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: TEXAS SERVICE CENTER Date: AUG 1 2 2010

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:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on October 8, 2009, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary 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 as a radio announcer/host. The director determined that the petitioner had not established the beneficiary's requisite extraordinary ability and failed to submit extensive documentation of his sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the beneficiary's "sustained national or international acclaim" and present "extensive documentation" of his or her 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, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific 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 claims that the beneficiary meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. Law

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

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

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate his or her 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.*

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.

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 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

---

[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).

II. Analysis

A. Evidentiary Criteria

At the outset, while not addressed by the director, we note here that a review of the record of proceeding reflects that the petitioner submitted numerous non-certified English language translations and/or partial or summary translations. The regulation at 8 C.F.R. § 103.2(b) provides in pertinent part:

> (3) Translations. Any 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.

Because the petitioner failed to comply with 8 C.F.R. §103.2(b)(3), the AAO cannot determine whether the evidence supports the petitioner's claims. Accordingly, any evidence supported by a partial or non-certified translation is not probative and will not be accorded any weight in this proceeding.

This petition, filed on August 27, 2008, seeks to classify the beneficiary as an alien with extraordinary ability as a radio announcer/host. The petitioner has submitted evidence pertaining to the following criteria under the regulation at 8 C.F.R. § 204.5(h)(3). [2]

> *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 the beneficiary's eligibility for this criterion based on the beneficiary's receipt of the Golden Palms Award (GPA) on November 8, 2006, and the monitorLATINO Radio Awards (mLRA) on July 20, 2008. Regarding the GPA, the petitioner submitted the following documentation:

1. A certified translation of a letter from Erasmo Nacias, U.S. Delegate of the National Circle of Journalists (NCJ);
2. A partial and translation of an article entitled, *Golden Palms 2006*, from www.PortalTuscon.com;
3. A partial and uncertified translation of a description of the GPA from the National Circle of Journalists (NCJ);
4. A partial and uncertified translation of an article entitled, *A Shower of Stars Fell on Phoenix*, from La Voz regarding the 2006 GPA ceremony;

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

5. A partial and uncertified translation of an article from www.hispanicprwire.com regarding and her expected attendance at the 2006 GPA ceremony; and
6. Documentation from www.southbaytix.com regarding tickets for the GPA.

Regarding the mLRA, the petitioner submitted the following documentation:

7. A certified translation of a letter from Latin Radio and Entertainment Convention (LREC), congratulating the beneficiary for being nominated for Announcer of the Year in a U.S. Medium Market;
8. A certified translation of a Certificate of Nomination from mLRA for the beneficiary in the Announcer of the Year category;
9. A certified translation of a letter from Mr. congratulating the beneficiary for winning the mLRA; and
10. A certified translation of an unidentified document reflecting the categories and nominated individuals of the mLRA.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor," and it is the petitioner's burden to establish every element of this criterion. In this case, the documentation submitted by the petitioner is insufficient to establish that the beneficiary received the GPA, and that the GPA and mLRA are nationally or internationally recognized prizes or awards.

Regarding the GPA, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "*[d]ocumentation of the alien's receipt* of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor [emphasis added]." The only documentary evidence submitted by the petitioner of the beneficiary's receipt of the GPA is a letter from Mr. who stated:

> For nearly 43 years the [NCJ], one of the most prestigious journalistic organizations in Mexico, has awarded the prestigious "GOLDEN PALMS" award to individuals of extraordinary talent in the fields of music, art, film, theater, and media.
>
> Through this award, which has international recognition, the [NCJ] acknowledges artists who have had the greatest impact in their fields.
>
> The [NCJ's] membership, including the most distinguished journalists in Mexico, consider a large number of artists in Mexico and the United States to select the winners at an annual gala event.
>
> [The beneficiary], also known as received a "Golden Palms" award on November 8, 2006 when the event was held in

> Phoenix, Arizona. With this award, the [NCJ] acknowledges [the beneficiary] as an extraordinary radio talent for his major professional achievements in the Phoenix market.

However, the regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. Where a record does not exist, the petitioner must submit an original written statement on letterhead from the relevant authority indicating the reason the record does not exist and whether similar records for the time and place are available. In this case, the petitioner failed to submit any documentary evidence demonstrating that primary and secondary evidence do not exist or cannot be obtained. As such, the letter from Mr. is insufficient to establish the beneficiary's receipt of the GPA.

Moreover, we are not persuaded that the documentary evidence submitted by the petitioner demonstrates that the GPA is a nationally or internationally recognized award for excellence. The petitioner submitted uncertified and/or partial translations for items 2 – 5. Regardless, while the documentation reflects that GPA garners some limited media coverage and tickets are sold for the event as evidenced by item 6, the attention of the GPA ceremony on two Internet websites and one publication, as well as the attendance of celebrities at the ceremony, are not necessarily indicative of a nationally or internationally recognized prize or award for excellence. Although Mr. described the GPA as "extraordinary" and "international[ly] recogni[zed]," the petitioner failed to submit sufficient independent, objective evidence to demonstrate that GPA is recognized nationally or internationally for excellence beyond the awarding entity.

Regarding mLRA, the petitioner submitted sufficient documentary evidence establishing the beneficiary's receipt of the mLRA. However, the petitioner failed to submit any documentary evidence demonstrating that mLRA is a nationally or internationally recognized prize or award for excellence. Merely submitting documentary evidence establishing the beneficiary's receipt of an award or prize is insufficient to meet this regulatory criterion, which also requires the awards or prizes to be nationally or internationally recognized for excellence.

Accordingly, the petitioner 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.*

The petitioner claims the beneficiary's eligibility for this criterion based on the following submitted documentation:

1. An uncertified translation of a document entitled, *The Voice of the Working Class*, unidentified date, unidentified author, Univision.com;
2. A partial translation of an article entitled, *The Brouhaha with the "Gatillero,"* unidentified date, unidentified author, Univision.com;
3. An uncertified translation of a snippet entitled, *El Gatillero for the Cucuy*, March 17 – 23, 2004, unidentified author, [redacted]
4. An uncertified and partial translation of an article entitled, *Gibran*, June 14 – 20, 2006, unidentified author, [redacted]
5. An uncertified and partial translation of a snippet entitled, *Gibran*, unidentified author, June 14 – 20, 2006; [redacted]
6. An uncertified and partial translation of an untitled article, March 12, 2004, unidentified author, [redacted]
7. An uncertified and partial translation of an article entitled, *The DJ Callejero del Gatillero Contest was a Total Success*, unidentified date, unidentified author, unidentified source;
8. An uncertified translation of an article entitled, *El Gatillero Replaces El Cucuy in the Evening*, unidentified date, [redacted], unidentified source;
9. An uncertified and partial translation of an article entitled, *El Show de El Gatillero Adds an Informative Twist*, February 8, 2006, [redacted]
10. An uncertified and partial translation of an article entitled, [redacted] *King of the Ratings*, December 29, 2004, [redacted]
11. An uncertified translation of an article entitled, *El Gatillero Replaces El Cucuy in the Evening*, March 17 – 23, 2004, [redacted]
12. An article entitled, *Univision Radio's Popular Midday Host David 'El Gatillero' Palacios*, Named Afternoon Drive-Time Disc Jockey on Los Angeles' KCSA, March 17, 2004, unidentified author, [redacted]; and
13. An article entitled, *'El Cucuy' Returning to Morning Radio*, March 18, 2004, [redacted], [redacted]

Regarding items 1 – 11, the petitioner submitted uncertified and/or partial translations of the foreign language documents. As 8 C.F.R. § 103.2(b)(3) specifically requires certified, full translations, we cannot consider any of this evidence to establish the beneficiary's eligibility. Furthermore, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that "[s]uch evidence shall include the title, date, and author of the material." However, the petitioner failed to include the title, date, and/or author of the material for items 1 – 8 and 12. As the petitioner failed to comply with the regulatory requirements, we also cannot consider this evidence in this proceeding. We further note that regarding items 7 and 8, the petitioner failed to identify where the material was published. As such, we are unable to determine if the material was published in professional or major trade publications or other major media.

Regarding item 13, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished 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." In other words, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about" the beneficiary relating to his work. *Compare* 8 C.F.R. § 204.5(i)(3)(i)(C) relating to outstanding researchers or professors pursuant to section 203(b)(1)(B) of the Act, which only requires published material about the alien's work. In this case, the article is about radio host, [redacted] returning to morning radio at KLAX-FM. In fact, the beneficiary is mentioned only one time as the replacement for [redacted] The article is insufficient to meet the plain language of this regulatory criterion. Furthermore, even if we found that this article met the eligibility requirements, which we do not, we do not find the beneficiary's single article meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) which indicates more than one is required.

Accordingly, the petitioner 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.*

In the director's decision, he found that the petitioner established the beneficiary's eligibility for this criterion. Specifically, the director stated:

> The evidence provided in the record does demonstrate the beneficiary has played a critical role for an organization. During the beneficiary's tenure as a radio personality in the Univision owned radio station, the beneficiary's time slot has brought in $4.7 million for the radio station. This amount makes up 21% of the revenue for the radio station. The beneficiary's time on the radio station during his time slot has increased the percentage of advertisement sponsorship, which has added an additional 2 – 3% to the bottom line of the radio station's revenue. Therefore, the beneficiary has met this element.

Based on a review of the record of proceeding, we are not persuaded that the documentary evidence submitted by the petitioner is sufficient to demonstrate that the beneficiary has performed in a leading or critical role consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). As such, we must withdraw the findings of the director for this criterion.

The petitioner submitted the following documentation:

1. A letter from [redacted] Vice President and General Manager for the petitioner, who stated:

> [The beneficiary] is our highest rated local talent on the station and commercials aired his shift alone account for over 21% of the revenues of the operation.
>
> Total Station Revenue 2007: $22,457,917
>
> PM Drive Contribution: $4,706,785
>
> This does not include the advertiser endorsement commercials with [the beneficiary's] voice and image that run outside of his day part. This revenue plus the paid promotional activity (special events, remotes and personal appearances) executed by [the beneficiary] supply an additional 2 – 3% to the bottom line;

2. A chart from the petitioner entitled, *Gatillero PM Drive KHOT Revenue Impact*, reflecting that from 2006 to 2007, there was an increase of 2087 PM Drive Units Sold, there was an increase of PM Drive Total Revenue of $438,962, there was an increase of .2% in PM Drive Percentage of Total Revenue;

3. A document from the petitioner entitled, *El Show Del Gatillero De La Tarde*, which contains pictures of the beneficiary with captions at various promotional events; and

4. A press release from the petitioner entitled, *Univision Announces 2008 First Quarter Results*, which reflects that the petitioner ranked number one among adults 25 – 54 in four major markets including Los Angeles.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a *leading or critical role* for organizations or establishments that have a distinguished reputation [emphasis added]." At issue for this criterion are the position the beneficiary was selected to fill and the reputation of the entity that selected him. In this case, the petitioner based the beneficiary's eligibility on self-compiled documentation without any independent supporting documentation such as financial statements. Nonetheless, we are not persuaded that a radio announcer from the timeslot of 3:00 PM to 7:00 PM for a local radio station, who is ranked number one in the surrounding Phoenix area, demonstrates that he has performed in a leading or critical role consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). While the documentary evidence suggests that the beneficiary has the number one time slot compared to other local radio stations in the area and there was a slight increase in revenue from 2006 to 2007, the petitioner failed to submit documentary evidence establishing that the beneficiary's role as a 3:00 PM – 7:00 PM radio announcer constitutes a leading or critical role for the petitioner. We are simply not persuaded that evidence reflecting number one rankings or

slight revenue increases also demonstrates a leading or critical role for an organization or establishment.

In fact, the beneficiary's radio station, KHOT 105.9 is one of two radio stations operated under the umbrella of the petitioner. In addition, the petitioner failed to submit evidence showing the beneficiary's roles and positions in relation to that of the other employees of both radio stations, including other radio announcers much less the station manager or employees who sold advertisements during the beneficiary's time slot. There is no evidence demonstrating how the beneficiary's role differentiated him from the other radio announcers or hosts. In this case, the documentation submitted by the petitioner does not establish that the beneficiary was responsible for the success or standing to a degree consistent with the meaning of "leading or critical role" pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). Finally, even if the petitioner established that the beneficiary's role with the petitioner is leading or critical, the petitioner failed to meet the plain language of the regulation which requires leading or critical roles in more than one organization or establishment. In this case, the petitioner only submitted documentation as it relates to one organization. As such, we withdraw the findings of the director for this criterion.

Accordingly, the petitioner 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.*

In the director's decision, he concluded that the documentary evidence submitted by the beneficiary established eligibility for this criterion. However, based on a review of the record of proceeding, we must withdraw the findings of the director for this criterion.

The petitioner claimed the beneficiary's eligibility for this criterion based on the following submitted documentation:

1. An employment agreement between the petitioner and beneficiary reflecting an annual base salary of $130,000, with possible annual bonuses up to $30,000;
2. Copies of five pay stubs; and
3. Documentation from Online Wage Library (OWL) – Foreign Labor Certification reflecting the following information for level 4 wage for radio and television announcers:

    A. Phoenix – Mesa, AZ - $50,660/year;
    B. Miami – Miami Beach – Kendall, FL - $59,738/year;
    C. Los Angeles – Long Beach – Glendale, CA - $75,462/year; and
    D. New York – White Plains – Wayne, NY - $85,987/year.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires "[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, *in relation to others in the field* [emphasis added]." In this case, the petitioner submitted evidence from OWL showing the median level 4 wages (fully competent) of radio and television announcers from four metropolitan regions. However, median regional wage statistics are not sufficient to meet this requirement. Accordingly, the petitioner has not established that the beneficiary's salary is significantly high in relation to other radio announcers as a whole and not limited to the Phoenix, Miami, Los Angeles, and New York surrounding areas.

As this regulatory criterion specifically requires the petitioner to demonstrate that the beneficiary has commanded a high salary "in relation to others in the field," the documentary evidence submitted by the petitioner fails to reflect that the beneficiary has earned a level of compensation that is significantly high compared to others in his field. As such, we withdraw the findings of the director for this criterion.

Accordingly, the petitioner failed to establish that the beneficiary 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.*

In the director's decision, he found that the petitioner failed to submit any documentary evidence for this criterion. However, at the time of the filing of the petition, counsel specifically claimed the beneficiary's eligibility for this criterion and stated:

> To support this criterion, we are submitting Arbitron ratings data to prove the level of commercial success achieved by the beneficiary during his time slot. Under TAB 5 we are submitting evidence regarding [the beneficiary's] high ratings performance for KHOT-FM, La Nueva 105.9 for his time slot.

On appeal, we will address and discuss the petitioner's submitted documentation as it relates to the beneficiary's eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted statistical data from Arbitron reflecting that the beneficiary's timeslot from Fall 2004 to Fall 2007 ranked between 1st and 5th, with emphasis that the beneficiary was ranked 1st for adults between 18 – 34 for the majority of the time. In addition, the petitioner submitted an uncertified and partial translation of an article entitled, *David Palacios El Gatillero King of the Ratings*. We have already addressed this evidence in the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii) and found that as the evidence failed to comply with the requirements at 8 C.F.R. § 103.2(b)(3), we could not accord it any weight in this proceeding.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires "[e]vidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales." The plain language of this regulatory criterion specifically requires the petitioner to submit "box office receipts or record, cassette, compact disk, or video sales."

However, we are not persuaded that the beneficiary's Arbitron ratings and rankings or the "additional 2 – 3%" supplied by the beneficiary to the petitioner's bottom line through advertisements and promotions are tantamount to evidence of "box office receipts or record, cassette, compact disk, or video sales" that is required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x).

Accordingly, the petitioner failed to establish that the beneficiary meets this criterion.

B. Comparable Evidence

On appeal, counsel states:

> In its denial, USCIS does not mention that comparable evidence is acceptable to support a petition for an alien of extraordinary ability. The petitioner submitted plenty of documentation in accordance with this criterion as set forth in 8 C.F.R. § 204.5(h)(4). Specifically, we included numerous letters from experts in the filed [sic] who attested that [the beneficiary] is an alien of extraordinary ability in the field.

The regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the following regulation categories. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. We further acknowledge that the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to the beneficiary's occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the beneficiary's occupation as a radio host cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, counsel mentions evidence in his brief that specifically addresses five of the ten criteria at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the beneficiary's occupation. Moreover, although the petitioner failed to claim these additional criteria, we find that a radio host could be a member of organizations requiring outstanding achievements, that a radio host could participate as a judge of others, and that a radio host could make original contributions of major significance. Counsel provided no documentation as to why these provisions of the regulation would not also be appropriate to the profession of a radio host or announcer.

While the petitioner submitted five letters of recommendation from and highly praising the beneficiary for his talents as a radio host, where an alien is simply unable to meet or submit documentary evidence of at least three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

C. 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." *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). *See also Kazarian,* 596 F.3d at 1115. The petitioner failed to establish the beneficiary's eligibility for any of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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." The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), 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). In this case, the beneficiary is a radio host at a local radio station in the Phoenix, AZ area, and the documentary evidence submitted by the petitioner relates to the beneficiary's acclaim and accomplishments at the local level rather than at the national or international level. For example, the letter from Mr. stated that the beneficiary is "an extraordinary radio talent for his major professional achievements in the Phoenix market." Although the petitioner failed to establish the beneficiary's eligibility under the awards criterion, the petitioner based the beneficiary's eligibility on only two awards based on the beneficiary's work at a local radio station.

Furthermore, while the petitioner failed to establish the beneficiary's eligibility under the published material criterion, the petitioner submitted documentary evidence ranging from 2004 to 2006. We do not find that such evidence, spanning a period of only two years, reflects the beneficiary's sustained national or international acclaim. Moreover, the petition was filed on

August 27, 2008, yet, the date of the last article submitted was in June 2006, more than two years prior the filing of the petition.

In addition, we cannot ignore that the statute requires the petitioner to submit "extensive documentation" of the beneficiary's sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). In this case, the petitioner based the beneficiary's eligibility on several documents, which failed to comply with the regulatory requirements of certified and full translations. Notwithstanding, the limited documentation submitted by the petitioner failed to demonstrate the beneficiary's critical or leading role for the petitioner, which the petitioner only claimed the beneficiary's eligibility based on one organization, as well as evidence reflecting the beneficiary's salary compared to others in his field. While the beneficiary's salary is high when only compared to others in select metropolitan areas, the petitioner failed to establish that the beneficiary is one of highest paid radio announcers compared to nationally or internationally renowned hosts.

Finally, while the beneficiary's achievements of averaging the number one radio show for four hours a day is an admirable personal achievement and impacts positively for the local radio station in terms of revenue, we are not persuaded that such accomplishments demonstrate sustained national or international acclaim and reflect that the beneficiary "is one of that small percentage who have risen to the very top of the field." In addition, the petitioner has not demonstrated the beneficiary's "career of acclaimed work in the field" as contemplated by Congress. [redacted] Sept. 19, 1990).

The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. 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.

III. O-1 Nonimmigrant Admission

We note that the petitioner submitted evidence reflecting that the beneficiary was last admitted to the United States as an O-1 nonimmigrant on August 15, 2006. However, while USCIS has 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 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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

IV. Conclusion

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.