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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B2

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 04 2009
EAC 02 228 51767

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center on August 3, 2004. The petitioner filed a subsequent appeal on September 8, 2004. The director declined to treat the late appeal as a motion and forwarded the matter to the AAO. On October 11, 2005, the Administrative Appeals Office (AAO) rejected the appeal as untimely without rendering a decision on the merits of the case. On November 9, 2005, the petitioner filed a motion to reopen the AAO's rejection of his appeal. On June 6, 2006, the director dismissed the motion rather than forwarding it to the AAO for consideration.[1] On December 12, 2007, the petitioner filed a motion to reopen the director's decision dismissing his prior motion. The director forwarded the motion to the AAO. Although jurisdiction over a motion resides in the official who made the latest decision in the proceeding, in this instance the service center director, given the director's errors throughout these proceedings, we find that the most expedient remedy is to consider both the petitioner's November 9, 2005 motion and December 12, 2007 motion at this time. The motions will be rejected and the petition will remain denied.

The petitioner 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 established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

The first issue to be determined in this matter is whether the AAO erred in its decision rejecting the late appeal.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B) states:

> *Untimely appeal – (1) Rejection without refund of filing fee.* An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.
>
> (2) *Untimely appeal treated as motion.* If an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) of this part or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The record indicates that the director issued the decision denying the petition on August 3, 2004. It is noted that the director's decision properly gave notice to the petitioner that he had 33 days to file the appeal. On page 5, the director's decision stated: "You may appeal this decision by filing a completed Form I-290B with the Vermont Service Center <u>within 30 days</u> from the date of this notice, 33 days if this notice was received by mail. A copy of Form I-290B, Notice of Appeal to the

[1] According to 8 C.F.R. § 103.5(a)(1)(ii), jurisdiction over a motion resides in the official who made the latest decision in the proceeding.

Administrative Appeals Unit, is enclosed for your use." While the director's August 3, 2004 decision properly gave notice to the petitioner that he had 33 days to file the appeal, the enclosed Form I-290B erroneously indicated that his appeal would be rejected as untimely if it was not "received at a Service office on or before September 8, 2004." The Form I-290B, however, should have indicated that that the petitioner had until "September 7, 2004" to file a timely appeal.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The regulation at 8 C.F.R. § 1.1(h) explains that when the last day of a period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

In this case, the appeal was not received by the director until September 8, 2004, 36 days after the decision was issued. Accordingly, the appeal was untimely filed. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(*1*) states in pertinent part that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed." Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. *See Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006). Even if the appeal was delayed by the overnight delivery service, the error would not warrant special consideration of the appeal. *Id.* The above regulations are binding on U.S. Citizenship and Immigration Services (USCIS) employees in their administration of the Act, and USCIS employees do not have the authority to extend that filing period. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission,* 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner,* 420 F.2d 809, (C.A. Md. 1969) (government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down); *Morton v. Ruiz*, 415 U.S. 199 (1974) (where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures). 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 the Form I-290B provided to the petitioner incorrectly advised him that he had until September 8, 2004 to file his appeal, the AAO would not be bound to follow the clerical error of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Thus, the AAO's October 11, 2005 decision rejecting the petitioner's appeal was not in error.

Nevertheless, the petitioner's untimely appeal did meet the requirements of a motion to reopen. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this instance the service center

director. *See* 8 C.F.R. § 103.5(a)(1)(ii). Therefore, rather than forwarding the matter to the AAO, the director should have considered the untimely appeal as a motion to reopen and rendered a new decision on the merits of the case as required by the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*).

On November 9, 2005, the petitioner filed a motion to reopen the AAO's decision rejecting his appeal. On June 6, 2006, the director dismissed the motion rather than forwarding it to the AAO for consideration.[2] It is noted that even if the director had forwarded the November 9, 2005 motion to the AAO, it would have been rejected. As the petitioner's appeal was properly rejected by the AAO as untimely, there is no decision on the part of the AAO to be reopened in this proceeding. According to 8 C.F.R. § 103.5(a)(1)(ii), jurisdiction over a motion resides in the official who made the latest decision in the proceeding. The AAO has not entered a decision on the merits of the petitioner's petition for classification as an alien of extraordinary ability. Because the disputed decision was rendered by the director, the AAO had no jurisdiction over the November 9, 2005 motion. Accordingly, the November 9, 2005 motion is rejected.

On December 12, 2007, the petitioner filed a subsequent motion to reopen the director's June 6, 2006 decision. The director declined to consider this untimely motion and forwarded the matter to the AAO. As the previous motion and appeal were rejected by the AAO, there is no decision on the part of the AAO that may be reopened in this proceeding. Because the disputed decision was rendered by the director, the AAO has no jurisdiction over the latest motion and it must also be rejected. Accordingly, the December 12, 2007 motion is rejected.

We further note that the latest motion is untimely. The regulation at 8 C.F.R. § 103.5(a)(1)(i), states that a motion must be filed within 30 days of the decision that the motion seeks to reopen or reconsider. The regulation at 8 C.F.R. § 103.a(b) states that whenever a person is required to act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. In this instance, the director issued the decision dismissing the previous motion on June 6, 2006. The present motion was not received by the director until December 12, 2007, more than 18 months after the decision was issued. The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that a late motion may be excused in the discretion of CIS where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. Further, the regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." In this matter, the petitioner's latest motion was not properly filed within the required thirty days and he has not demonstrated that this delay was reasonable and beyond his control. Therefore, even if the present motion is not rejected by the AAO, it would be dismissed as untimely filed.

Although the AAO has rejected the petitioner's appeal and subsequent motions, counsel's latest motion makes a persuasive argument that the petitioner's untimely appeal should have been treated as a motion and that a decision should have been made on the merits of his case. We agree with counsel that the director erred in not treating the petitioner's late appeal as a motion to reopen. Given the director's

[2] The second paragraph of the director's June 6, 2006 decision was irrelevant to the petitioner's case.

errors in these proceedings, we will consider the merits of the petitioner's appeal on a *de novo* basis. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

On appeal, the petitioner argues that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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.

Citizenship and Immigration Services (CIS) 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* 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition, filed on June 26, 2002, seeks to classify the petitioner as an alien with extraordinary ability as a Chinese opera artist. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement

(that is, a major, internationally recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The petitioner has submitted evidence pertaining to the following criteria.[3]

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

The petitioner submitted the following:

1. Certificate from the CBA Culture & Arts Center (New York) presented to the petitioner for his "Extraordinary Expertise in the).
2. Certificate of Merit stating that the petitioner won the Prize at the
3. Certificate of Award stating that the petitioner received the at the held by the Department of Cultural Affairs of China
4. Certificate from the Liaoning Branch of the Chinese Opera Association stating that the petitioner received an ' for his achievements in the
5. Certificate from the Chinese Opera Association stating that the petitioner "trained the students who have won the title of '
6. Certificate issued by the Shanghai TV Station stating that the petitioner's performance "won the MTV Prize" for the section in the National TV Competition in Shanghai (
7. Certificate of Merit stating that the petitioner directed the Golden prizewinning performance ' at the Youth Chinese Peking Opera Competition (
8. Certificate of Honor stating that the petitioner won for the ' in the National Opera Performing Competition of the Chinese Festival of Traditional Arts (

[3] The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

9. Certificate issued by the Department of Cultural Affairs of Liaoning Province stating that the petitioner was awarded the title of '[redacted]" for his achievements in [redacted]
10. Certificate stating that the petitioner won an [redacted] at the [redacted]
11. Certificate stating that the petitioner received an [redacted] for placing [redacted] at the [redacted].
12. Certificate issued by the Chinese Opera Association of Liaoning Province stating that the petitioner earned recognition for [redacted]e" at the '[redacted] [redacted]e."

Pursuant to 8 C.F.R. § 103.2(b)(3), any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. The English language translations accompanying the petitioner's award certificates were not certified by the translator as required by the regulation.

Items 1 and 9 above reflect local or provincial recognition rather than national or international recognition. With regard to awards won by the petitioner or his students in youth competition (items 2, 4, 5, 7, 10, and 11), we do not find that such awards indicate that he "is one of that small percentage who have risen to the very top of the field of endeavor." *See* 8 C.F.R. § 204.5(h)(2). There is no indication that the petitioner or his students faced competition from throughout the field, rather than limited to their approximate age group within the field. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.[4] Likewise, it does not follow that a performing artist who has had success in competitions restricted to youth should necessarily qualify for an extraordinary ability employment-based immigrant visa. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor."

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[4] While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 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 at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and 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.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

On appeal, the petitioner submits an August 20, 2004 letter from the Chinese Opera Artist Association briefly discussing the National Cultural Art Festival Opera Performing Tournament (item 8). The English language translation accompanying the letter was not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, the translated document does not provide a name, address, telephone number, or any other information through which the author of the letter can be contacted. As such, we cannot assign any weight to this letter.

In regard to items 1 through 12, the plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this case, the petitioner has not submitted evidence showing that his awards commanded national or international recognition beyond the presenting organizations consistent with sustained national or international acclaim. The record does not include evidence establishing the significance and magnitude of the preceding competitions. Further, the record lacks information regarding several of the petitioner's competitions (such as the eligibility criteria and number of entrants). National competitions typically issue event programs listing the names of the participating contestants and the award categories. At a competition's conclusion, results are usually provided indicating how each participant performed in relation to the other contestants. The petitioner, however, has provided no evidence of the official comprehensive results for the contests in which he received awards. Nor is there supporting evidence showing that the recipients of the preceding awards were announced in major media or in some other manner consistent with national or international acclaim.

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

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.*

The petitioner submitted his certificate of membership for the Chinese Musician Association and his Certificate of Official Rank from the Human Resource Department of Liaoning Province declaring him a "First Level Opera Musician." The petitioner has not established that being issued such a ranking by a provincial government is tantamount to outstanding achievements or that his qualifications were evaluated by national or international experts in his field. Further, the record does not include evidence of the membership bylaws or the official admission requirements for the Chinese Musician Association. The petitioner also submitted two letters stating that he is a member of the Chinese Opera Association and its Evaluating Committee of Opera Artists. The English language translations accompanying the preceding documents were not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, the English language translations accompanying the two letters from the Chinese Opera Association do not provide a name, address, telephone number, or any other information through their author can be contacted. As such, we cannot assign any weight to this evidence. In this case, the petitioner has not established that the preceding organizations require outstanding achievements of their members, as judged by

recognized national or international experts in his field or an allied one. Accordingly, the petitioner has not established that he meets this 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.*

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication or from a publication printed in a language that the vast majority of the country's population cannot comprehend. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.[5]

The petitioner submitted articles in *World Journal* dated September 30, 2000, December 16, 2000, September 10, 2001, and December 10, 2001. The petitioner also submitted a May 21, 2000 article in *China Press*, an October 2, 2000 in *Singtao Daily*, and an October 10, 1986 article in *Wen Wei Po Daily*. There is no evidence (such as circulation statistics) showing that the preceding Chinese language publications qualify as major media. Regional coverage or coverage in a publication read by only a small ethnic segment of a country's total population is not evidence of national or international acclaim. Further, many of these articles are not primarily about the petitioner. The plain language of this regulatory criterion, however, requires that the published material be "about the alien." We further note that the authors of the preceding articles were not identified as required by the plain language of this regulatory criterion. Finally, pursuant to 8 C.F.R. § 103.2(b)(3), any document containing foreign language submitted to USCIS shall be accompanied by a *full* English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. The preceding articles were accompanied by only partial English language translations and the individual translations were not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3).

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

> *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.*

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[5] Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

The regulation at 8 C.F.R. § 204.5(h)(3) provides that "a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." Evidence of the petitioner's participation as a judge must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criterion at 8 C.F.R. § 204.5(h)(3)(iv), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). For example, judging a national competition for professional actors is of far greater probative value than judging a regional youth competition involving students or amateur artists.

The petitioner submitted a January 1998 letter from the Chinese Opera Association stating:

> This Letter of Appointment appoints [the petitioner] to be a member of the "Evaluating Committee of Opera Artists" in charge of Enrollment of membership for Chinese Opera Association of P. R. China and has been appointed to be the Representing Judge since January 1998 for all accredited opera competitions nationwide.

The plain language of this regulatory criterion requires "[e]vidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the . . . field." In this instance, there is no evidence showing the specific work or competitions judged by the petitioner, the names of those he evaluated, their level of expertise, his actual dates of participation, or documentation of his assessments. Without evidence showing, for example, that the petitioner's activities involved judging top performers or were otherwise consistent with sustained national or international acclaim at the very top level of his field, we cannot conclude that he meets this criterion.

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

We acknowledge the petitioner's submission of several recommendation letters praising his talent as a Chinese opera performer. Talent in one's field, however, is not necessarily indicative of artistic contributions of major significance. The record lacks evidence showing that the petitioner has made original contributions that have significantly influenced or impacted his field.

NYJPW Chinese American Arts & Culture Association Inc., New York, states:

> I personally regard [the petitioner] as one of the best artists in his field. He is so talented and outstanding that he is capable of playing different type of roles in the same show. It is of no surprise that [the petitioner] sometimes won standing ovation due to his marvelous performances. [The petitioner's] singing and his fabulous techniques in martial arts and body movements always makes his audiences deeply appreciate the true beauty of Chinese opera.

of the Qi Shu Fang Peking Opera Company, New York, states:

> I knew [the petitioner] since 2002, when I invited [the petitioner] as a guest performing artist to have a performance in New York. As one of the major representative of Shanghai Style of Beijing Opera, I have known the difference and the contribution of [the petitioner] in Beijing Opera and the important position that [the petitioner] in Chinese Beijing Opera. [The petitioner] has not only learned how to play the Wusheng and Wengsheng in Beijing Opera, but also famous in his creation of his own style for Wusheng and Wengsheng in Beijing Opera. [The petitioner] not only can perform Wusheng well, but also performs the Wensheng in Beijing Opera in scholar's way.

, Tung Ching Chinese Center for the Arts, Inc., New York, states:

> Besides [the petitioner's] achievements on the opera stages, his talents in developing Chinese opera on TV is also very astonishing to most of opera artists. By directing operas into the form of movie on TV, [the petitioner] broke the traditional way of opera which is always played on stages and developed a whole new way to express this ancient art. [The petitioner] has also played the main character in some of his most recent opera TV movies such like

There is no supporting evidence showing that the petitioner was the first to televise Chinese opera or that his productions constitute original contributions of major significance in his field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner's performances have earned the admiration of those providing letters of recommendation, there is nothing to demonstrate that his work has had major significance in the field at large. For example, the record does not indicate the extent of the petitioner's influence on other artists nationally or internationally, nor does it show that the field has somehow changed as a result of his work.

In this case, the letters of recommendation submitted by the petitioner are not sufficient to meet this criterion. These letters, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 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 of support from the petitioner's personal contacts 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. Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of a performing artist who has sustained national or international acclaim at the very top of the field. Without extensive

documentation showing that the petitioner's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The petitioner submitted evidence of his stage performances. The plain language of this regulatory criterion indicates that it is intended for visual artists (such as sculptors and painters) rather than for performing artists such as the petitioner. In the performing arts, sustained national or international acclaim is generally not established merely by performing in public, but rather by consistently attracting a substantial national or international audience. For this reason, the regulations establish separate criteria, especially for those whose work is in the performing arts. The petitioner's performances are far more relevant to the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x). Nevertheless, there is no evidence establishing that the petitioner's level of performance or artistic venues are consistent with sustained national or international acclaim at the very top of his field. As such, the petitioner has not established that he meets this criterion.

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

In order to establish that he performed a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of his role within the entire organization or establishment and the reputation of the organization or establishment.

The petitioner submitted evidence showing that he appeared in multiple productions for various arts organizations. The petitioner's evidence included a flyer promoting a production by the Tung Ching Chinese Center for the Arts at Murray Bergtraum High School and a program booklet for the Wossing Center Chinese & Chinese Theatre Circle's performance in the "Basement" of the Chinese Community Center at [redacted] On appeal, the petitioner submits documentation for more recent ensemble performances at Norman Thomas High School (April 25, 2004), Alice Tully Hall of Lincoln Center (September 19, 2003), and Murray Bergtraum High School (September 29, 2002). The preceding three performances occurred subsequent to the petition's filing date. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Accordingly, the AAO will not consider these three performances in this proceeding.

Aside from the Qi Shu Fang Peking Opera Company for which the petitioner appeared only as a "guest" artist, there is no supporting evidence showing that the remaining arts organizations for which he performed have distinguished reputations. Nor is there evidence demonstrating how the petitioner's role differentiated him from the other performers employed by these arts organizations, let alone their artistic management. For example, there is no evidence showing that the petitioner's name frequently received the top billing or that the popularity of the opera companies increased

when the petitioner was known to be performing. As such, the petitioner has not established that he was responsible for his arts organizations' success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim at the very top of his field.

The petitioner submitted evidence showing that he served as a professor at the Chinese Opera Institute of Liaoning Province. On appeal, the petitioner submits an August 21, 2004 letter from the Liaoning Province Opera School stating that he served as head of the school's Youth League from 1998 to 2000. The English language translation accompanying this letter was not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, the translated document does not provide a name, address, telephone number, or any other information through which the author of the letter can be contacted. Nevertheless, there is no evidence showing that these institutions have distinguished reputations. The record also lacks evidence demonstrating how the petitioner's role differentiated him from the other faculty members at these institutions, let alone their more senior leadership. As such, the petitioner has not established that his positions were leading or critical.

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

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

The August 21, 2004 letter from the Liaoning Province Opera School states that the petitioner was "paid a higher wage in the national art field. The monthly wage was set to be 2,500 RMB, 2,000 RMB for every performance, accumulated annual salary to be 45,000 RMB." As discussed, the English language translation accompanying this letter was not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, the translated document does not provide a name, address, telephone number, or any other information through which the author of the letter can be contacted. Nor is there supporting evidence (such as payroll records or income tax forms) showing the petitioner's actual earnings for any specific period of time. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Finally, the plain language of this criterion requires the petitioner to submit evidence of a high salary "in relation to others in the field." The petitioner offers no basis for comparison showing that his compensation was significantly high in relation to others in his field.

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

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

The petitioner submitted documentation of various ensemble stage performances in which he participated. This plain language of this regulatory criterion, however, calls for commercial successes

in the form of "sales" or "receipts"; simply submitting playbills, event programs, promotional material, video footage, or photographs from the petitioner's stage performances cannot meet the plain language of this criterion. The record does not include evidence of documented "sales" or "receipts" showing that the petitioner achieved commercial successes in the performing arts in a manner consistent with sustained national or international acclaim at the very top of his field. For example, there is no evidence that the petitioner's performances in China or the United States consistently drew record crowds, were regular sell-out performances, or resulted in greater audiences than other similar performances that did not feature the petitioner. Nor is there evidence showing that the video and DVDs featuring the petitioner's performances had a high national or international sales volume or that he received significant royalties for his involvement. Finally, with regard to the petitioner's television productions, there is no quantifiable evidence showing that his shows attracted a substantial national or international audience.

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

In this case, the petitioner has failed to demonstrate receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

Review of the record does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, even if the petitioner's appeal and subsequent motions were not rejected, his petition will remain denied.

ORDER: The appeal remains rejected. The subsequent motions will also be rejected and the petition will remain denied.