



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 26 2014** Office: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office on appeal. We will dismiss the appeal.

The petitioner, an illustrator, designer and painter, seeks classification as an employment-based immigrant 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 alien of extraordinary ability in the arts. The director determined that the petitioner had not met the requisite criteria for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. See section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. The director determined that the petitioner's evidence had met the category of evidence at 8 C.F.R. § 204.5(h)(3)(vii).

On appeal, the petitioner submits a brief and additional evidence. In the brief, the petitioner asserts that he meets the additional categories of evidence at 8 C.F.R. § 204.5(h)(3)(v) and (x).

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, internationally 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 our decision to deny the petition, the court took issue with our 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 our 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 we 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 we 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, we 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.*

II. ANALYSIS

A. Evidentiary Criteria²

¹ Specifically, the court stated that we 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).

² On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision. Therefore, no determination has been made regarding whether the petitioner meets the remaining categories of evidence.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The director discussed the evidence submitted for this regulatory criterion and found that the petitioner failed to establish his eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. When an appellant fails to offer argument on an issue, that issue is abandoned. *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) (plaintiff's claims abandoned when not raised on appeal). 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 director discussed the evidence submitted for this criterion and found that the petitioner failed to establish his eligibility. In the appeal brief, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The petitioner, therefore, has abandoned this issue. *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.

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

The director determined that the petitioner failed to establish eligibility for this regulatory criterion. 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).

In the appeal brief, the petitioner points to the reference letters, comic book titles, a [REDACTED] nomination, contracts, a talent retreat invitation, and media articles as evidence for this regulatory criterion.

In his initial letter dated October 26, 2012, [REDACTED] Vice President, Business Affairs – Talent, [REDACTED] states:

[The petitioner] is engaged by [REDACTED] as an independent contractor to render artistic services to our company on an ongoing freelance basis.

[The petitioner] has been a fixture of the United States comic book industry for more than a decade, and is currently headlining our acclaimed monthly comic book title [REDACTED]

Prior to this engagement, [the petitioner] has been a featured artist on many other of our flagship titles, including [REDACTED]

[REDACTED] confidence in [the petitioner's] artistic talent and our desire to continue our working relationship with him is based upon the exceptional ability he has displayed in the work he has contributed to our comic book publications as well as those of our principal competitors. During his time working in the comic book industry, [the petitioner] has justifiably developed a following among our editorial staff, the professional community at large, and the many comic book readers worldwide who support his work. We at [REDACTED] are certain that his following among industry insiders and fans alike will continue to grow.

Mr. [REDACTED] comments on the petitioner's work for [REDACTED] illustrating titles such as [REDACTED] but does not provide specific examples of how the petitioner's comics artwork has influenced the industry at a level indicative of original contributions of major significance in the field. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the petitioner's contributions be "of major significance in the field" rather than limited to the companies that contracted his services. *See Visinscaia v. Beers*, --- F. Supp. 2d ---, 2013 WL 6571822, at *4,*6 (D.D.C. Dec. 16, 2013) (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole). In addition, Mr. [REDACTED] asserts that the petitioner's "following among industry insiders and fans alike will continue to grow." Speculation about the possible future impact of the petitioner's work is not evidence, and cannot establish eligibility for this regulatory criterion. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, adopting *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

The petitioner submitted information from [REDACTED] website showing that he illustrated [REDACTED] volumes 13 – 18. In addition, the petitioner submitted a copy of a September 8, 2012 interview with [REDACTED] that was posted at [http://\[REDACTED\]](http://[REDACTED]) and entitled "[The petitioner] Artist for [REDACTED]". The online interview introduces the petitioner as the new illustrator for [REDACTED] but does not explain how his work has had a substantial impact in the comics market, has influenced the work of other illustrators, or otherwise constitutes original contributions of major significance in the field.

In his second letter dated March 23, 2013 and submitted in response to the director's request for evidence, Mr. [REDACTED] states:

[The petitioner] is a premiere talent among [REDACTED] pool of freelance artists. [The petitioner] is currently the featured artist on [REDACTED] monthly comic book title, [REDACTED] ... Looking ahead, [the petitioner] will be a primary artist featured in [REDACTED] event focusing upon the [REDACTED] and follow that work with an engagement as artist on a weekly version of one of our flagship titles, [REDACTED]

Mr. [REDACTED] points out that the petitioner "is currently the featured artist on [REDACTED] monthly comic book title, [REDACTED]" but there is no documentary evidence showing that his work on that title has

affected the industry in a major way, has topped comic book sales rankings for a substantial period of time, or has otherwise risen to the level of original contributions of major significance in the field. In addition, Mr. [REDACTED] mentions that the petitioner will be working on [REDACTED] in the near future. The petitioner's appellate submission includes the cover pages of [REDACTED] volume 22 (July 2013) and volume 23 (August 2013) that were illustrated by the petitioner. In addition, the petitioner submits July 2013 and August 2013 online reviews of volumes 22 and 23 that mention the petitioner's artwork. [REDACTED] volumes illustrated by the petitioner in 2013 and the online reviews of those volumes were published subsequent to the petition's December 19, 2012 filing date. Again, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49. Accordingly, [REDACTED] volumes 22 and 23, the online reviews from July 2013 and August 2013, and the petitioner's future work on [REDACTED] cannot be considered as evidence to establish his eligibility at the time of filing.

Mr. [REDACTED] further states:

Our belief in [the petitioner's] overall contributions is so great that he was a member of a select group of [REDACTED] talent invited to attend a company sponsored creative retreat on February 9 and 10 in [REDACTED] NC, held with the specific purpose to define our company's editorial vision moving forward into 2013 and beyond. This certainly means that [the petitioner] will be an essential part of coming editorial events at [REDACTED]

Mr. [REDACTED] comments that the petitioner was invited to attend the February 9 – 10, 2013 [REDACTED] creative retreat in [REDACTED] North Carolina. The February 2013 talent retreat post-dates the filing of the petition, however, and cannot be considered as evidence to establish the petitioner's eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49.

[REDACTED] Senior Vice President, Operations and Procurement, [REDACTED] states: “[The petitioner] has achieved recognition and admiration for his work in the comics industry. Because of his talent and reliability, [REDACTED] has assigned [the petitioner] to some of our most prestigious franchises. He is a true professional, and has been an asset to [REDACTED]” Mr. [REDACTED] comments briefly on the petitioner's recognition and admiration in the comics industry, his talent, reliability, professionalism, and value to [REDACTED], but fails to provide specific examples of how the petitioner's original work was of major significance in the field. Vague, solicited letters from colleagues that do not specifically identify original contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian*, 580 F.3d at 1036. In 2010, the *Kazarian* court reiterated that conclusion was “consistent with the relevant regulatory language.” 596 F.3d at 1122.

In the appeal brief, the petitioner points to “media articles showing that [the petitioner] was such an asset to [REDACTED] that they signed him to an exclusive contract.” The petitioner submitted articles in [REDACTED] and [REDACTED] mentioning his work under contract with [REDACTED]. There is no documentary evidence showing, however, that the petitioner's comic book illustrations for [REDACTED] rise to the level of contributions of major significance in the field. In addition, the regulations include a separate criterion for published material about the alien in major trade publications or other major media

at 8 C.F.R. § 204.5(h)(3)(iii).³ Furthermore, with regard to the amount of remuneration specified in the petitioner's [REDACTED] contract, the regulations include a separate criterion for commanding a high salary or other significantly high remuneration for services at 8 C.F.R. § 204.5(h)(3)(ix).⁴ Evidence relating to or even meeting the published material about the alien and the significantly high remuneration criteria are not presumptive evidence that the petitioner also meets this criterion. The regulatory criteria are separate and distinct from one another. Because separate criteria exist for contributions of major significance, published material about the alien, and significantly high remuneration, USCIS clearly does not view those criteria as being interchangeable. To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria.

Editor [REDACTED], states:

I worked with [the petitioner] on the important [REDACTED] project here at [REDACTED], where I work as an Editor. [The petitioner's] work was exceptional, often ahead of schedule, and included interior story pages as well as full-color cover illustrations. [The petitioner] was integral to the launch of our first [REDACTED] series, as well as several other series for [REDACTED].

Working with [REDACTED], our Senior Managing Editor, [the petitioner] has also contributed to the successful [REDACTED] series. [The petitioner's] work on two acclaimed volumes in the [REDACTED] universe helped earned [sic] that series a nomination for a [REDACTED] and has helped keep those [REDACTED] books perennial best-sellers for our company.

I really do look forward to working with [the petitioner] again soon. His artwork is stunning, and he's a highly professional freelancer, often ahead of deadlines, as mentioned before. After working with me on the [REDACTED] series, [the petitioner] has continued to excel in the comic-book industry, delivering great work for other editors here at [REDACTED] – as well as marvelous work for other companies. He's becoming quite an inspiring force in the industry, and I hope . . . he can continue to network in the industry and move on to produce more quality work within our market.

Mr. [REDACTED] points out that the petitioner worked “on two acclaimed volumes in the [REDACTED] universe” and that those volumes earned a nomination for a [REDACTED] in 2009. The petitioner submitted a list of “2009 [REDACTED]” nominations showing that [REDACTED] (“Written by [REDACTED] art by [the petitioner], color by [REDACTED] cover by [REDACTED]”) was nominated for [REDACTED]. The regulations include a separate criterion for nationally or

³ The submitted articles, however, did not meet the category of evidence at 8 C.F.R. § 204.5(h)(3)(iii). Specifically, the director stated that the petitioner had not submitted evidence showing that the articles were “published in professional or major trade publications or other major media.” Moreover, the petitioner did not contest that finding on appeal.

⁴ The petitioner, however, does not claim to meet the category of evidence at 8 C.F.R. § 204.5(h)(3)(ix). Even if the petitioner had made such a claim, the petitioner did not submit any evidence as a basis for comparison showing that the remuneration specified in his [REDACTED] contract was significantly high relative to that of others in the field.

internationally recognized prizes or awards for excellence at 8 C.F.R. § 204.5(h)(3)(i).⁵ In the appeal brief, the petitioner repeats Mr. [REDACTED] assertion that the [REDACTED] comic books are perennial best-sellers for [REDACTED] but does not point to any specific documentary evidence (such as published sales rankings or other objective evidence) showing that the two [REDACTED] volumes illustrated by the petitioner were best-sellers. USCIS need not rely on unsubstantiated claims. *See 1756, Inc. v. U.S. Att’y Gen.*, 745 F. Supp. 9, 15 (D.D.C. 1990) (holding that an agency need not credit conclusory assertions in immigration benefits adjudications); *see also Visinscaia*, 2013 WL 6571822, at *4, *6 (upholding USCIS’ decision to give limited weight to uncorroborated assertions from practitioners in the field). Regardless, the petitioner has not established that his [REDACTED] series illustrations have influenced the comic book industry in a major way, or that his work was otherwise indicative of original contributions of major significance in the field.

The petitioner submitted a [REDACTED] agreement for producing “at least 22 pages penciled for each of the eight issues of a publication tentatively entitled [REDACTED]. The agreement was signed by the petitioner on October 1, 2013, but the signature block for the President of [REDACTED] was left blank. Regardless, the petitioner signed the preceding agreement subsequent to filing the petition on December 19, 2012. Again, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49. Accordingly, the October 2013 agreement executed by the petitioner to produce artwork for the upcoming [REDACTED] cannot be considered as evidence to establish his eligibility at the time of filing.

[REDACTED] Creative Director, [REDACTED], states:

I am writing on behalf of [the petitioner], the uber talented and incredible artist I have worked with [the petitioner] on several projects for [REDACTED] Magazine and have found his work to be of utmost quality – in its creativity and execution. Truly, [the petitioner] is one in a million. [The petitioner] has the unique ability to take a germ of a story and miraculously bring it to life, entertaining and amazing our readers along the way.

Not only is [the petitioner’s] work fabulous, but his professionalism is beyond reproach. He’s extremely conscientious about deadlines, sensitive to budgets, and a true pleasure to work with.

We have had such great response to [the petitioner’s] work from kids across the country and I fully intend to work with him on future projects.

Ms. [REDACTED] points to the high quality of the petitioner’s work, and his unique ability, talent, and professionalism. It is not enough to be a talented artist and to have others attest to that talent. An

⁵ The petitioner’s 2009 [REDACTED] nomination, however, did not meet the requirements of the category of evidence at 8 C.F.R. § 204.5(h)(3)(i). The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires evidence of receipt of nationally or internationally recognized “prizes or awards,” not receipt of only a nomination. Earning a nomination does not equate to receipt of a prize or an award. On appeal, the petitioner does not contest the director’s finding that his [REDACTED] nomination was not sufficient to meet the requirements of 8 C.F.R. § 204.5(h)(3)(i).

individual must have demonstrably impacted his field in order to meet this regulatory criterion. There is no documentary evidence showing that the petitioner's work for [REDACTED] has affected the field as a whole, has substantially influenced the work of other artists, or otherwise equates to original contributions of major significance in the field.

[REDACTED], Entertainment Coordinator, [REDACTED] states:

I have been fortunate to work with [the petitioner] on a [REDACTED] card game recently. [The petitioner's] contribution to our product was invaluable, he was professional and on schedule. He is highly regarded in the comic industry as a top level talent and added credibility to our product.

* * *

I look forward to working with [the petitioner] on future projects. His art has become essential to the comic industry: if it was possible I would have [the petitioner] work on everything [REDACTED] related for [REDACTED]. As an art acquisition coordinator it can be hard to find a professional artist who you can trust to provide excellent work, on time or ahead of deadlines. I can trust [the petitioner]; I hope we can continue to create excellent products together.

Mr. [REDACTED] comments on the petitioner's work with [REDACTED] on a card game project for [REDACTED], but does not provide specific examples of how his work has influenced the field as a whole or otherwise constitutes original contributions of major significance in the comic industry. Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the petitioner's contributions be "of major significance in the field" rather than limited to the companies that contracted his services for various projects.

[REDACTED], Chief Executive Officer, [REDACTED] an agency that represents artists, states:

[The petitioner] . . . is a premier illustrator, designer, and painter working from Brazil under contract with our Agency for the past 14 years, earning his entire income from American clients. We'd [sic] thrilled and lucky to have him, and he adds significantly to our business success.

As such, as a much sought-after artist, [the petitioner] has illustrated for [REDACTED]

For years, [the petitioner] drew exclusively for [REDACTED] top-selling books, including [REDACTED]. He currently illustrates [REDACTED] and other books for [REDACTED] owned by [REDACTED].

At movie and [REDACTED] he is best known as artist of [REDACTED] movie writer/director [REDACTED] series of graphic novels.

Mr. [REDACTED] comments on the petitioner's work for various clients in the United States, but does not provide specific examples of how the petitioner's artwork has influenced other illustrators, or has otherwise affected the comics industry at a level indicative of contributions of major significance in the field.

[REDACTED], a comics illustrator with additional experience in graphic novels, video games, toy packaging, commercial illustration, and gallery shows, states:

I consider [the petitioner] to be a peer and my contemporary. I've known him for more than a decade, and we've attended many conventions and events in the USA. Not only have we worked on several high-profile books together -- most notably [REDACTED] -- he's followed in my footsteps at [REDACTED] and other career-making series.

Mr. [REDACTED] mentions the petitioner's work on [REDACTED] and [REDACTED] but fails to provide specific examples of how his artwork was of major significance in the field.

[REDACTED] a comics illustrator, author, and painter, states:

I consider it my very good fortune to have met [the petitioner], both through his published work, and also through our travels, at conventions and festivals in the USA and abroad. I consider him to be not only an incredibly talented artist and visual storyteller, but I'm also very fortunate to call him my friend, as well as colleague. [The petitioner] and I are currently in discussions with [REDACTED] to work together on an ongoing series. I believe [the petitioner] will not only continue to be in demand for his incredible commercial and artistic gifts, but also for his genuine warmth, decency and humor.

Mr. [REDACTED] asserts that the petitioner is "an incredibly talented artist and visual storyteller" and that he will "continue to be in demand for his incredible commercial and artistic gifts," but does not explain how the petitioner's artwork has specifically affected the comics industry or otherwise equates to original contributions of major significance in the field. There is no documentary evidence showing the extent of the petitioner's influence on others in the field, or demonstrating that the field has specifically changed as a result of his original work, so as to establish the major significance of his contributions.

The petitioner submitted letters of varying probative value. A number of the letters are generalized, without identifying specific contributions or their impact in the field, and thus have little probative value. *See 1756, Inc. v. U.S. Att'y Gen.*, 745 F. Supp. at 17; *see also Visinscaia*, 2013 WL 6571822, at *6 (upholding USCIS' decision to give limited weight to uncorroborated assertions from practitioners in the field); *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (holding that an agency "may, in its discretion, use as advisory opinions statements . . . submitted in evidence as expert testimony," but is ultimately responsible for making the final determination regarding an

alien's eligibility for the benefit sought and "is not required to accept or may give less weight" to evidence that is "in any way questionable"). 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"). Furthermore, all of the letters of support are from individuals who have worked with the petitioner or whose companies have a business arrangement with the petitioner. Although such letters are important in providing details about the petitioner's work, they cannot by themselves establish the influence of the petitioner's work beyond his immediate circle of professional acquaintances.

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. *Id.* Without additional, specific evidence showing that the petitioner's work has been unusually influential, has substantially affected the field, or has otherwise risen to the level of original contributions of major significance, 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 evidence supports the director's finding that the petitioner meets this regulatory criterion.

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

This regulatory criterion focuses on the volume of sales and box office receipts as a measure of the petitioner's "commercial successes in the performing arts." The petitioner's field, however, is not in the performing arts. None of the petitioner's documentary evidence demonstrates that he has achieved "commercial successes in the performing arts."

The petitioner pointed to the aforementioned letters from Mr. [REDACTED] Mr. [REDACTED] Mr. [REDACTED] Ms. [REDACTED] Mr. [REDACTED], and Mr. [REDACTED] as "comparable evidence" for this regulatory criterion. The regulation at 8 C.F.R. § 204.5(h)(4) provides the petitioner an opportunity to submit comparable evidence to establish eligibility if the ten categories of evidence at 8 C.F.R. § 204.5(h)(3)(i) – (x) do not readily apply to his occupation. The director's decision stated: "The petitioner did not declare and demonstrate why the standards do not readily apply to the [petitioner's] occupation."

In the appeal brief, the petitioner states: "The Service blatantly ignores the arguments [the petitioner] put forth to show that [8 C.F.R. § 204.5(h)(3)(x)] does not readily apply to his profession as an illustrator, designer, and painter, because he cannot show record sales or box office receipts." The regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. The regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the

[petitioner's] occupation, the petitioner may submit comparable evidence to establish the [petitioner's] eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i) – (x). In the present matter, there is no evidence that eligibility for visa preference in the petitioner's occupation cannot be established by the categories of evidence specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, the petitioner has submitted evidence showing that multiple categories of evidence apply to his occupation such as 8 C.F.R. § 204.5(h)(3)(i), (iii), (v), (vii), and (ix). Where an individual is simply unable to satisfy the plain language requirements of at least three categories of evidence at 8 C.F.R. § 204.5(h)(3), the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

Even if the petitioner demonstrated that he was eligible for the provisions of the regulation at 8 C.F.R. § 204.5(h)(4), which he has not, the petitioner has failed to establish that submitting letters of support prepared specifically for his petition and attesting to his work for [redacted] is *comparable* to the regulation at 8 C.F.R. § 204.5(h)(3)(x) that requires "[e]vidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales."

In his initial letter dated October 26, 2012, Mr. [redacted] states that the petitioner headlined [redacted] "acclaimed monthly comic book title, [redacted] and was "a featured artist on many other of [its] flagship titles, including [redacted]." In his second letter dated March 23, 2013, Mr. [redacted] states that the petitioner "is currently the featured artist on [redacted] monthly comic book . . . [redacted]" "will be a primary artist featured in [redacted]" and will "follow that work with an engagement as artist on a weekly version of . . . [redacted]." As previously discussed, the petitioner's work on *New 52* and [redacted] post-dates the filing of the petition on December 19, 2012. Eligibility, however, must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49. Accordingly, the petitioner's 2013 work on *The New 52* and his future work on [redacted] cannot be considered as evidence to establish his eligibility at the time of filing.

In his letter, Mr. [redacted] states that [redacted] has assigned [the petitioner] to some of [its] most prestigious franchises." The petitioner also submitted an article from [redacted] entitled "Artist [the petitioner] ends exclusive contract with [redacted]." Although the article shows that the petitioner had an exclusive contract with [redacted] "for about 5 years," it does not specify the sales figures for the comic books illustrated by the petitioner or the amount of his remuneration as stated in the contract. In addition, the petitioner submitted a letter from Mr. [redacted] mentioning that the petitioner worked on [redacted] comic books. Mr. [redacted] further states that his agency was "thrilled and lucky to have [the petitioner]" and that the petitioner "adds significantly to [redacted] business success." Mr. [redacted] however, did not specify the amount of revenue that the petitioner generated for [redacted]

Mr. [REDACTED] asserts that the petitioner's work on two volumes of the *Serenity* comic book series "helped keep those [REDACTED] books perennial best-sellers" for [REDACTED] but did not point to any specific sales figures.

Ms. [REDACTED] comments that [REDACTED] has "had such great response to [the petitioner's] work from kids across the country" and that she "fully intend[s] to work with him on future projects." In addition, Mr. [REDACTED] states that "if it was possible [he] would have [the petitioner] work on everything [REDACTED]"

Rather than submitting evidence of comic book or product "sales" that is comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(x), the petitioner instead submitted letters of support and other documentation showing only that the petitioner has secured work in his field. None of the preceding evidence provides specific sales figures for the comic book volumes illustrated by the petitioner. 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). The record lacks objective documentary evidence (such as published comic book sales rankings or audited financial reports) showing the specific sales directly attributable to the petitioner's work.⁶ As the quality of the submitted documentation is not of the same caliber of objective evidence required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x), we cannot conclude that the petitioner's evidence is comparable.

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

B. Summary

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

III. CONCLUSION

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

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

⁶ For instance, [REDACTED] provides monthly sales data for comics obtained from comic book distributors who serve comics shops in North America. *See* [http://www.\[REDACTED\]](http://www.[REDACTED]) accessed on July 21, 2014, copy incorporated into the record of proceeding.

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, we need not explain that conclusion in a final merits determination.⁷ 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.

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.

⁷ The AAO conducts appellate review on a *de novo* basis. See *Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). 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).