . ." According to Mr. [redacted] these numbers "are even more impressive." Mr. [redacted] concludes that "[i]t is clear from these statistics that [the petitioner's] blogs are significant publications, and rank him well above average among others who operate similarly in his field." Neither the letter nor any other evidence in the record provides the source(s) of these statistics. USCIS need not accept primarily conclusory assertions. *See 1756, Inc.*, 745 F. Supp. at 17. Moreover, although Mr. [redacted] states that the petitioner's blogs constitute significant publications, neither his letter nor any other evidence in the record establishes that the blogs also constitute professional or major trade publications or other major media, as required under the plain language of the criterion.

In addition, the petitioner has not shown that his written work posted on his blogs constitutes scholarly articles in the field of software engineering, as required by the plain language of the criterion. 8 C.F.R. § 204.5(h)(3)(vi). Unlike scholarly articles that are published in professional or major trade publications, the written work posted on the petitioner's blogs represent his opinions that are not subject to peer review. Also, unlike scholarly articles, material posted on blogs does not have footnotes, endnotes, or a bibliography, and rarely includes graphs, charts, videos, or pictures as illustrations of the concepts the petitioner expressed. As such, the petitioner has not shown that his written work posted on his blogs meets this criterion.

Finally, the record includes a printout from [redacted] indicating that the petitioner has authored a writing entitled [redacted] on the website. The petitioner has not provided a copy of the article. As such, the petitioner has not shown that the article constitutes a scholarly article in the field. Furthermore, the petitioner has not provided any evidence showing that hackermonthly.com constitutes a professional or major trade publication or other media. In his letter, Mr. [redacted] states that hackermonthly.com "is among the most read for the very few print magazines circulated among iOS developers" and that [redacted] is an "extremely popular generalist blog." Mr. [redacted] however, has not provided any specific information or data relating to these websites in support of his conclusory statements. USCIS need not accept primarily conclusory assertions. *See 1756, Inc.*, 745 F. Supp. at 17. As such, the petitioner has not shown that either website constitutes a professional or major trade publication or other major media.

Accordingly, the petitioner has not submitted evidence of his authorship of scholarly articles in the field, in professional or major trade publications or other major media. The petitioner does not meet this criterion. 8 C.F.R. § 204.5(h)(3)(vi).

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).

In his April 19, 2013 decision, the director concluded that the petitioner has met this criterion. The record does not support this finding. The AAO conducts appellate review on a *de novo* basis. *Soltane v. Dep't of Justice*, 381 F.3d 143, 145-46 (3d Cir. 2004). The AAO may deny an application or petition that does not comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The evidence in the record shows that the petitioner has performed in a critical role for Ms. stated in her March 11, 2013 letter that the petitioner was first software engineering employee, designed the company's platform and is "an indispensable performer, leading the development of the software that ensures continued success." According to Mr. the petitioner's "contributions are absolutely critical to the success of because this platform is the company's sole product."

According to a March 4, 2013 article entitled " "helps game developers by handling the challenges of distribution and marketing. It runs a network where games can advertise in other games." The article further provides that has grown from 800 developers to 12,000 in two years and raised $19 million from According to Mr. "is well on its way to achieving great success, and is in fact poised to take its place among the upper echelon of startup companies in which has] invested." Mr. states in his letter that is well-known, and its accomplishments have [] been reported in popular blogs like "

Although the evidence shows that the petitioner has performed in a critical role for the plain language of the criterion requires evidence of the petitioner performing a leading or critical role for organizations or establishments, in the plural, that have a distinguished reputation, consistent with the statutory requirement for extensive documentation. *See* section 203(b)(1)(A)(i) of the Act. Even if the petitioner's role in constitutes a single example of his role in a qualifying organization or establishment, the record lacks evidence showing that he has performed a leading or critical role for a second qualifying organization or establishment.

The record does include evidence of the petitioner's involvement in the development of an app, Specifically, according to Mr. the petitioner "was responsible for a number of contributions that were part of the success of " Mr. further states "[d]ue in part to [the petitioner's] programming contributions, Tap Tap Revenge 4 not only matched the success of earlier editions, but also surpassed them" and that the petitioner "played an integral part in ensuring the continued success of the franchise. " Similarly, according to Mr. "[i]n part as a result of [the petitioner's] contributions, was a huge success . . . ." is a game developed by which has been acquired by

The evidence shows that the petitioner performed a critical role in the development of one version of a game for one company, specifically, of the franchise for The petitioner, however, has not shown that he has performed either a leading or critical role for as a whole, as required by the plain language of the criterion.

Accordingly, the petitioner has not presented evidence that he has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(viii).

> *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).

Counsel asserts for the first time on appeal that the petitioner meets this criterion. As supporting evidence, counsel files an online printout from the United States Bureau of Labor Statistics relating to software developers' salary and a June 13, 2013 letter from Ms. stating that the petitioner's total compensation "clears this figure" of "a[n] annual salary of over $133,110."

The AAO will not consider counsel's assertion that the petitioner meets this criterion. In his request for evidence (RFE), the director requested that the petitioner submit evidence showing he meets this criterion, including evidence relating to the petitioner's salary and information relating to compensation in the field. In the RFE response, neither the petitioner nor counsel submitted such evidence, or even asserted that the petitioner meets this criterion. A petitioner may submit anything in support of an appeal, including new evidence; however, where a Service Center has requested specific evidence in a request for evidence, and the petitioner failed to comply with the request, that particular evidence will not be considered on appeal. In other words, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 766-67; *see also Matter of Obaigbena*, 19 I&N Dec. at 537.

Accordingly, the petitioner has not submitted evidence that he has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(ix).

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: (1) 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," and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.[5] Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of presenting three types of evidence. *Kazarian*, 596 F.3d at 1122.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

[5] The AAO maintains *de novo* review of all questions of fact and law. *See Soltane v. United States Dep't of Justice*, 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* INA §§ 103(a)(1), 204(b); 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).