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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

[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: DEC 28 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 \$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,

2 Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO reopened the matter on the petitioner's motion, and affirmed its appellate decision. The matter is now before the AAO on a subsequent motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner seeks classification as an "alien of extraordinary ability" in the 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 that the petitioner had not established the requisite extraordinary ability through extensive documentation and 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 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 motion, counsel argues that the petitioner meets the categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i), (iii), and (viii). For the reasons discussed below, we affirm our prior decision.

In addition to counsel's arguments, the petitioner submits evidence of his 2008 and 2009 Filipino community awards, activities, and performances in the United States. This evidence post-dates the petition's October 2, 2006 filing date. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). All of the case law on the issue of when eligibility must be established focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak*, 14 I&N Dec. at 49; *see also Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008). Accordingly, the AAO will not consider the petitioner's 2008 and 2009 community awards, activities, and performances in this proceeding.

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 an alien demonstrate his or her sustained acclaim and the recognition of his or her achievements in the field. Such acclaim and achievements must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through meeting at least three of the following ten categories of evidence:

(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

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

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

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

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

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

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

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).

Id. at 1119-1120.

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).

II. Analysis

A. Evidentiary Criteria

This petition seeks to classify the petitioner as an alien with extraordinary ability as a performing artist. The petitioner has submitted evidence pertaining to the following categories of evidence 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.

In finding that the petitioner's evidence did not satisfy this criterion, the AAO's October 29, 2009 decision stated:

The petitioner submitted photographs of trophies and award ceremonies featuring a small number of individuals sitting on the floor in a room with a drape and a handful of balloons as evidence that he won "Entertainer of the Year" at the 16th and 19th [REDACTED] in 2001 and 2004 and "Best Dressed" at the 13th, 14th, 15th, 16th, 17th and 18th [REDACTED] in 1998, 1999, 2000, 2001, 2002, and 2003. While the record contains a photograph of the petitioner seeming to receive the "Entertainer of the Year" trophy in 2001, the photograph of just the trophy itself appears to be enhanced with regard to the inscription, reducing the evidentiary weight of this evidence. Moreover, the July 30, 2004 article in the "Round the Biz" section of the [REDACTED] submitted by the petitioner, however, indicates that the petitioner received recognition as "Entertainer of the Year" during the 17th and 19th [REDACTED] in 2002 and 2004. While the discrepancy as to when the first "Entertainer of the Year" award was issued was not raised previously, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not

² On motion, the petitioner does not claim to meet or submit evidence relating to the categories of evidence not discussed in this decision.

suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

On motion, petitioner resubmits the same photographs as evidence that he won "Entertainer of the Year" at the 16th and 19th [REDACTED] in 2001 and 2004. The petitioner's motion does not address the AAO's observation that the July 30, 2004 article in the "Round the Biz" section of the [REDACTED] indicates that the petitioner received recognition as "Entertainer of the Year" during the 17th and 19th [REDACTED] in 2002 and 2004. Accordingly, the petitioner has not resolved the discrepancy between the date of the trophy in the photograph (indicating 2001) and the content of the [REDACTED] article (indicating 2002) as to when his first "Entertainer of the Year" award was issued. As previously discussed, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

The AAO's decision further stated:

In response to the director's request for additional evidence, the petitioner submitted an unsigned and unpublished document addressed to counsel's attention about the [REDACTED]. The document appears to have been prepared by [REDACTED] identified as [REDACTED] publicist. The document states that the awards currently recognize performers at [REDACTED] comedy club, which facilitates them in securing television and movie roles. Significantly, while the document states that the awards are a "coveted plum," it also states: "There are about twenty two awards that the owner happily gives to everyone every anniversary. Mostly, to uplift the credibility of the hosts in their acts the whole year through."

As stated in our previous decision, in order to qualify under this criterion, the petitioner must show that the awards are nationally or internationally recognized. The AAO concluded that the awards were limited to performers at a single club and, thus, were not national in scope. The AAO further concluded that the record lacked supporting evidence, such as news articles or letters from sponsoring organizations, documenting the prestige associated with these awards that would indicate their national or international recognition as awards for excellence in his field as required by 8 C.F.R. § 204.5(h)(3)(i).

On motion, counsel asserts that the AAO "failed to appreciate the fact that these awards were covered by national newspapers, which were originally submitted." Counsel also states that the petitioner submitted the April 15, 2002 issue of [REDACTED] listing [REDACTED] as one of the best entertainment places to visit in Manila.

We acknowledge that [REDACTED] receives some media attention. At issue, however, is not the club's reputation but whether or not the awards it issues are nationally or internationally recognized. The record contains a single article in *Intrigue* reporting the issuance of awards by [REDACTED]. The record contains no evidence regarding the significance of this publication. Moreover, the photographs and text are by [REDACTED] identified as [REDACTED] publicist on

the abovementioned unsigned document submitted by the petitioner. Thus, this "article" appears to be a promotional press release which carries less weight than independent journalistic coverage.

First, the petitioner has not established that the "Best Dressed" awards represent recognition for excellence as a performer. Thus, we will only consider the "Entertainer of the Year" awards. We reaffirm our prior finding that an award limited to a pool of performers at a single comedy club, even a distinguished comedy club, cannot constitute a lesser nationally or internationally recognized award. The record contains evidence of other Filipino comedy clubs that also receive media attention, such as [REDACTED] and [REDACTED] whose performers would not be eligible to compete for awards from [REDACTED] unless they also happened to perform at that venue as well.

On motion, counsel states: "[REDACTED] is the Philippines' leading incubator and proving ground for the country's top comedians, singers, hosts and sing-along masters. Nominees for the [REDACTED] [REDACTED] while culled from among [REDACTED] performers, are among the country's best talents." The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this instance, there is no documentary evidence demonstrating that the petitioner's "Entertainer of the Year" trophies from the [REDACTED] are recognized beyond the presenting organization and therefore commensurate with nationally or internationally recognized prizes or awards for excellence in the field.

Counsel further states:

To further prove [the petitioner's] recognition as the Philippines' top comedian, he was recently bestowed the following top honors:

Comedian of the Year 2008 given by [REDACTED] . . . in Sacramento, California, that awards the best professionals in their respective fields.

Outstanding Service to the Community, given during the [REDACTED] celebration on June 13-14, 2009 in San Francisco, California.

The petitioner received the preceding awards subsequent to the petition's filing date. As previously discussed, a petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider the awards received by the petitioner in 2008 and 2009 in this proceeding. Nevertheless, there is no evidence showing that the preceding community awards equate to nationally or internationally recognized prizes or awards for excellence in the field.

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

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.³

In finding that the petitioner's evidence did not satisfy this criterion, the AAO's October 29, 2009 decision stated:

Counsel . . . does not contest the AAO's finding that promotional materials such as posters cannot serve to meet this criterion as they do not appear in professional or trade journals or other major media. In addition, counsel does not contest the AAO's conclusion that the Internet search results for the petitioner's name cannot serve to meet this criterion. Finally, the petitioner does not submit certified translations for the foreign language published materials, which the AAO noted was mandated under 8 C.F.R. § 204.5(h)(3)(iii) and 8 C.F.R. § 103.2(b)(3) but absent from the record. We reaffirm the AAO's prior conclusions on these issues and the analysis in our previous decision, which we incorporate by reference. Regarding the Internet search results, we further note that the petitioner searched for his first and last name without quotes, allowing for results that do not relate to the petitioner at all. We will consider the remaining evidence relating to this criterion below.

The petitioner submitted copies of press releases, promotional materials and articles appearing both on the Internet and in print. The AAO stated that international accessibility via the internet is not a realistic indicator of whether a given publication qualifies as a professional or trade journal or other major media. As noted in our previous decision, the petitioner presented no information regarding the general online readership of the websites on which these articles appeared or any other indication that the websites constitute professional or major trade journals or other major media as required by the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Significantly, the AAO further noted that most of these articles were not primarily about the petitioner but instead mentioned his name in a list of performers at particular events.

³ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

The articles that can be said to be "about" the petitioner are: an article in the *Midweek Balita* where he appears with counsel in an article with no journalist byline, an article in *FAB* by [REDACTED] an article in the *Manila Bulletin* by [REDACTED] and an article allegedly in the *Philippine Daily Inquirer* as reprinted on [REDACTED] website. The AAO concluded that, based on the information submitted about *Midweek Balita*, it is a regional Filipino-American publication available only in Southern California. The AAO further acknowledged the submission by the petitioner of information from *Wikipedia* (an online encyclopedia) regarding the circulation of *The Manila Bulletin*.

Regarding information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.⁴ See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008). Accordingly, we will not assign weight to information for which *Wikipedia* is the source.

The AAO's decision further stated:

The AAO acknowledged that counsel asserts that the *Manila Bulletin* is national in scope, but noted that the unsupported assertions of counsel are not 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). Finally, the AAO noted the lack of reliable information supporting counsel's assertions. Thus, the AAO concluded that the petitioner had not established that the *Manila Bulletin* is a professional or major trade journal or other major media.

On motion, counsel erroneously concludes that the AAO determined that the *Manila Bulletin* is not a professional or major trade journal or other major media based on a search at www.google.com. Counsel asserts that a search on this website produces results other than a description on *Wikipedia* and asserts that a search of this newspaper as well as *Balita*, the *Philippine Star* and the *Philippine Daily Inquirer* would demonstrate that they are qualifying media.

⁴ Online content from *Wikipedia* is subject to the following general disclaimer:

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

See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on December 21, 2010, copy incorporated into the record of proceeding.

We reiterate that it was *the petitioner* who submitted materials from *Wikipedia* about the *Manila Bulletin*. For the reasons stated in our previous decision and reiterated above, these materials, submitted by the petitioner (and not through an Internet search by the AAO) will not be considered. On motion, counsel does not provide new evidence or even reference a specific website that contains the circulation data or other evidence that might establish that the above publications are professional or major trade journals or other major media. Rather, counsel appears to suggest that it is the AAO's responsibility at this stage in the proceeding to research the publications which have covered the petitioner on the Internet. It is the petitioner's burden, however, to submit the evidence to establish every element of a given criterion, including that the materials appeared in a professional or major trade publication or other major media.

Without reliable evidence supporting counsel's assertions regarding the media that have covered the petitioner, we cannot conclude that they constitute professional or major trade journals or other major media. Even if we were to conclude that the *Manila Bulletin* and the *Philippine Daily Inquirer* are professional or major trade journals or other major media and that the article on [REDACTED] website attributed to the *Philippine Daily Inquirer* actually appeared in that newspaper, the evidence falls far short of establishing that the petitioner meets any other criterion.

On motion, the petitioner submits circulation information from the Philippine Communication Centrum Foundation's Media Museum webpage indicating that the *Manila Bulletin* and the *Philippine Daily Inquirer* are major newspapers in the Philippines. However, the petitioner has not established that the article on [REDACTED] website attributed to the *Philippine Daily Inquirer* actually appeared in that newspaper in 2001. The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Moreover, Section 203(b)(1)(A)(i) of the Act, requires the submission of "extensive documentation." Consistent with that statutory requirement, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) expressly requires qualifying published material about the alien in "professional or major trade publications or other major media" in the plural. In this case, the petitioner has only documented qualifying material in a single publication, the *Manila Bulletin*. Accordingly, the petitioner's evidence does not meet the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Additional deficiencies pertaining to the petitioner's evidence will be addressed below in our final merits determination regarding whether the submitted evidence is commensurate with sustained national or international acclaim.

The petitioner's motion also includes articles, reviews, press releases, photographs, and promotional material from 2008 and 2009 (such as documentation pertaining to his participation in the Pinoy Music Festival in May 2008, Fiesta Filipina in June 2008, and One Kapamilya Go in September 2009). This documentation post-dates the petition's filing date. As previously discussed, a petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider the articles, reviews, press releases, photographs, and promotional material from 2008 and 2009 in this proceeding. Nevertheless, there is no evidence showing that any the preceding material meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

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

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

In finding that the petitioner's evidence did not satisfy this criterion, the AAO's October 29, 2009 decision stated:

The petitioner initially claimed to meet this criterion by virtue of his appearance on the television show, [REDACTED] hosted by [REDACTED] and his appearance at a variety of comedy clubs including [REDACTED]

The AAO rejected all of these assertions. On motion, counsel only addresses the petitioner's one-time appearance on [REDACTED]. We incorporate our previous findings by reference and will address only the petitioner's appearance on [REDACTED].

The AAO acknowledged the submission of an article allegedly from *Business Wire* reproduced on *Encyclopedia.com* about The Filipino Channel network on which [REDACTED] airs. This article indicates that "TFC is viewed by more than one million Filipinos around the globe every day." In addition, according to the article, the show is one of TFC's most popular programs. The AAO concluded that even if the television show and/or station were shown to have a distinguished reputation, the petitioner did not establish that his appearances on the television show amounted to a leading or critical role. As noted by the AAO, the *Business Wire* article states that [REDACTED] television show hosts many different types of artists including "notable Pinoy songwriters and lyricists, up-and-coming Fil-Am entertainers and even a karaoke jam night featuring renowned karaoke club legends." Counsel asserts that the petitioner served as a "featured special guest performer" on the show. An undated press release indicates that the petitioner appeared with two other singers on one episode of the show. As noted by the AAO, the record contains no evidence of additional appearances or evidence of how the petitioner's appearance as one of three performers led to the television show's success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim. On motion, counsel reiterates the significance of TFC and [REDACTED] and concludes that an invitation to appear and perform on this show "is an honor in itself." A one-time appearance on a variety show, however, is not a leading or critical role for that variety show.

Upon review, we find the AAO properly considered the evidence submitted, thoroughly addressed the petitioner's arguments, and appropriately addressed the evidence and arguments in its decision.

On motion, counsel states:

[The petitioner] played a key co-starring role in [redacted] opposite [redacted] [redacted] one of the Philippines' most respected actresses. [The petitioner] plays [redacted] one of the few friends the lead character has in the United States where she went to work as an adult caregiver. The episode was included in [redacted] 18th Anniversary Special Episodes Collection. [redacted] is one of the longest-running and top-rating drama anthologies in the Philippines. It is produced and broadcast by ABS-CBN, the country's largest television and entertainment network, and seen around the world through The Filipino Channel.

Even if the preceding television show was shown to have a distinguished reputation, there is no evidence indicating the extent of the petitioner's role in [redacted] or that he was responsible for the television drama's success or standing to a degree consistent with the meaning of "leading or critical role." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel further states:

We previously submitted on June 22, 2009 [the petitioner's] appearance as a main featured guest in another top-rating TV show, [redacted] hosted by [redacted] considered the Oprah Winfrey of the Philippines. [redacted] is also produced by ABS-CBN and broadcast worldwide via TFC.

The petitioner's evidence included three photographs of a television set showing the petitioner being interviewed by [redacted] in San Francisco on June 22, 2008. The petitioner's June 22, 2008 appearance on [redacted] post-dates the petition's filing date. As previously discussed, a petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not this evidence in this proceeding. Nevertheless, even if [redacted] was shown to have a distinguished reputation, the petitioner has not established that his appearance on [redacted] show amounted to a leading or critical role.

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

Summary

In this case, the petitioner has failed to demonstrate his receipt of a major, internationally recognized award, or that he meets at least three of the ten categories of evidence that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3). A final merits determination that considers all of the evidence follows.

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.” Section 203(b)(1)(A) of the Act; 8 C.F.R. § 204.5(h)(3). *See also Kazarian*, 596 F.3d at 1119-1120. In the present matter, 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)(i), (iii), and (viii) and in our prior decisions dated March 20, 2009 and October 29, 2009.

With regard to the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(iii), there is no evidence showing that the petitioner has had qualifying material published about him in major media since the July 2004 article in the *Manila Bulletin*. The statute and regulations, however, require the petitioner to demonstrate that his national or international acclaim as an entertainer has been *sustained*. *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). The documentation submitted for 8 C.F.R. § 204.5(h)(3)(iii) is not commensurate with *sustained* national or international acclaim as of the October 2, 2006 filing date of the petition.

In this case, the evidence of record falls short of demonstrating the petitioner’s sustained national or international acclaim as an entertainer in the United States, Philippines, or any other country. According to information on the Form I-140, Immigrant Petition for Alien Worker, the petitioner was last admitted to the United States in January 2005. Aside from the July 21, 2004 article in the *Manila Bulletin*, the record does not include evidence of any qualifying nationally or internationally acclaimed achievements and recognition as an entertainer since that time and subsequent to his entry into the United States. Rather, the petitioner’s reputation and achievements during the two years immediately preceding the petition’s filing date have been primarily limited to the Filipino community in California. Accordingly, the petitioner has not demonstrated “sustained national or international acclaim” as a performing artist as of the filing date of the petition. *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). The conclusion we reach by considering the evidence to meet each criterion at 8 C.F.R. § 204.5(h)(3) separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

C. Prior O-1 Nonimmigrant Visa Status

The record reflects that the alien was the beneficiary of approved O-1 nonimmigrant visa petitions for an alien of extraordinary ability in the arts. Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, “The term ‘extraordinary ability’ means, for

purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(o)(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines extraordinary ability as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the beneficiary’s receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Further, we do not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each petition must be decided on a case-by-case basis upon review of the evidence of record.

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 the alien’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. 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 has approved a nonimmigrant petition on behalf of the alien, 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).

III. Conclusion

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

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).

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 AAO's October 29, 2009 decision is affirmed. The petition will remain denied.