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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE:

[REDACTED]
LIN 07 094 51952

Office: NEBRASKA SERVICE CENTER

Date: SEP 02 2009

IN RE:

Petitioner:
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. More specifically, the director found that the petitioner had failed to demonstrate receipt of a major, internationally recognized award, or that she meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

On appeal, counsel argues that the petitioner 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 to the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and the 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, 60898-9 (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 has 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 the beneficiary has sustained national or international acclaim at the very top level.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as a ballet dancer. We note that the record contains evidence of the beneficiary's prior approval as an O-1 non-immigrant pursuant to section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i). While USCIS has approved an O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d at 1090.

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *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).

Although the words "extraordinary ability" are used in the Act for both the nonimmigrant O-1 classification and the first preference employment-based immigrant classification, the applicable regulations define the terms differently for each classification. The O-1 regulation explicitly states that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear regulatory distinction between these two classifications, the beneficiary's receipt of O-1 nonimmigrant classification is not evidence of her eligibility for immigrant classification as an alien with extraordinary ability.

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 of the criteria outlined in 8 C.F.R. § 204.5(h)(3). In determining whether the beneficiary 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 that, it claims, meets the following criteria under 8 C.F.R. § 204.5(h)(3).¹

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

The petitioner claims that the beneficiary has won first prize "in numerous highly regarded ballet competitions," including the gold prize "at the most difficult and prestigious ballet competition in the world, the Varna International Ballet Competition." However, the document submitted to support this claim is in a foreign language and is not accompanied by the translation required under 8 C.F.R. § 103.2(b)(3) which states that "[a]ny document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which 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." Without the requisite certified translation we are unable to determine whether this document supports the petitioner's claims. Accordingly, the evidence is not considered probative and will not be considered in this proceeding.

The documents submitted in support of the petitioner's claims regarding the beneficiary's receipt of first prize at the 52nd Japan Ballet Competition in 1995, a Certificate of Merit from the 50th Japan Ballet Competition in 1993, first prize and the Tachibana Akiko Award at the 26th Saitama Ballet Competition in 1993, a Certificate of Merit at the 51st Japan ballet Competition in 1994, a Certificate of Merit from the 49th Japan Ballet Competition in 1992, and a Certificate of Merit from the 24th Saitama Ballet Competition in 1991 are similarly lacking. Again, without the required certified translation, we are unable to determine that these documents support the petitioner's claims and establish her eligibility under this criterion. As such, these documents will not be considered in this proceeding. We further note that a certificate of merit, while evidence of the petitioner's performance in a particular competition is an implausibly broad

¹ The petitioner does not submit evidence relating to or claim the beneficiary meets the criteria not discussed in this decision.

interpretation of the word “award.” Therefore, even if accompanied by the requisite translation, the aforementioned certificates are not sufficient to meet this criterion.

The remaining document evidences the beneficiary’s receipt of third prize and the IBM Award in the junior division of the Fifth Asian Pacific Ballet Competition in August 1995. On appeal, counsel argues that age is “an inherent characteristic” and that applying the director’s “faulty logic,” USCIS would discount “juvenile” or “child actor” Oscars that were awarded to [REDACTED] and others because they were relatively young when they earned those awards.” We are not persuaded by counsel’s argument. In this instance, contrary to counsel’s argument, we are not focusing on the beneficiary’s age at the time she received the claimed award. Rather, the focus is on the award itself which appears to have been won by the beneficiary in competition that was limited by her age. The Oscar examples cited by counsel are similar in that they did not compete for their awards with all others in their field. [REDACTED] and [REDACTED] were awarded “special” Oscars because of their ages and [REDACTED] received an “Honorary” Oscar, also because of her age. Given the limitation in the available pool of applicants and the fact that the petitioner does not appear to have been competing against competitors throughout her field, we do not find that such an award indicates that she “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). 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 60899.² Likewise, it does not follow that a competitor, like the beneficiary, who has had success in a single age-group competition involving limited participants 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.”

Further, 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 her burden to establish every element of this criterion. In this case, there is no

² 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.

evidence showing that petitioner's awards commanded a significant level of recognition beyond the context of the events where they were presented. Accordingly, the petitioner has not established that the categories in which she successfully competed resulted in her receipt of nationally or internationally recognized prizes or awards.

The petitioner submitted no documentation with the petition to establish that any of the awards that the beneficiary allegedly won were nationally or internationally recognized as awards of excellence in the beneficiary's field. In response to the director's February 21, 2008 request for evidence (RFE), the petitioner's artistic director, [REDACTED] stated:

The criteria for winning these prizes . . . are: 1) winners must demonstrate an extraordinary talent for classical and contemporary dance, 2) winners show a charisma as a performer that engulfs both the audience and judges alike.

The prestigious International ballet Competition in Varna would be sufficient to establish [the beneficiary's] status in the international ballet world as a ballerina of extraordinary ability, an ability recognized by a jury of international ballet experts and former dancers, who honored [the petitioner] with the highest possible prize, the gold medal.

The petitioner submitted copies of pages from the website of the Varna International Ballet Competition that discusses the competition's history and popularity. However, the petitioner submitted no independent or objective documentation to establish the significance of the Varna competition.

On appeal, the petitioner submits a June 6, 2008 letter from [REDACTED] in which he states that he is "perplexed that [the beneficiary's] gold prize at the Varna International Ballet Competition is being questioned as to its stature in the realm of dance competitions and requirements." He further states:

Any person who values classical ballet as an art both knows and values the importance of the International Ballet Competition of Varna and respects the key qualification necessary to win any prize there. But most of all, the coveted gold prize that was awarded to [the beneficiary], that very quality required to win this top prize is the very one you are seeking to award with [the beneficiary's change of status: extraordinary ability! [Emphasis in the original.]

Nonetheless, the burden remains on the petitioner to establish by objective and competent evidence that the award it claims meets this criterion is nationally or internationally recognized as an award of excellence in the beneficiary's field. On appeal, the petitioner submits additional documentation from Varna's website and a discussion of "USA International Ballet Competition" from Wikipedia. With regard to information from *Wikipedia*, there are no

assurances about the reliability of the content from this open, user-edited internet site.³ See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008). Accordingly, we will not assign weight to information which relies on *Wikipedia* as its cited source.

The petitioner has not only failed to provide evidence of the renown of these awards, but because it did not provide certified translations of documents that purport to show the beneficiary's receipt of these awards, it has failed to establish that she actually won any award.

Furthermore, as noted by the director, the petitioner did not claim and provided no evidence of any award won by the beneficiary subsequent to 1998. Section 203(b)(1)(A)(i) of the Act provides that the alien's extraordinary ability must be demonstrated by "sustained acclaim" and whose achievements have been recognized "through extensive documentation." The lack of any awards alleged to have been won by the beneficiary during the nine years preceding the filing of this visa petition is not consistent with a claim of sustained acclaim.

The petitioner has failed to establish that the beneficiary 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.

To demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or work experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

³ Online content from *Wikipedia* is subject to the following general disclaimer:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. Wikipedia is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . Wikipedia cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on June 18, 2009, a copy of which is incorporated into the record of proceeding.

In response to the RFE, ██████████ stated that the competitions in Japan and the International Ballet Competition of Varna “are the closest ballet would come to an association to be judged by national and international experts in the field of ballet.” However, neither of these competitions is an association which grants membership to individuals. ██████████ also stated that the American Guild of Musical Artists (AGMA) “is the oldest dancer’s union that represents opera, orchestra and dance in the US.” However, the petitioner does not allege and presents no evidence that the beneficiary is a member of the AGMA, much less provide membership criteria demonstrating that membership requires outstanding achievement as judged by national or international experts in the beneficiary’s field.

The petitioner does not pursue this issue on appeal, and has failed to establish that the beneficiary 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 order to meet this criterion, published material must be primarily about the beneficiary and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

The petitioner submitted a copy of a document “The way to be a BALLERINA,” that it stated was in a publication “Japanese Dancers Abroad 2005.” The translation accompanying this document does not comply with the provisions of 8 C.F.R. § 103.2(b)(3) in that the translator is not identified, and there is no certification that the translation is complete and accurate or that the translator is competent to translate from Japanese into English. Furthermore, the article does not comply with the provisions of 8 C.F.R. § 204.5(h)(3)(iii) in that it does not contain a date or an author. Accordingly, the document is of no evidentiary value in this proceeding. In response to the RFE, the petitioner stated that the “‘Way to be a Ballerina’ is a major Japanese dance magazine,” which has a nationwide distribution. However, the petitioner submitted no documentation to corroborate this statement, to indicate the true name of the publication or to establish that the publication is a professional or major trade publication or that it is other major media. 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)).

The petitioner also provided what it stated are “programs, brochures, and press clippings” about the beneficiary. The documentation includes covers from the petitioner’s brochures, some of which feature the beneficiary in the promotion of a performance. The brochures and programs

include a brief biography of the beneficiary along with others of the ensemble. Brochures and programs from the petitioner are not professional or major trade publication and do not constitute other major media.

The petitioner submitted a copy of an October 2006 article from the *Oregonian*, entitled "In defense of ballet." The article briefly mentions the beneficiary as one of two dancers in a dual role. The article is not about the beneficiary or her work. This article is similar to the other documentation submitted by the petitioner, which either report on the success of the petitioner or the shows it staged. The beneficiary is often mentioned briefly as only one of the performers in the show. Her work was sometimes critiqued briefly as with all of the performers. The one exception is an October 7, 2003 article from *The Asian Reporter*, which reports on the beneficiary's move from Japan to Portland, Oregon. However, the petitioner submitted no documentation to establish that *The Asian Reporter* is a professional or major trade publication or that it is other major media.

The petitioner also submitted "copies of various Japanese performance programs and periodicals." However, as the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3), which requires that documents submitted in a foreign language "shall be accompanied by a full English translation which 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."

In response to the RFE, the petitioner submitted a copy of a March 21, 2007 article from *PhotoMedia Magazine Online* reporting on a photograph by [REDACTED] to promote one of the petitioner's performances. The photograph features the beneficiary as one of two dancers. However, the article is not about the beneficiary or her work. Further, it does not identify an author of the article as required by the regulation. Another article about [REDACTED] appears in the March-April 2008 edition of *Communication Arts* and also includes a photograph taken by Mr. [REDACTED] of the beneficiary in the petitioner's production of *Swan Lake*. The article is about [REDACTED] and his work and not about the beneficiary. Furthermore, as the article was published after the filing date of the petition, it cannot be used to establish the beneficiary's eligibility for this visa petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, counsel's argument focuses primarily on whether *The Oregonian*, in which most of the articles submitted by the petitioner appeared, constitutes major media. Counsel argues that *The Oregonian* is a "statewide daily newspaper," and provides letters including a letter from the vice president and wire transfer manager of Wells Fargo Bank to "confirm[] the status of The Oregonian as 'major media.'" Beyond these letters counsel does not, however, submit any probative evidence regarding, for instance, the circulation of *The Oregonian* or a statistical comparison of its readership versus other papers to demonstrate counsel's claims of major media. Without documentary evidence to support the claim, the assertions of counsel will

not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel asserts that “[t]here is no support in the [Act] or its legislative history for discounting publications as not ‘major media’ because they are ‘local or regional in nature.’” Counsel’s argument, however, is without merit. The Act requires the petitioner to demonstrate that the alien has sustained national or international acclaim. The ten criteria listed in the regulation at 8 C.F.R. § 204.5(h)(3) are designed to aid the petitioner in establishing such acclaim. It would be inconsistent with the Act and the regulation if one could establish national or international acclaim through the use of documentation that was of only local or regional significance.

Counsel also questions the director’s finding that the articles were “not solely about the beneficiary and in most instances only briefly mention her.” Quoting the court in *Racine v. INS*, 1995 WL 153319 (N.D. Ill.), counsel asserts:

There is no requirement under the Act that the [newspaper or journal] articles need to state that [the beneficiary] is one of the best or even that the articles describe him at the top of his fields. The articles need to demonstrate his work within the field.

While we concur that the petitioner is not required to submit articles stating the beneficiary is “the best,” the regulation still requires the article to be about the beneficiary. In this instance, the articles in the record, including all of The Oregonian articles, are about the ballet company or others. Furthermore, while the reviews presented by the petitioner as evidence under this criterion “demonstrates” the beneficiary’s work, a mere mention of the beneficiary’s name in the context of a much larger discussion about the petitioner or its work is not an article “about” the beneficiary, as required by 8 C.F.R. § 204.5(h)(3)(iii).

Finally, counsel asserts:

Subsection (iii) does not require that published articles or reviews taken individually demonstrate “acclaim.” Rather, the statutory requirement of “sustained national or international acclaim” can be met indirectly by providing evidence to satisfy three or more of the categories in subsection (i) through (x).

Counsel’s argument ignores that the regulatory criteria are designed to assist the petitioner in demonstrating national or international acclaim, and must be interpreted as a whole with the statute. While published articles about the alien need not state specifically that the alien has acclaim, the content of the articles must be consistent with sustained acclaim in the field. Otherwise, any mention of the alien, even in a negative manner, would be evidence of this criterion.

The petitioner has not established that the beneficiary satisfies this criterion.

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

As evidence that the beneficiary meets this criterion, the petitioner submitted letters from several individuals. However, while all laud the beneficiary's performance, none state that the beneficiary has made a contribution of major significance to ballet. For example, [REDACTED] Artistic Director of the San Francisco Ballet, stated in a March 11, 2006 letter that he found the beneficiary "extremely gifted" with "excellent outstanding ability," and that he is convinced that "she will continue to impress and inspire ballet audiences in America." [REDACTED] Artistic Director of Pacific Northwest Ballet (PNB) and Director of the School in Seattle, Washington, in a March 6, 2006 letter stated that the beneficiary "is an enormously gifted and intelligent artist" who "has enabled "the petitioning organization "to perform much more difficult ballets than in its past." [REDACTED] in a December 7, 2006 letter stated that he chose the beneficiary to perform the leading role in a new ballet that he created. [REDACTED] Senior Advisory Editor of *Dance Magazine*, stated in a February 27, 2008 letter that the beneficiary "sets a standard of excellence for younger dancers in the company, acting as a role model for them." [REDACTED] Resident Choreographer of the New York City Ballet, stated in a March 1, 2008 letter that the petitioning organization is fortunate to have the beneficiary "and she has undoubtedly helped them achieve international acclaim and status as one of the most rapidly growing and successful companies in the US."

In denying the petition, the director stated:

[T]he record contains no objective documentary evidence which indicates the beneficiary has made any original contributions of major significance to the field. The record does not otherwise establish that the beneficiary has developed new styles, techniques, methodologies, etc that have been recognized and adopted by others and which have significantly impacted the field.

Counsel asserts that the director's determination is both factually and legally wrong. Counsel then refers to the "detailed, objective letters from objective, third-party experts" such as Mr. [REDACTED] and [REDACTED]. Nonetheless, the passages quoted by counsel from the letters of these individuals merely attest to the beneficiary's abilities as a dancer. None attest that she has made a contribution of major significance to her field.

On appeal, the petitioner submits a June 11, 2008 letter from [REDACTED] a writer and dance historian, who stated that the beneficiary "as a ballerina, offers contributions of major significance in the field of dance by performing in her extraordinary, professional fashion. It is not her job as a dancer to create new techniques or styles, rather to display those entrusted to her by the masters." Nonetheless, [REDACTED] doesn't explain how the beneficiary's dancing, no matter how extraordinary, is a contribution of major significance to the field, especially if her style and technique are only a display of another's innovation and creativity.

Furthermore, while the beneficiary may not have created new styles or techniques that influenced ballet dancing, the petitioner has also failed to submit documentation that the beneficiary's dancing raises the overall consciousness of the public to ballet such that ballet as a whole benefits from her performances, such as with [REDACTED] or [REDACTED]

Counsel argues that USCIS lacks the expertise to determine whether or not a performer has extraordinary ability and that is why the regulations "require an expert opinion from artistic peer groups when determining whether a performer has 'extraordinary ability' under 8 C.F.R. § 214.2(o)(3)." The regulation cited by counsel refers to the nonimmigrant O-1 classification, which, as discussed previously, has different criteria. There is no requirement under 8 C.F.R. § 204.5(h)(3) to obtain an expert opinion as the burden is on the petitioner to provide extensive documentation of the alien's extraordinary ability and for this specific criterion, that the beneficiary's work is both original and that she has made contributions of major significance to her field, none of which has been demonstrated.

The petitioner has failed to establish that the petitioner meets this criterion.

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

The petitioner claims that the beneficiary meets this criterion through her performances. The director determined that "it is inherent" in the beneficiary's field that she perform before an audience and that this criterion cannot be met "simply by demonstrating that the beneficiary has performed in the field." The director further stated:

The record [does] not establish that the beneficiary's performances were so extraordinary that they place her at the pinnacle of the field. Not every performance can be considered an exhibition or showcase such that it is indicative or consistent with national or international acclaim.

On appeal, counsel asserts that the director's statement that "it is inherent" in the beneficiary's field that she perform before an audience is "absurd and an irrational application" of the regulation, and that the regulation "does not require that each display of performance be so extraordinary that they place her at the pinnacle of the field."

Nevertheless, the plain language of this regulatory criterion indicates that it is intended for visual artists (such as sculptors and painters) rather than for a dancer such as the beneficiary. Frequent performances are intrinsic to the dance profession. Duties or activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself. In the performing arts, acclaim is generally not established by the mere act of appearing in public, but rather by attracting a substantial audience. For this reason, the regulations establish separate criteria, especially for those whose work is in the performing arts. Not every stage performance is an artistic exhibition or showcase. Without evidence that the beneficiary's performances were

comparable to the exclusive artistic showcases that might serve to meet this criterion for a visual artist, we cannot conclude that the beneficiary meets this criterion. We find that the beneficiary's performances are best considered under the leading or critical role criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii) and the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x), discussed below.

The petitioner has failed to establish that the beneficiary meets this criterion.

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

To meet this criterion, the petitioner must show that she performed a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

In a January 20, 2006 letter, [REDACTED], artistic director of the Reiko Yamamoto Ballet Company, stated that the beneficiary trained at the Reiko Yamamoto Ballet School and joined the company in 1996. [REDACTED] stated that the beneficiary danced most of the leading roles for the company and won several awards, including the Varna International Ballet Competition (Junior Division) in 1998. The petitioner submitted no documentation to establish that the Reiko Yamamoto Ballet Company enjoys a distinguished reputation or that the beneficiary's performances as a lead dancer were in a leading or critical role for the organization.

The petitioner submitted articles from *The Oregonian* and the webpage of the *Portland Tribune* about the petitioning organization, its artistic director, [REDACTED] and performances by the organization. As previously discussed, the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3) must depend 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. Although [REDACTED] stated that the petitioner has achieved international acclaim and a "status as one of the most rapidly growing and successful companies in the US," the petitioner submitted no documentation to corroborate its reputation beyond the distribution area of *The Oregonian*. Thus, the petitioner's reputation on a local or regional level is not consistent with establishing that the beneficiary's acclaim at the national or international level.

In its January 24, 2007 letter, the petitioner stated that the beneficiary performed in the title roles in its production of *Firebird* and in principal roles in other of its productions, as well as featured artist on two tours during the petitioner's 2004-2005 season. In his April 1, 2008 letter responding to the director's RFE, [REDACTED] the petitioner's artistic director, stated:

There are very few (possibly a hand full) of ballets in the classical repertoire choreographed for one dancer. [The petitioner] does not have any of these ballets in its repertoire. The reviews of [the beneficiary] therefore do not mention her solely, but include other members of [the petitioning organization] who dance

with her. Only as a guest artist might she receive solo critical acclaim . . . but as a member of [the petitioning organization], others are reviewed with her. That said, every time [the beneficiary] dances, she is singled out for her extraordinary talent and ability.

The petitioner submits no evidence showing that the beneficiary performed in a leading or critical role for the petitioning organization. Although the evidence reflects that the beneficiary has performed in leading roles in productions by the petitioner, nothing in the record distinguishes her from other soloists or principals in the company let alone its artistic management. In addition, although [REDACTED] stated that the beneficiary enabled the petitioning organization to perform more difficult ballets, and [REDACTED] and [REDACTED] attributed the rising success of the petitioning organization in part to the beneficiary, the petitioner submitted no evidence showing that the beneficiary is responsible for its 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 her field.

Counsel argues on appeal:

Nothing in § 204.5(h)(3)(viii) requires that the beneficiary “was or is responsible for the success and standing” of an organization. Nor is there any basis in the INA, regulations, or case law for the Decision’s rationale that even though [the beneficiary] has danced dozens of leading roles for [the petitioning organization] and Reiko Yamamoto Ballet Company, [the petitioner] also must show how her contributions as a prima ballerina were different from those of “all other dancers, production personnel and key employees in the overall organization.

Counsel asserts that the requirement to show how the beneficiary’s role differs from others in the organization “is arbitrary, capricious, and without support in the record.” However, in order to show that the beneficiary meets this criterion, the petitioner must show that the beneficiary performed in a position or at a level beyond that of rank and file members of the organization so as to establish that her role within that organization was leading or critical.

The petitioner has failed to establish that the beneficiary 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 petitioner provided a copy of the “contract of engagement” between the petitioner and the beneficiary for the 2007-2008 ballet season. The contract, although signed by [REDACTED] on behalf of the petitioner on December 19, 2006, does not contain the beneficiary’s signature. Without evidence of her signature, it is not clear that the contract was executed or in effect. Moreover, the contract indicated that the beneficiary was to be compensated at the rate of \$806 per week, and specified the period of the contract was August 27, 2007 to June 8, 2008. Therefore, at the time of filing, six months prior to the period specified in the contract, the

petitioner had yet to have received any salary. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); 8 C.F.R. § 103.2(b)(1), (12). The petitioner must establish that the beneficiary commanded a high salary or other significantly high remuneration prior to the filing date of the petition. It is noted that according to its own terms, the contract could be terminated by OBT for reasons such as the beneficiary's injury, poor attitude, unacceptable weight gain or loss, or unforeseen circumstances requiring the cancellation of rehearsals and performances. The contract further indicates that the beneficiary would not receive any contractually mandated salary until the week following her first week worked, which had yet to occur at the time of filing. Given these terms, it is apparent that the contract could be terminated prior to the beneficiary receiving any compensation. Such evidence does not establish that the petitioner "has commanded" a high salary at the time of filing. Counsel arguments on appeal regarding the beneficiary's contracts for the 2008 through 2011 seasons are lacking for the same reason.

In response to the RFE, the petitioner submitted a March 28, 2008 letter from its human resource manager attesting that the beneficiary, "[d]ue to her extraordinary ability and status[,] her compensation is top tier in our organization." The petitioner submitted no documentation of the beneficiary's actual compensation or how it compared to others in her field.

On appeal, the petitioner submits information from the Foreign Labor Data Certification Center website indicating that dancers at wage level 4 in the Portland-Vancouver-Beaverton area of Oregon and Washington earned \$16.75 per hour between July 2, 2007 and June 2, 2008. The petitioner submitted no documentation of the compensation received by dancers outside of this specified area. Therefore, the petitioner's evidence does not reflect the beneficiary's compensation relative to all others in her field of endeavor, much less salaries received by other dancers in OBT.

The petitioner has failed to establish that the beneficiary meets this criterion.

The regulation at 8 C.F.R. § 204.5(h)(4) states: "*If the above standards do not readily apply to the beneficiary's occupation*, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." [Emphasis added]. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation. However, we will briefly address other evidence the petitioner submitted under this provision.

Counsel asserts that the letters of recommendation submitted on behalf of the beneficiary are evidence of her contributions of major significance to the field of ballet. Counsel also asserts, "If the Service insists on its procrustean interpretation of the term "original contributions" that are inapplicable to classical ballet, it should consider that evidence under § 204.5(h)(4) instead." We note first that the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires the petitioner to establish that the beneficiary's original contributions are of major significance to the field. The petitioner failed to do this. Furthermore, we do not determine that a classical ballet dancer cannot make

original contributions or original contributions of major significance to the field. We only hold that the petitioner failed to establish that the beneficiary made such contributions.

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 her field of endeavor. Review of the record, however, does not establish that the petitioner has distinguished herself to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

Finally, counsel asserts on appeal that USCIS has approved petitions for others with similar achievements and asserts that the regulations have been applied more restrictively for the beneficiary. Those cases and the specific facts of those cases, which include, for instance, information on awards and publication, are not in the record. Without the records, it cannot be determined whether the facts of any other case are similar to those of the present case. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous immigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. As previously indicated, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *Matter of Church Scientology International*, 19 I&N Dec. at 597.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.