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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

FILE:

Office: TEXAS SERVICE CENTER

Date:

DEC 17 2010

IN RE:

Petitioner:

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:

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 \$630. 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 Director, Texas Service Center, denied the employment-based immigrant visa petition, which 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 the performing arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). 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 additional evidence. In general, counsel asserts that the AAO should take into account the number of visas Congress has set aside for the classification sought as evidence of Congressional intent in creating this classification, noting that the classification is currently undersubscribed. We find that the plain language of the statute and the discussion set forth in the legislative history is far more useful in determining Congressional intent than the number of visas allocated. Counsel cites no legal authority, and we know of none, supporting counsel’s implication that Congress intended that aliens unable to document sustained national or international acclaim should nevertheless be approved for the classification sought if the classification is undersubscribed. Counsel’s more specific assertions will be addressed below. For the reasons set forth in the remainder of this decision, we concur with the director’s ultimate conclusion that the petitioner has not established his eligibility for the exclusive classification sought.

At the outset, the AAO notes that U.S. Citizenship and Immigration Services (USCIS) has approved two previous O-1 nonimmigrant petitions in behalf of the petitioner. The O-1 nonimmigrant visa classification requires that the alien seek to enter the United States “to continue work in the area of extraordinary ability.” *See* section 101(a)(15)(O) of the Act, 8 U.S.C. § 1101(a)(15)(O). The most recent petition is within the petitioner’s current field of performing arts. The regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts*, however, are dramatically different. 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) as simply “distinction,” which is further defined as follows:

Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

The regulation relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field 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.” Unlike the regulations pertaining to the immigrant classification, separate criteria for nonimmigrant aliens of extraordinary ability in the arts are set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv). The distinction between these fields and the arts, which appears in 8 C.F.R. § 214(o), does not appear in 8 C.F.R. § 204.5(h). As such, the petitioner’s approval for a non-immigrant visa under the lesser standard of “distinction” using different criteria than those set forth at 8 C.F.R. § 204.5(h)(3) is not evidence of his eligibility for the similarly titled immigrant visa. Regardless, each petition must be adjudicated on its own merits under the regulations which apply to the benefit sought. Thus, the petitioner’s eligibility will be evaluated under the regulatory criteria relating to the immigrant classification, discussed below.

In addition, the initial O-1 nonimmigrant visa supports the beneficiary’s employment in the martial arts, a different field than the petitioner currently intends to pursue. Even assuming the petitioner had established eligibility as an athlete for the nonimmigrant petition, for the reasons discussed below, that would not create a presumption that he also qualifies for a similar immigrant petition as a performing artist.

Moreover, the prior nonimmigrant 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).

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. 593, 597 (Comm’r. 1988). 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 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 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).

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.

On appeal, counsel asserts: "USCIS takes the position that meeting the required regulatory criteria is not sufficient to result in approval of an EB-1 petition." Counsel suggests that this position is based on a proposed regulation that was never enacted and, thus, violates the Administrative Procedure Act (APA), 5 U.S.C. Subchapter II. Counsel provides no citation or source for USCIS' alleged "position." As counsel fully acknowledges, a federal circuit court recently challenged an AAO analysis that did not follow the "position" stated by counsel. Rather, the AAO had simply looked at whether the alien met the regulatory criteria. As discussed in more detail below, the federal court decision referenced by counsel on appeal concluded that the AAO's one-step analysis was in error and mandated an analysis of eligibility separate from simply "counting" the evidence under the criteria, in no way suggesting such a procedure would be a violation of the APA. In discussing this decision, however, counsel mischaracterizes the second step, a "final merits determination," mandated by that court.

More specifically, 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, as noted by counsel on appeal, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination.

On appeal, counsel asserts that the *Kazarian* court only contemplated the consideration of "evidence not implicated in the criteria or evidence contrary to the requirements of the criteria" in the final merits determination. A careful reading of the decision does not support counsel's assertion. Specifically, the *Kazarian* court stated that the quality of the evidence that technically meets a given criterion can be taken into account in the final merits determination. For example, while the court stated that internal judging responsibilities meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv), USCIS would not be precluded from taking into account that such internal duties are not indicative of or consistent with national or international acclaim. *Id.* at 1122. Similarly, the court expressly stated that while the authorship of scholarly articles meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi), USCIS would not be precluded from considering the field's response to those articles in a final merits determination. *Id.* Thus, it is clear that the court was not limiting a final merits determination to a consideration of whether adverse or derogatory evidence unrelated or "contrary" to

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).

the criteria exists. Instead, the *Kazarian* court was permitting USCIS to examine the significance of the evidence that falls under the regulatory criteria at this stage.

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

Before addressing the evidence, it is significant that section 203(b)(1)(A)(ii) requires that the alien seek to enter the United States to continue working in the area of extraordinary ability. On the Form I-140 petition, the petitioner indicated that the proposed employment was "Martial Arts Instructor/Dancer/Choreographer." The petitioner, however, has not documented any martial arts awards since 2004 and his most recent martial arts DVD dates from 2006. The petitioner also submitted a June 15, 2005 letter from [REDACTED], [REDACTED] confirming his intent to employ the petitioner as a Tae Kwon Do instructor and a martial arts consulting contract with the City of New York Parks and Recreation for a work order dated October 17, 2006. While the petitioner lists recent work as a martial arts instructor on his resume, the record contains no evidence of recent employment in the martial arts. Rather, the most recent evidence is from dance troupes. We further note that while the record contains references to the petitioner's skills as a choreographer, the programs and video credits in the record list the petitioner as a dancer only. As it appears that the petitioner seeks to work in the United States as a dancer, that is the area where he must demonstrate his extraordinary ability. While a martial artist and dancer may share some skills, martial arts and dancing are not the same area of expertise. See *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002) (coaching and competitive athletics are not the same area of expertise). In other words, it does not follow that dancing falls within the area of expertise of an individual who enjoys sustained national or international acclaim in the martial arts.

In light of the above, we will consider whether the petitioner has documented sustained national or international acclaim as a dancer.

A. Evidentiary Criteria²

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

Initially, the petitioner submitted the following evidence:

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

1. [REDACTED] from the South Central Tae Kwon Do Association where the petitioner was employed in 2004;
2. [REDACTED] for Black Belt Forms from the same association in 2004;
3. [REDACTED] from the same association in 2002;
4. A photograph of a trophy purportedly won by the petitioner at the New York City Challenge Karate Tournament in 2006 and a promotional flier for that tournament;
5. Certification as a First Degree Karate Do and for the rank of Second Dan in 1999 and 1997 respectively; and
6. A photograph of a first place trophy from the Urban Club purportedly won by the petitioner at the Urban Legacy Tournament in New York City in April 2006.

The petitioner lists an award from a tournament in Missoula, Montana on his self-serving resume but the record contains no evidence of this award. 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). Initially, the petitioner submitted a self-serving explanation for each award, asserting that each award drew competitors nationally. The petitioner failed to submit any evidence supporting these assertions.

In response to the director's request for additional evidence, the petitioner submitted internet materials about [REDACTED] indicating that [REDACTED] was "reportedly one of the men responsible for establishing structured tournaments in America" and founded the Goju system of Karate. The petitioner also submitted materials from Goju and Urban Cup websites containing pictures and promotions of the Urban Legacy Cup, held for the first time in 2006. The petitioner failed to submit any evidence, such as but not limited to media coverage, establishing that the Urban Cup is recognized beyond its promoters. USCIS need not rely on self-promotional material.³ Moreover, the materials submitted fail to confirm the petitioner's claim that the competition is national.

The petitioner also submitted evidence that [REDACTED] includes 18 schools in Pennsylvania, Maryland, Virginia, West Virginia, Indiana, Washington and New Jersey. Nothing in these materials indicates that the tournaments hosted by the association are open to the best competitors nationwide regardless of where they train. Rather, the competitions appear limited to

³ See *Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media).

students at these 18 schools. Once again, the petitioner failed to submit media coverage or other evidence suggesting that the association's tournaments are recognized in the field of martial arts beyond the association.

On appeal, counsel asserts that the director failed to consider a letter from [REDACTED] of the South Central Tae Kwon Do Association. [REDACTED] advises that a second degree black belt in Tae Kwon Do, a first degree brown belt in Karate and "the equivalent" of a second degree black belt in Kendo "places [the petitioner] easily in the top 10% of practitioners in the world." [REDACTED] then mentions the petitioner's awards at the South Central Tae Kwon Do Association's tournaments but does not address whether these tournaments are national. Rather, he states that the petitioner "is fully able to compete on the national level."

We are not persuaded that the normal progression in ranking acquired through examination represented by black belt and dan ranking are nationally or internationally recognized awards or prizes. Moreover, as the petitioner acknowledges that prizes and awards exist in the field of martial arts, comparable evidence pursuant to 8 C.F.R. § 204.5(h)(4) cannot be accepted.⁴

Finally, the petitioner seeks to enter the United States to perform as a dancer. Awards and prizes in the martial arts are not awards in the petitioner's current field of performing arts. [REDACTED] the petitioner's current employer, asserts that his dancers are not involved in martial arts competitions. The assertion that [REDACTED] dancers do not compete as martial artists does not establish that there are no nationally or internationally recognized awards in the field of dance such that the standards at 8 C.F.R. § 204.5(h)(3) are inapplicable. Even if such awards do not exist, and the record contains no support of such an assertion, counsel has not explained how awards in the martial arts are comparable to prizes or awards in the petitioner's current field of performing arts such that they can be considered pursuant to 8 C.F.R. § 204.5(h)(4).

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)(i).

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, the petitioner submitted a list of his alleged memberships. We reiterate that 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. at 165 (citing *Matter of Treasure Craft of California*, I&N Dec. at 190).

⁴ The regulation at 8 C.F.R. § 204.5(h)(4) permits the submission of comparable evidence where the standards set forth at 8 C.F.R. § 204.5(h)(3) do not "readily apply" to the alien's occupation.

In response to the director's request for additional evidence, the petitioner submitted his July 19, 2009 diploma from the Japan Karate Association licensing him at the first dan level. The petitioner also submitted general information about the association, including that it is the "world's largest and most prestigious karate organization." The petitioner also submitted the petitioner's 2010 Membership Certificate in Chung Do Kwan USA and materials from Chung Do Kwan's website indicating that it is a "new organization that unites practitioners of a Korean martial art first taught by [REDACTED] Members may compete in Chung Do Kwan sanctioned events. Finally, the petitioner submitted materials about the All Japan Kendo Federation but no evidence that the petitioner is, in fact, a member of the federation. Rather, as stated under the previous criterion, the petitioner is ranked as a second level dan by this federation. The materials provide the history of Kendo and the benefits of practicing Kendo but fail to specify any membership requirements.

On appeal, counsel once again references the letter from [REDACTED] While we acknowledge the assertions of [REDACTED] who is himself an 8th Dan Black Belt, they are not supported by official materials from the federation confirming the number of levels of dan in Kendo and the number of individuals certified at the various dan levels. Significantly, [REDACTED] states that the petitioner's black belt level only places him at the top of his age group.

The petitioner has not established that he is a member of an association that requires outstanding achievements of its members. While the petitioner has been tested at various belt and dan levels, he has not established that this certification is a "membership" in an "association" or that the progression of skill levels is an outstanding achievement.

Finally, once again, the petitioner seeks to work as a dancer. The petitioner acknowledges that he is not a member of any association in the field of dancing that requires outstanding achievements of its members.

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)(ii).

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

Initially, counsel referred the director to the petitioner's resume and evidence of the petitioner judging martial arts competitions. Counsel has not addressed this criterion in subsequent submissions. We reiterate that the petitioner's current field is dance. We are not persuaded that the martial arts are an "allied field." The record contains no evidence that the petitioner has judged other dancers or individuals in an allied field within the performing arts.

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)(iv).

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

On appeal, counsel asserts that the regulation at 8 C.F.R. § 204.5(h)(3)(v) does not require evidence of emulation. Counsel explains that others do not emulate a Pulitzer Prize winning author or composer and that it is the originality of the work that leads to the award. Counsel further asserts that because the petitioner's contributions are grounded in the martial arts, they are unlikely to be emulated in dance. Counsel concludes instead that the accolades of other dancers and the petitioner's authorship of a book demonstrate that he has made contributions of major significance.

Counsel is not persuasive. First, prizes and scholarly authorship fall under separate criteria set forth at 8 C.F.R. §§ 204.5(h)(3)(i), (vi) and are not presumptive evidence of a contribution of major significance in the field. Second, according to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. To be considered a contribution of major significance in the field of dance, the contribution must prove influential beyond the petitioner's own troupe.

The petitioner submitted evidence that the petitioner has produced three instructional martial arts DVDs. As stated above, the petitioner also authored a book, which bears no indicia of publication. The overall sales rankings of the DVDs on Amazon.com, according to printouts submitted by the petitioner prior to appeal, were between 25,898 and 27,172. The petitioner submitted no evidence regarding the sales of his book. On appeal, the petitioner submits evidence that one of his DVDs is a top ten seller among Independently Distributed Action and Adventure, a very limited class of DVDs. The petitioner still submits no actual sales figures. Without additional information as to how the petitioner's martial arts DVDs and book have influenced the field of dance, they cannot be considered persuasive evidence under 8 C.F.R. § 204.5(h)(3)(v).

██████████ the petitioner's employer, asserts that it is the petitioner's extraordinary contributions to the martial arts, his stylized movements, that make him an extraordinary dancer. ██████████ provides no examples of how the petitioner's martial arts movements are influencing the field of dance or are even widely recognized as of major significance within the field of dance.

██████████ a choreographer, director and performer and Artistic Director of his own company ██████████ asserts that the petitioner has a "remarkable and unique character," including his experience in the martial arts. ██████████ praises the petitioner's abilities and concludes that his value as a dancer is apparent from the company with which he works. ██████████ then praises ██████████. We will not infer a contribution of major significance from the reputation of the dance troupe with which the petitioner dances. While the petitioner submitted newspaper coverage of ██████████ the articles mostly predate the petitioner's affiliation with ██████████ and do not single out the

petitioner's performances. This material cannot demonstrate the significance of the petitioner's individual contributions in the field of dance.

founder of another dance company in New York City, praises the petitioner's dance achievements "though his natural flair for the martial arts." She further asserts that the petitioner's dances are different from her own and concludes that he has reached a "level of renown and achievement above that ordinarily encountered." USCIS need not accept primarily conclusory assertions.⁵

, notes that her company is the only Japanese opera company in the United States and "are very much interested" in the petitioner's form of Tae Kwon Do. confirms that she is exploring ways to use the petitioner's "choreographic skills as an instructor" as well as in an upcoming production. The petitioner submitted a program for that show listing the petitioner as a dancer. The portions of the program submitted for in which the petitioner appeared do not identify the choreographer.⁶ willingness to cast the petitioner does not demonstrate that he has made contributions of major significance in the field of dance. Rather, it demonstrates his ability to work in his field of endeavor.

an associate professor in the where the petitioner was previously a student, affirms the petitioner's talent in martial arts and dance, affirming that the college awarded the petitioner a scholarship. Once again, this letter does not establish the petitioner's influence in the field beyond the localities where he has lived.

In a letter submitted in response to the director's request for additional evidence, in New York City, asserts that she saw the petitioner which occurred after the date of filing. She further asserts that after seeing him perform, she invited him to perform in her troupe's production of While praises the petitioner's performance, explains how his experience with martial arts benefited his abilities as a dancer and asserts that his performance contributed to the troupe's prestige, she does not explain how the petitioner or his experience with the martial arts constitutes a contribution in the field of dance as a whole. While references reviews of the petitioner as a dancer, the record contains no such reviews.

In a joint letter, and both with credentials in the visual and performing arts, assert that the petitioner's incorporation of martial arts traditions into modern dance is original. By way of analogy, they note that the Washington Ballet, of which is a member of the Board, is currently presenting an original production based Accepting that the petitioner's use of his martial arts experience in his dance performances is original, it does not follow that this original style is a contribution of major significance in the field of dance. We reiterate that in order to

⁵ *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

⁶ In support of a previous immigrant petition, SRC 07-237-53058, the petitioner submitted the complete program, which identifies and as the choreographers of "Nasu No Yoichi."

demonstrate that the petitioner has made contributions of major significance in the field as a whole, the petitioner must demonstrate a wider influence or at least wide recognition of his style. As discussed above, while several references refer to his choreography, the record contains no programs listing the petitioner as a choreographer and the only choreography listed on his resume is "fight choreography," which is different from dance choreography. Moreover, the petitioner has not documented his experience as a fight choreographer.

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient.⁷ The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions of acclaim and vague claims of contributions without specifically identifying contributions and providing specific examples of how those contributions rise to a level consistent with major significance in the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.⁸ The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

⁷ *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" was insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122.

⁸ *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc.*, 745 F. Supp. at 15.

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

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires evidence of scholarly "articles" appearing in professional or major trade publications or other major media. Thus, counsel's assertion that the petitioner's DVDs fall under this regulation is not persuasive. Moreover, the petitioner's book has not been documented to constitute a professional or major trade publication or other major media. In fact, it bears no indicia of publication. Further, contrary to counsel's assertion on appeal, the instructional content does not create a presumption the materials are "scholarly." The record contains no evidence that the petitioner's DVDs or book were aimed at scholars or that scholars in dance or even the martial arts have taken any notice of the book. Finally, the petitioner has not authored any scholarly articles in the field of dance.

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

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

The petitioner submitted evidence of his appearances at martial arts events. These are not artistic exhibitions or showcases. Thus, they cannot be considered under the plain language of 8 C.F.R. § 204.5(h)(3)(vii). USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian*, 596 F.3d at 1221, citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir.2008).

The petitioner has also appeared on stage as a dancer and on a video of undocumented distribution. Even if we were to accept that this criterion applies to the performing arts such that this evidence meets the plain language of 8 C.F.R. § 204.5(h)(3)(vii), the petitioner would meet only a single regulatory criterion.

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

Initially, counsel asserted that the petitioner has played a leading or critical role for [REDACTED] and Harmonia Opera Company. While [REDACTED] and [REDACTED] praise the petitioner's talents and contributions to their troupes, at issue is the nature of the role the petitioner performed for these organizations. The programs in the file identify the petitioner as one of the troupes' dancers. The record contains no reviews singling out the petitioner from the other dancers. Without such evidence, the petitioner cannot establish that he has performed in a leading or critical role for either group.

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 submitted evidence that the hourly wages for the top ten percent of dancers nationally is \$28.01. While some dancers may not work full-time annually, such a wage, if full-time, would annualize to \$58,240. The proposed wages listed on the Form I-140 petition are \$600 per week. While the petitioner indicated his hours would vary, these weekly wages, if full time, annualize to only \$31,200. Regardless, the petitioner must have already earned a high salary in order to meet this criterion.

In support of his Form I-485 Application to Register Permanent Residence or Adjust Status, the petitioner submitted his Internal Revenue Service (IRS) Form 1040 U.S. Individual Income Tax Return for 2006. This form reflects that the petitioner's total income in 2006 was \$19,624.⁹ Of this amount, \$6,602 were wages and \$13,022 derived from business income. The petitioner did not include his Forms W-2 or schedule C such that we can determine the source of these funds. [REDACTED] asserts that "when dancing in a work that he has created, [the petitioner] earns a salary of \$29.00 per hour." The petitioner, however, does not submit a contract, Form W-2 or other evidence confirming that the petitioner has ever received this alleged salary. We reiterate that none of the programs submitted list the petitioner as the choreographer, the only situation for which [REDACTED] indicates that the petitioner receives \$29 per hour.

On appeal, counsel asserts that the director cites no evidence to support his conclusion that the petitioner's income listed on the 2006 tax return does not meet the threshold required for 8 C.F.R. § 204.5(h)(3)(ix) and references his own initial cover letter as evidence that the petitioner earns more than the top ten percent of wages for dancers identified by the Bureau of Labor Statistics. The unsupported assertions of counsel, however, 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).

[REDACTED] unsupported assertion that the petitioner is paid \$29 per hour for dances he has created is insufficient, especially given the lack of credits identifying the petitioner as choreographer. Once again, the record lacks contracts confirming or Forms W-2 consistent with a salary of \$29 per hour.

We acknowledge that the \$19,624 total income on the 2006 tax return may not represent full-time employment, but it is the only documentary evidence of the petitioner's salary in the record.¹⁰ Without

⁹ The director, looking at the petitioner's adjusted gross income after deductions, listed the petitioner's documented income as \$17,284. According to the plain language of 8 C.F.R. § 204.5(h)(3)(ix), however, at issue is the actual salary or remuneration, not what remains after deductions.

¹⁰ In support of a previous petition, [REDACTED] which is part of the record of proceeding, the petitioner submitted a 2005 contract between himself and Harmonia Opera Company, Inc. The contract indicates that the petitioner would be paid \$400 for 51.5 hours of rehearsal in addition to the show. Even if

documentary evidence, such as a contract, of the petitioner's more recent hourly salary, we have no evidence with which to make a meaningful comparison with the hourly data provided by the Bureau of Labor Statistics. The petitioner's only documented salary, \$19,624 for all of 2006, while potentially covering less than full-time employment, is less than one-third of the annualized salary for the top ten percent of dancers, \$58,240. Even assuming the full \$19,624 represents remuneration for dancing services, this evidence by itself does not reflect a high salary for a dancer.

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

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.

Ultimately, the evidence in the aggregate does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The petitioner, a dancer with a troupe that occasionally appears at festivals internationally, relies on prior experience as a martial artist, his association with reputable dance troupes, his alleged wages and the praise of his local peers. Without evidence of the impact of his past experience in the martial arts, the mere fact that the petitioner brings his experience as a martial artist to bear on his dance is not indicative of or consistent with national or international acclaim as a dancer. Moreover, simply performing on stage is inherent to the petitioner's occupation in the performing arts and, by itself, cannot demonstrate the petitioner's sustained national or international acclaim. As discussed above, the petitioner has not satisfactorily documented significant wages for a dancer. While we recognize the cultural significance of New York City, it remains that statute requires evidence of sustained national or international acclaim. Performing outside New York City on occasion does not necessarily establish any acclaim outside of that city. The record contains little evidence of the petitioner's recognition outside that city, such as but not limited to

we only considered the 51.5 hours of rehearsal, the petitioner was only paid \$7.77 per hour, far less than the \$28.01 per hour listed for the top ten percent of dancers.

individual reviews of his performances in newspapers outside of New York City. Even the letters submitted include only a single letter from a locality where the petitioner has not resided.

Regarding the petitioner's status in the field, we note that [REDACTED] was [REDACTED] [REDACTED] (the national opera house) and has created works for or received commissions from [REDACTED]. He has also directed and choreographed productions for the [REDACTED]. He is the subject of a published biography and received a lifetime achievement award at [REDACTED]. Even if we look at the field of martial arts, [REDACTED] has four black belts between third and seventh dan, higher dan levels than the petitioner has achieved. [REDACTED] was also inducted into [REDACTED] Master of the Year." [REDACTED] won first place in sparring at the U.S. National Tae Kwon Do Championships. Thus, it appears that the highest level in both martial arts and dance is far above the level the petitioner has attained.

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 a dancer 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 a dancer, 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.