

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B2

[REDACTED]

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER

Date: AUG 06 2010

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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

[REDACTED]

Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and affirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in athletics, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The petitioner is an athletic trainer. 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.

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.

On appeal, counsel submits a brief and a newspaper article that postdates the filing of the petition. The petitioner must establish his eligibility as of the filing date. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). As such, we cannot consider this new evidence under 8 C.F.R. § 204.5(h)(3)(iii) (requiring evidence of published material about the alien). For the reasons discussed below, we uphold the director's ultimate finding that the petitioner has not established eligibility for the exclusive classification sought.

While U.S. Citizenship and Immigration Services (USCIS) approved at least one 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 beneficiary's qualifications).

Moreover, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross



error on the part of the director. Due to the lack of required initial evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant visa petition.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged error as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved a nonimmigrant petition 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).

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.

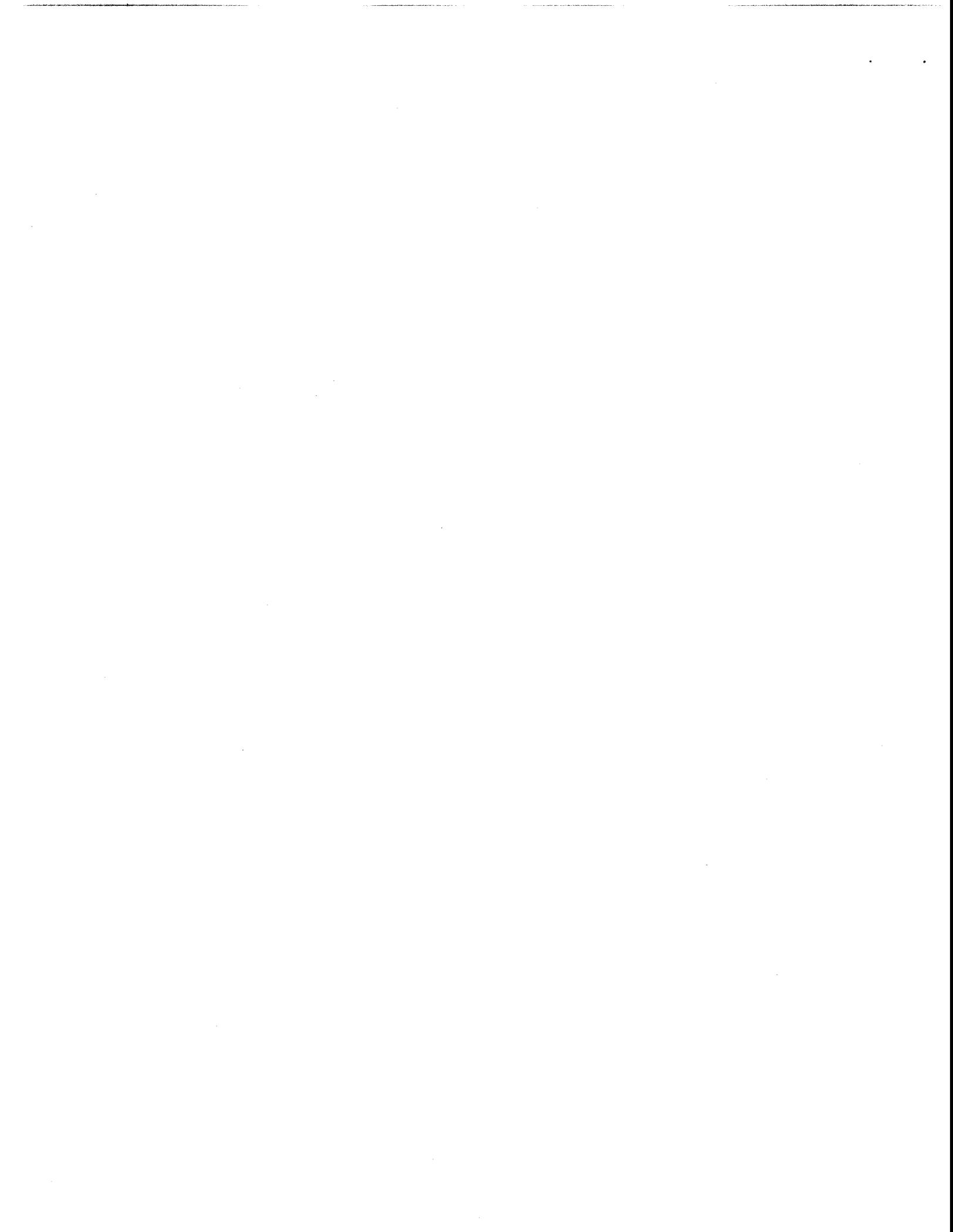
USCIS and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).



The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the following ten categories of evidence.

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) 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;
- (iii) 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;
- (iv) 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 specialization for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
- (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the



court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both 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," 8 C.F.R. § 204.5(h)(2), and "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)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at 1119-20.

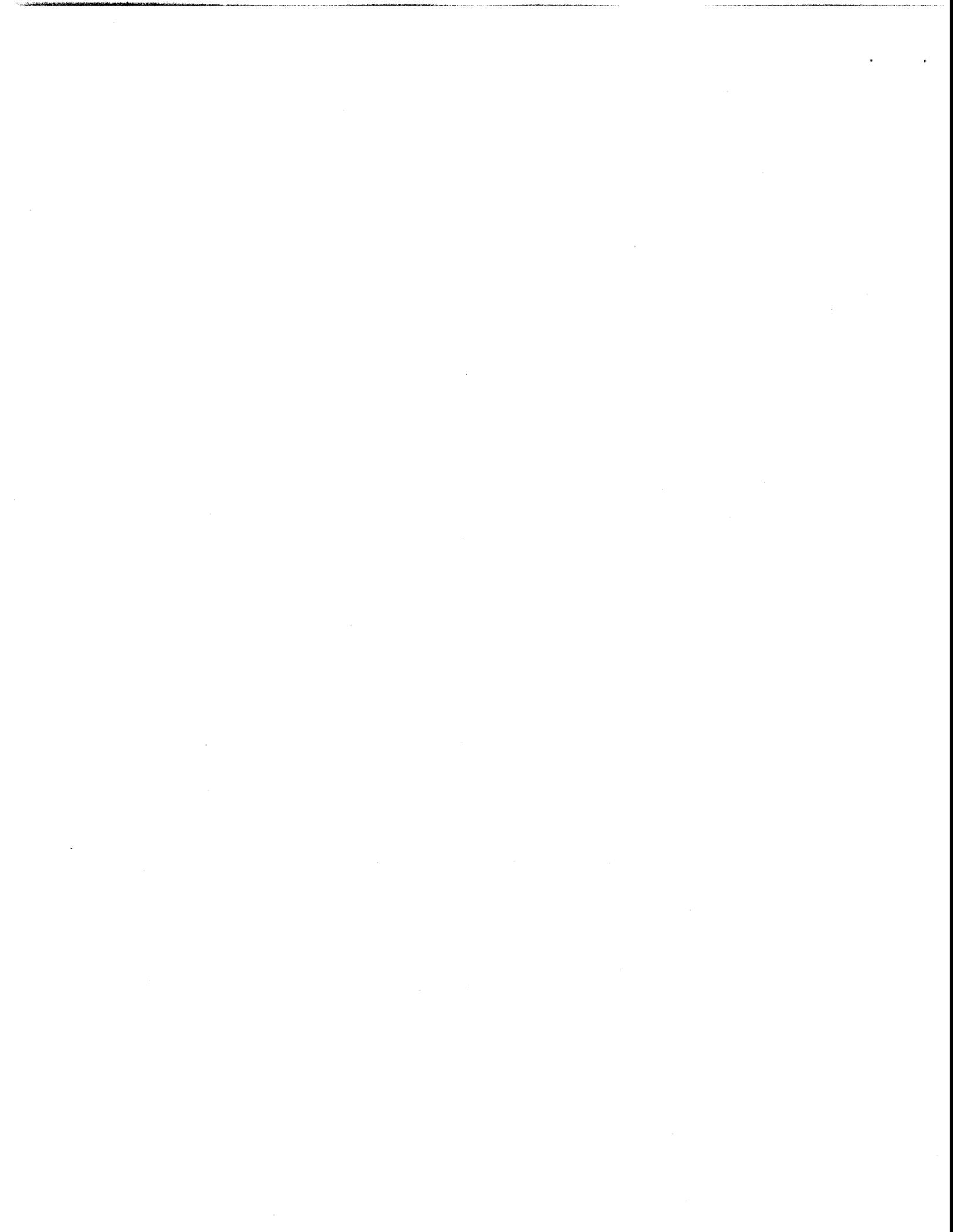
Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See 8 C.F.R. 103.3(a)(1)(iv); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (recognizing the AAO's *de novo* authority).

II. Analysis

At the outset, we note that the supplementary information at 56 Fed. Reg. 60899 (Nov. 29, 1991) states:

The Service disagrees that all athletes performing at the major league level should automatically meet the "extraordinary ability" standard. . . . A blanket rule for all major

¹ Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).



league athletes would contravene Congress' intent to reserve this category to "that small percentage of individuals who have risen to the very top of their field of endeavor."

We find that the reasoning expressed in this language is equally applicable to athletic trainers serving major league teams.

A. Evidentiary Criteria²

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.

Initially, counsel asserts that the petitioner's membership in the [REDACTED]

[REDACTED] serve as qualifying evidence under 8 C.F.R. § 204.5(h)(3)(ii). Counsel, however, relies solely on the petitioner's self-serving resume as the evidence documenting these memberships. The director noted the lack of evidence documenting the petitioner's membership in these societies and concluded that the petitioner had also not provided any evidence of the membership requirements for these societies. Counsel did not challenge these conclusions on motion or appeal.

In light of the above, the petitioner has not submitted the required initial evidence under 8 C.F.R. § 204.5(h)(3)(ii).

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.

Initially, counsel asserted that the petitioner "is featured in Major Magazines and Newspapers throughout the world." The petitioner initially submitted several foreign language articles with uncertified translations that are barely comprehensible. The regulation at 8 C.F.R. § 103.2(b)(3) requires that all foreign language documents be accompanied by complete certified translations. Most of the translations do not provide the date and author and some do not identify the publication. The petitioner did not submit the circulation or distribution data for the publications or any other evidence that would confirm that the publications are professional or major trade publications or other major media. The director concluded that with one exception, the articles were not about the petitioner.

On motion, the petitioner submitted a 2007 article in the *Los Angeles Times* about [REDACTED]. The article notes that the petitioner would return for a fourth season as the team's massage therapist. The article, however, also discusses new hires and

² The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.



provides updates on injured players. The article identifies the Cleveland Indians as having the medical department as "among the best in baseball at preventing injuries." Counsel asserted that the article was being submitted "in addition to the numerous articles previously submitted."

The director noted that qualifying evidence under 8 C.F.R. § 204.5(h)(3)(iii) consists of published material where the petitioner is the "focal point" and that appears in professional or major trade publications or other major media. The director concluded that the submitted evidence did not meet these requirements.

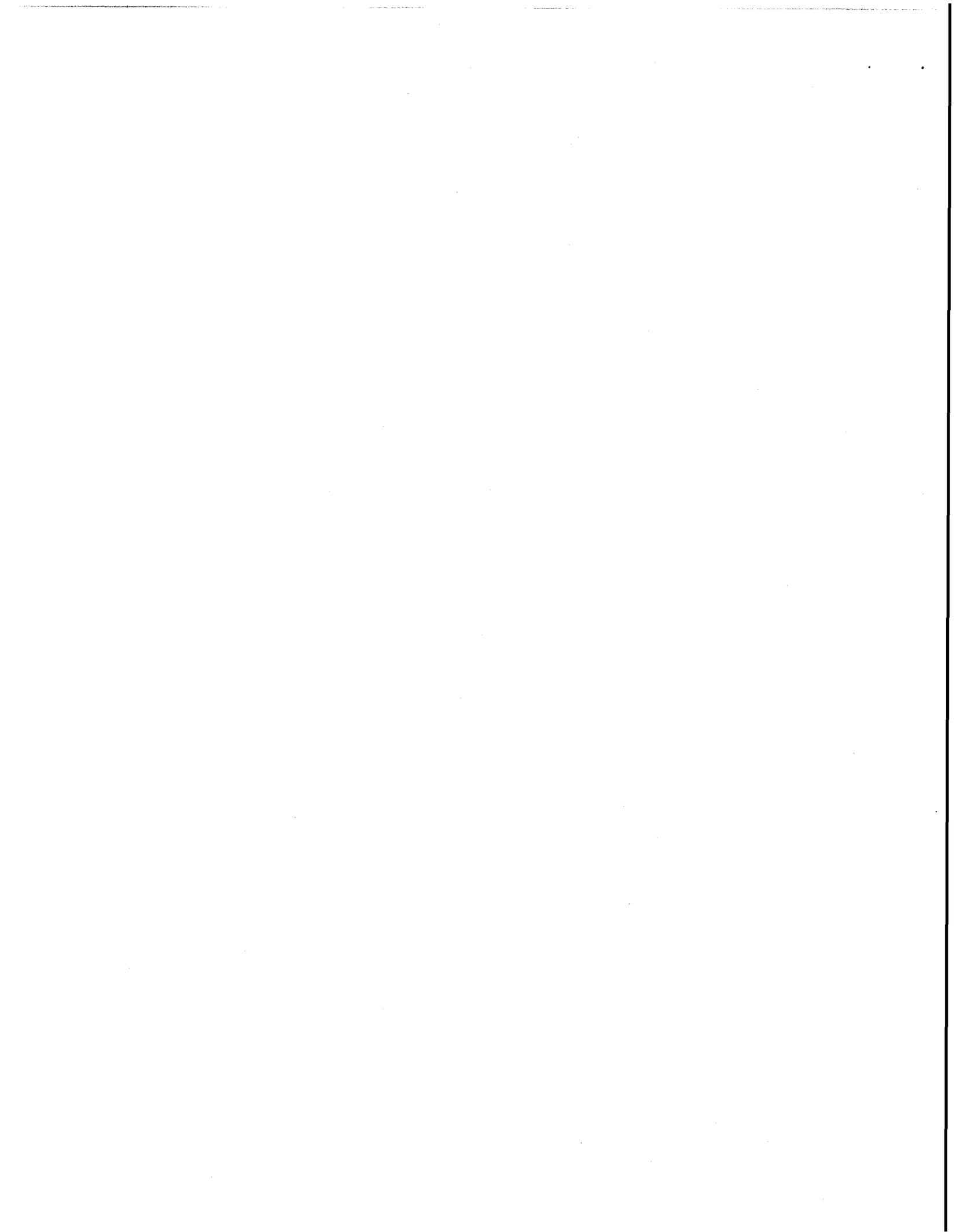
On appeal, counsel submits another article in the [REDACTED] dated September 11, 2009 and asserts that this article demonstrates how the petitioner was part of the [REDACTED] under [REDACTED] leadership. Counsel notes that the article states that, of the trainers on the staff, the petitioner was [REDACTED]. **The article is primarily about the Dodgers' goal of finishing the season with six or more players with at least 500 plate appearances.** The nearly three-page article mentions the petitioner in only a single sentence.

The petition was filed on May 14, 2009. Thus, any qualifying published material submitted under 8 C.F.R. § 204.5(h)(3)(iii) must have been published prior to that date. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak*, 14 I&N Dec. at 49; see also *Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that he will subsequently be covered by qualifying media. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008).

We concur with the director that the 2007 *Los Angeles Times* article is not "about" the petitioner relating to his work. Rather, it is primarily about [REDACTED] **change in his department's philosophy and structure.**

Regarding the initial published material submitted, as stated above, the translations are not certified as required under 8 C.F.R. § 103.2(b)(3) and are difficult to comprehend. Even assuming that any of these articles are primarily "about" the petitioner, the record lacks any evidence of the circulation or distribution of the publications in which these articles appeared. As stated above, the petitioner also failed to comply with the regulation at 8 C.F.R. § 204.5(h)(3)(iii) by providing the date and author of each article.

In light of the above, the petitioner has not submitted the required initial evidence under 8 C.F.R. § 204.5(h)(3)(iii).



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

According to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be both original and of major significance. We must presume that the word "original" and the phrase "major significance" are not superfluous and, thus, that they have some meaning. To demonstrate an original contribution of major significance in the field of athletic training, it can be expected that other teams would be demonstrably influenced by training techniques developed by the petitioner. The application of traditional methods in a different region from where they were developed does not transform those traditional methods into something "original."

Initially, counsel stated:

The distinguished reputation of the [redacted] will be a driving force in the establishment of [the petitioner's] career in the United States, particularly in Southern California. The reputable professional baseball organization will lead to events, competitions and possible championships nationwide with [the petitioner] as a representative of the prestigious [redacted]

(Emphasis in original.) This statement does not explain how the petitioner has already made contributions of major significance in the field of athletic training. Counsel references "EXHIBIT D," which consists of letters from individuals associated with the [redacted] a representative of the [redacted] and an official with the [redacted] the Japanese team for which the petitioner previously worked.

[redacted] confirms the team's interest in continuing to employ the petitioner and affirms that the petitioner does [redacted] and treats many of the players on a daily basis.

[redacted] asserts that the petitioner [redacted] While [redacted] confirms that he has seen Japanese massage and acupuncture introduced to Major League training rooms over the years and confirms its effectiveness, he does not suggest that the petitioner developed these methods or that he has influenced the introduction of such treatments.

[redacted] states that he has met few athletic trainers with the petitioner's [redacted] The only examples [redacted] provides are Japanese massage and acupuncture, which he does not suggest the petitioner developed or expanded. [redacted] does not suggest that the petitioner has influenced athletic trainers beyond the [redacted]



██████████ asserts that the Japanese massage and acupuncture provided by the petitioner were not available to ██████████ during his previous service for the ██████████. While ██████████ asserts that his ability to perform at the level he does for the ██████████ is due to the petitioner's abilities, he does not assert that the petitioner has developed original techniques rather than apply traditional Japanese techniques or explain how the petitioner is influencing athletic training as a whole.

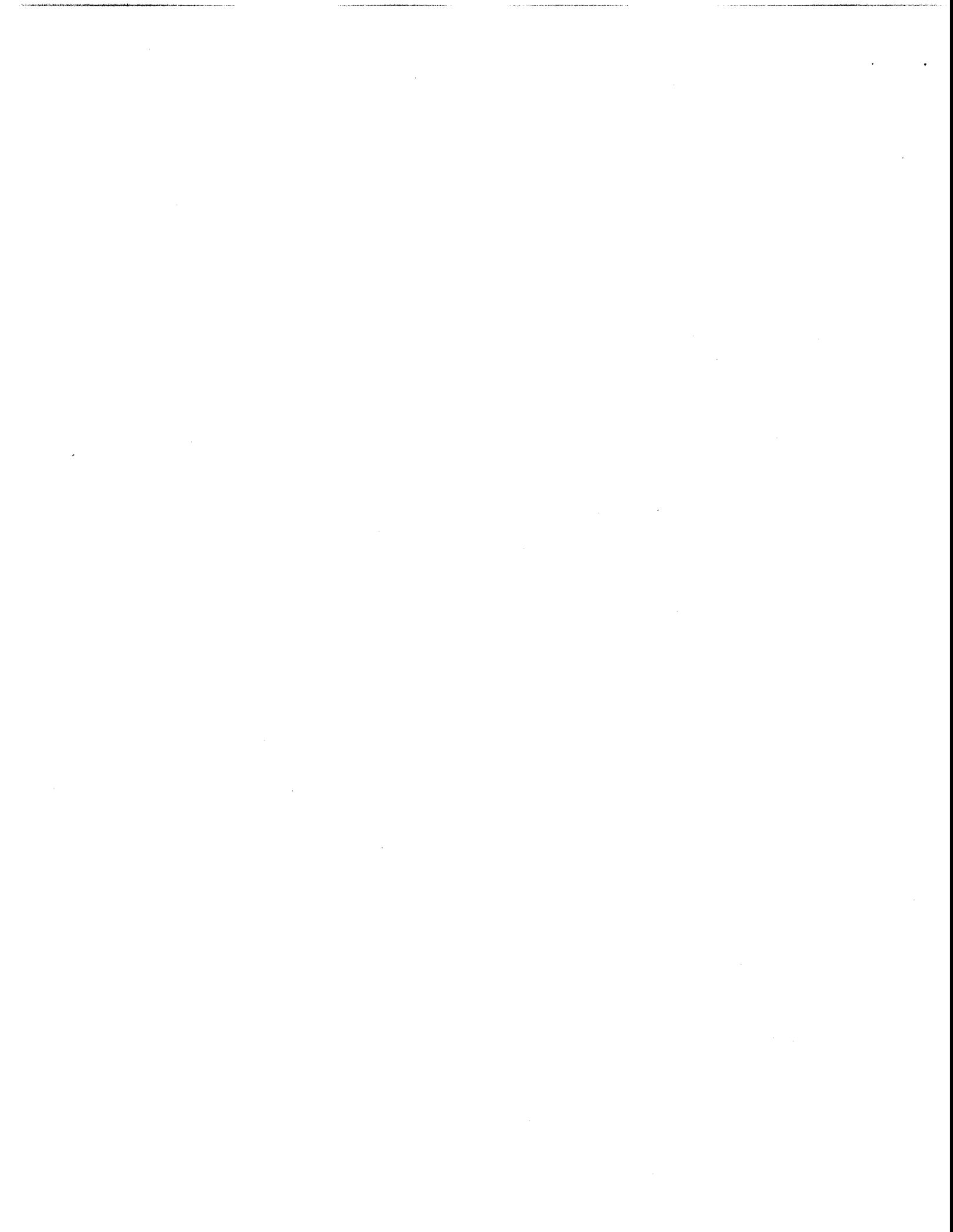
██████████ asserts that when in Japan, he received treatments based on Japanese "teachings" and "was very happy that I was able to receive the same kind of treatment by [the petitioner] here in the [S]tates too." This statement confirms that the petitioner is familiar with Japanese techniques that, while possibly less practiced in the United States, are not "original."

The petitioner also provides similar letters from other ██████████ players who praise the petitioner's skills and credit him with their own performances. None of these letters explain how the petitioner's techniques are original in that he developed them or how the petitioner's influence has extended outside the ██████████.

██████████ affirms the petitioner's "extraordinary ability" but does not explain how the petitioner's contributions, if any, are original or of major significance in the field of athletic training.

██████████ confirms that the petitioner was an ██████████. ██████████ discusses the reputation of this professional baseball team in Japan. He explains that the petitioner served as an ██████████ for the team and its subsidiary minor league teams, as head athletic trainer for a minor league team and as a trainer during the ██████████. ██████████ explains that the petitioner prepared individualized exercise and training programs and rehabilitation programs and therapies for injured athletes. While the programs may have been individualized for each athlete, ██████████ does not assert that they were "original" in that they utilized novel techniques. ██████████ does not suggest that other trainers have been influenced by the petitioner.

The director acknowledged the submission of letters, but concluded that they did not establish that the petitioner has made significant contributions to the field of athletic training. On motion, counsel asserted that the letters provided "did in fact praise the rare techniques [the petitioner] uses to rehabilitate these professional baseball players." "Rare" is not synonymous with "original." The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *New York State Dep't of Transp.*, 22 I&N Dec. 215, 221 (Comm'r 1998). The director concluded that the petitioner had not demonstrated that his contributions have been significantly influential and noted that performing one's job competently is not a contribution of major significance to the field.



On appeal, counsel submits the 2009 article in the *Los Angeles Times* and asserts that it demonstrates the petitioner's contribution to the philosophy of the [REDACTED] and the health of the team's players. Insofar as the article discusses the petitioner's employment prior to the date of filing, we will consider this article. The article discusses the importance of keeping players off the disabled list, noting that of the seven teams that were projected to finish the season with six or more players with 500 plate appearances, only the [REDACTED] had a losing record. The article further states that [REDACTED] has been responsible for increasing the number of players with 500 or more plate appearances. While Mr. [REDACTED] allowed the petitioner to remain, the article reveals that the prevention of injuries increased with [REDACTED] arrival, not the petitioner's. The article also references [REDACTED] use of platelet rich plasma. The record contains no evidence that the petitioner developed this technique.

The record reveals that the petitioner is skilled in Japanese massage and acupuncture treatments, traditional techniques that the petitioner did not develop or expand. Even assuming that introducing those techniques to the [REDACTED]s somehow "original," the petitioner has not established that these techniques are contributions of major significance in the field as a whole. The record contains no evidence that other teams have taken notice of the techniques being used by the [REDACTED]s and are emulating their use rather than simply following a national trend of using Eastern-based massage and acupuncture techniques.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

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

The petitioner submitted his contract with Major League Baseball listing his position as [REDACTED]. The 2007 article in the [REDACTED] identifies the petitioner as the team's massage therapist. The record also contains the above-mentioned letter from [REDACTED] regarding the petitioner's position with the [REDACTED]. The director concluded that the petitioner's position within the team's hierarchy did not suggest that the petitioner's role was either leading or critical. On motion, counsel asserted that the petitioner performed a leading or critical role for the [REDACTED] and, as the team's only massage therapist and acupuncturist, serves a leading or critical role for the [REDACTED]. The director reaffirmed his previous conclusion. On appeal, counsel reiterates previous assertions.

According to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the petitioner must demonstrate that the role for which he was selected is leading or critical and that the organization or establishment that selected him enjoys a distinguished reputation. While letters and contracts explaining the petitioner's title and position are useful evidence, other helpful evidence may also include organizational charts that explain how the petitioner fits within the organization's or establishment's hierarchy.



As stated above, [REDACTED] confirms that the petitioner was an athletic trainer for the [REDACTED] and the head athletic trainer for an associated minor league team. The petitioner was also one of an unknown number of athletic trainers for an All-Star game in 2003 and a Japan Championship series in 2003. [REDACTED] does not state how many athletic trainers worked for the major league [REDACTED] team and how the petitioner fit within the hierarchy of these trainers. We acknowledge that the petitioner played a leading or critical role for the minor league team, but the record lacks evidence that this team enjoyed a distinguished reputation. As stated above, the record lacks evidence regarding the number of trainers for the All-Star game or the championship series or evidence explaining how the petitioner fit within the hierarchy of these trainers.

Even if we concluded that the petitioner played a critical role for the [REDACTED], the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence of such a role for organizations or establishments in the plural, consistent with the statutory requirement for extensive evidence at section 203(b)(1)(A)(i) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. Thus, we can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation.³

We are not persuaded that the petitioner's role as the team's *sole* massage therapist and acupuncturist is determinative. The existence of the petitioner's position demonstrates that the team wishes to employ a competent massage therapist and acupuncturist, but the existence of a position does not establish that it is a critical or leading role for the employer within the context of 8 C.F.R. § 204.5(h)(3)(viii).

The petitioner's contract identifies him as an assistant athletic trainer. He is referenced in the 2007 article as a massage therapist. The record contains no organizational chart or other evidence of how the petitioner fits into the hierarchy of the team's staff. Serving as an assistant athletic trainer is not a particularly leading or critical role for an athletic trainer. While we recognize that the petitioner is affiliated with a major league team, the regulation at 8 C.F.R. § 204.5(h)(3)(viii) does not suggest that employment for a distinguished entity alone is sufficient. As stated above, the supplementary information at 56 Fed. Reg. 60899 (Nov. 29, 1991) states that there is no blanket rule for athletes playing on a major league team.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

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

³ See *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).



The petitioner initially submitted the petitioner's contract for 2008 and 2009 reflecting a salary of \$43,000 in 2008 and \$45,000 in 2009 with a housing stipend of an additional \$5,400. A 2006 letter from [REDACTED] indicates that the team was offering the petitioner a salary of \$30,000 at that time. Counsel asserts that the petitioner would also receive "per diem." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner did not submit any wage data for athletic trainers.

The director initially concluded that the petitioner had not submitted qualifying evidence under 8 C.F.R. § 204.5(h)(3)(ix). The director reached this conclusion by going outside the record of proceeding and considering wage data at <http://www.bls.gov/oes/2009/may/oes299091.htm>, stating that the website indicates that the top ten percent of athletic trainers earn \$60,960 or more. The director did not, however, add this information to the record of proceeding. We accessed the site on August 5, 2010 and have incorporated the data into the record of proceeding, which now indicates that the top ten percent earn at least \$65,140.

On motion, the petitioner submitted his 2008 Form W-2 Wage and Tax Statements issued by the [REDACTED]. The petitioner appears to have been issued several Form W-2 statements, all but one of which are blank. The statement with wage data indicates that the petitioner earned \$152,757.26 in 2008, well above the 90th percentile wages in his field. Thus, the director concluded on motion that the petitioner had submitted qualifying evidence under 8 C.F.R. § 204.5(h)(3)(ix).

The petitioner, however, submitted no explanation from the [REDACTED] regarding the huge discrepancy between his contract and the Form W-2. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

At issue is how the alien's basic salary compares with the salary of other athletic trainers irrespective of any overtime the alien may work. Any remuneration other than salary, such as bonuses or reimbursement of travel expenses, must be compared with bonuses and expense reimbursement in the field and must be "significantly high."⁴ 8 C.F.R. § 204.5(h)(3)(ix). The record is absent any evidence explaining the type of remuneration represented by the difference between the \$43,000 salary and \$5,400 housing stipend stated in his contract and the \$152,757.26 he actually received. The record is also absent evidence that this other remuneration, distinct from his salary, is "significantly high" among athletic trainers.

Without additional evidence about the petitioner's compensation and that provided to other athletic trainers, the petitioner cannot meet his burden under the plain language requirements of 8 C.F.R. § 204.5(h)(3)(ix).

⁴ Regarding overtime, an alien cannot meet this criterion simply by working extra hours.



Summary

In light of the above, the petitioner has not submitted the requisite evidence under at least three of the evidentiary categories for which evidence must be submitted to meet the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. Nevertheless, we will review the evidence in the aggregate as part of our final merits determination.

B. Final Merits Determination

In accordance with the *Kazarian* opinion, we must next conduct 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," 8 C.F.R. § 204.5(h)(2); 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)(3). See *Kazarian*, 596 F.3d at 1119-20. We reiterate that the supplementary information at 56 Fed. Reg. 60899 (Nov. 29, 1991) states that there is no blanket rule for athletes playing on a major league team, which would appear equally applicable to the staff for such teams.

The published materials do not focus on the petitioner or the articles appear in publications with unknown circulation. While the content of these articles suggests that the petitioner's skills are valued by his employer, the articles are not indicative of or consistent with national or international acclaim.

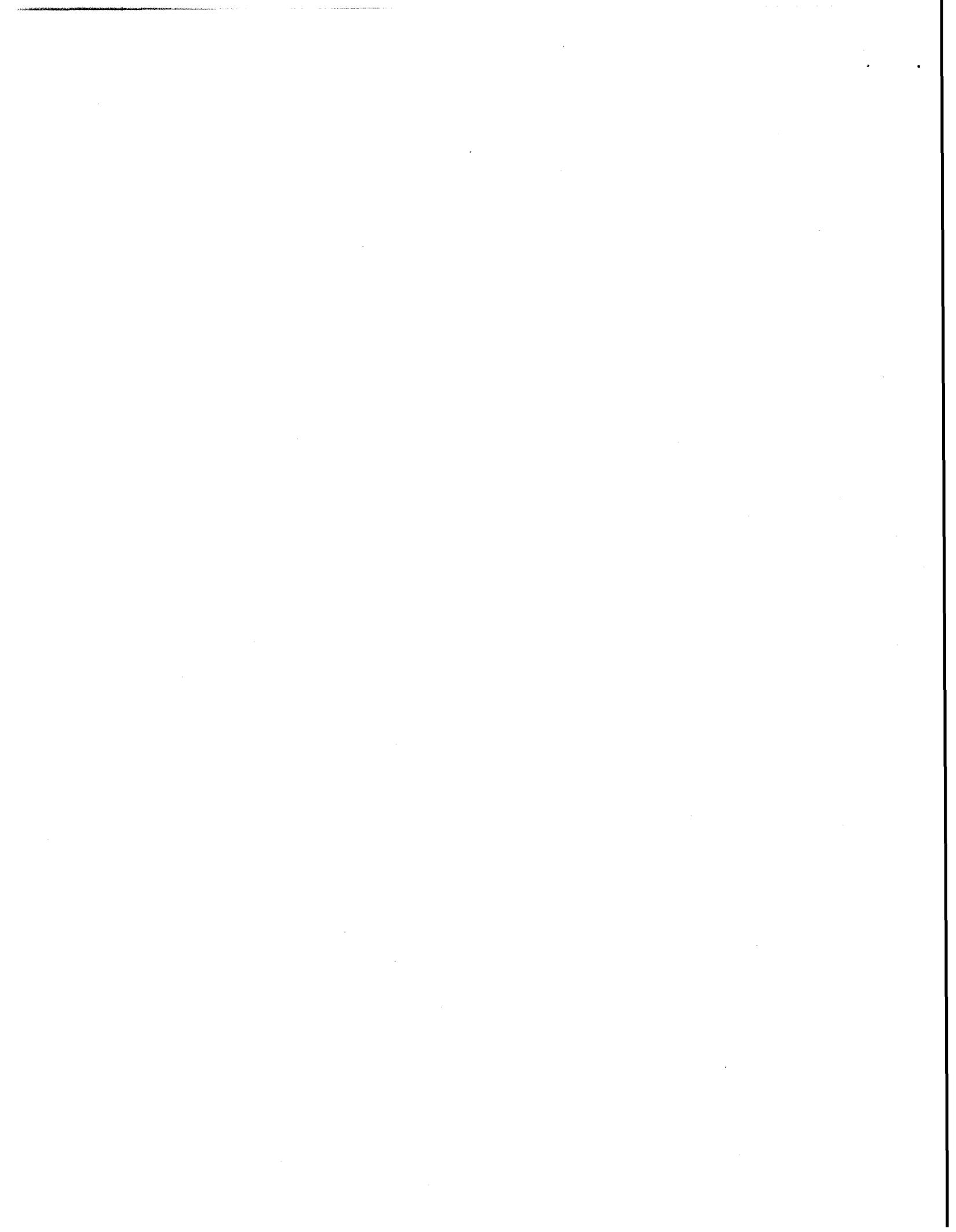
As stated above, the petitioner's skill at his job is not a contribution of major significance. We note that, according to a June 20, 2006 letter from ██████████ developing individualized treatments, rehabilitation schedules and reconditioning programs is an inherent duty for the position of athletic trainer.

The petitioner's role as an assistant athletic trainer is inherent to working in that occupation and does not set him apart from other athletic trainers. Finally, the record does not resolve the discrepancy between the petitioner's contract salary and the 2008 Form W-2.

Considering all of the evidence in the aggregate, the petitioner has not established that he enjoys sustained national or international acclaim or that his achievements have been recognized in the field of expertise.

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.



Review of the record, however, does not establish that the petitioner has distinguished himself as an athletic trainer 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 indicates that the petitioner shows talent as an athletic trainer, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his 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.

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.

