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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 25 2011

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) rejected the appeal as untimely filed. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted, the previous decision of the AAO will be withdrawn, and a new decision will be entered on this petition. The appeal will be dismissed.

We note that the AAO rejected the petitioner's appeal on November 4, 2009. Although the AAO's decision informed the petitioner that "[a]ll motions must be submitted to the office that originally decided your case," counsel submitted the motions to AAO instead of the Texas Service Center. In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(E) requires that a motion must be submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction. In addition, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party must file the motion within 30 days after service of the unfavorable decision. If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i). The AAO rejected the motions and returned them to counsel, who subsequently submitted the motions to the Texas Service Center on December 9, 2009, a period of 35 days after the decision of the AAO. Accordingly, the motions were untimely filed. A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4).

However, a review of the documentary evidence submitted with the motions reflects that the petitioner timely submitted the original appeal. The director denied the petition on July 29, 2008. Although the director stamped the petitioner's appeal as being received on October 28, 2008, a period of 35 days after the denial of the petition, counsel submitted documentary evidence from the United States Postal Service reflecting that the appeal was actually received at the Texas Service Center on October 27, 2008, a period of 34 days after the denial of the petition. As the 33rd day fell on Sunday, October 26, 2008, the petitioner properly filed the appeal. *See* 8 C.F.R. § 1.1(h). As the record of proceeding reflects that the petitioner timely filed his original appeal, the AAO will enter a new decision.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate "sustained national or international acclaim" and present "extensive documentation" of his or her achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific evidence. 8 C.F.R. §§ 204.5(h)(3)(i)

through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel claims that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. Law

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

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

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

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

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

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

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

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

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

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

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

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

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

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

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

Id. at 1119.

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

II. Analysis

A. Evidentiary Criteria

This petition, filed on December 17, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a dancer. We note here that at the time of the original filing of the petition, the petitioner submitted documentation but failed to specifically identify the criteria under the regulation at 8 C.F.R. § 204.5(h)(3) he claimed to meet. It was not apparent from the review of the evidence to which criteria the evidence pertained. The burden is on the petitioner to establish his eligibility and not on the director to infer or second-guess the intended criteria. As such, the director issued a notice of intent to deny the petition pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) describing each of the ten criteria under the regulation at 8 C.F.R. § 204.5(h)(3). In response to the director's notice of intent to deny the petition, the petitioner submitted additional documentation but again failed to identify the intended criteria. The director denied the petition determining that the petitioner failed to establish eligibility as an alien of extraordinary ability without addressing any of the criteria pursuant to the regulation at 8 C.F.R.

§ 204.5(h)(3). On appeal, counsel submits additional documentary evidence and claims the petitioner's eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). Again, with the exception of a few brief references to documents, counsel failed to identify which documents on appeal, as well as which documents submitted by the petitioner at the time of the filing of the petition and in response to the director's notice of intent to deny, pertained to the specific claimed criteria. As counsel has failed to specify which documentary evidence relates to the regulatory criteria at 8 C.F.R. § 204.5(h)(3), we have considered the evidence submitted under the criterion we find to be most applicable. If it is counsel's contention that the documentary evidence meets a different criterion, he has never explained which criteria they are or how the evidence relates to those criteria.

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

On appeal, counsel argues:

> The Petitioner has been a member of [redacted] and other dancing ensembles in his home country. He has proved he received broad national recognition, awards and references. Internationally he has been recognized as a part of the National Ballet and its soloist, which means he has been a leading dancer and one of the most famous artists in the ballet troupe.

A review of the record of proceeding reflects that the petitioner submitted the following documentary evidence:

1. A diploma from the Cultural Relate Youth Center, Municipal Service of Youth Tbilisi Municipality reflecting "[a]rt leader of Ensemble 'GELATI' [the petitioner] is rewarded for active cultural work in 2001";

2. A diploma from the Tbilisi Municipal, City Office of Culture and Social Service, CID UNESCO and IOV Representative in Georgia, Cultural Relate Youth Center, reflecting "'FOLKART' REWARDS Leader of Choreographic Ensemble 'GELATI' [the petitioner] for active cultural work";

3. A diploma from the Cultural Relate Youth Center, Alliance of Georgian Unity reflecting "Member of Ensemble 'MAMULI' [the petitioner] is rewarded for active cultural work in 2000";

4. A diploma from CID UNESCO and Folklore International Organization IOV Representative in Georgia, Cultural Relate Youth Center reflecting "'FOLKART' REWARDS Art Leader of Georgian Folk Dance Ensemble 'GELATI' [the petitioner]"; and

5. A diploma from the 1999 International Festival of Folk Dance, Youth Center of Cultural Relations reflecting "Awarded [the petitioner] Soloist of Folk Dance Company 'MAMULI.'"

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt of lesser *nationally or internationally recognized prizes or awards for excellence* in the field of endeavor [emphasis added]." Moreover, it is the petitioner's burden to establish eligibility for every element of this criterion. Not only must the petitioner demonstrate his receipt of awards and prizes, he must also demonstrate that those awards and prizes are nationally or internationally recognized for excellence. In other words, the petitioner must establish his awards and prizes are recognized nationally or internationally beyond the awarding entities.

The petitioner failed to establish that any of his diplomas reflect prizes or awards for excellence. Instead, the diplomas are reflective of the petitioner's participation in dance ensembles and not evidence that he received an award or prize for excellence for his dance ensembles. For example, the diplomas recognize the petitioner for his "active cultural work" and leader of the ensembles. Furthermore, counsel's argument that the petitioner has "received broad national recognition" and "has been recognized as a part of the National Ballet and its soloist" fails to reflect the petitioner's receipt of nationally or internationally recognized prizes or awards for excellence. Merely submitting documentation recognizing or acknowledging the petitioner's participation in dance ensembles without evidence demonstrating his receipt of any prizes or awards is insufficient to meet the plain language of the regulation.

In addition, even if the diplomas reflected prizes or awards for excellence, which they do not, the petitioner failed to submit any other documentary evidence demonstrating that the diplomas are nationally or internationally recognized for excellence. In other words, the petitioner failed to establish that his diplomas are recognized nationally or internationally beyond the Cultural Relate Youth Center, Municipal Service of Youth Tbilisi Municipality, "CID UNESCO," or "IOV" Representative in Georgia. Simply submitting evidence of the petitioner's receipt of prizes or awards without submitting documentary evidence that the prizes or awards are nationally or internationally recognized for excellence is insufficient to establish eligibility for this criterion.

As discussed, the plain language of this regulatory criterion specifically requires that the petitioner receive nationally or internationally recognized prizes or awards for excellence, and it is his burden to establish every element of this criterion. In this case, there is no evidence demonstrating that the petitioner has received any prizes or awards, let alone nationally or internationally recognized prizes or awards for excellence.

Accordingly, the petitioner failed to establish 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.*

On appeal, counsel argues:

> Evidence has been submitted with published material about [the petitioner] in the local newspaper popular among the Georgian community in NY, USA. Also, press release of the world newspapers for the Georgian National Ballet performances around the world. Online based testimonials (www.YouTube.com) from Georgian National Ballet spectator from all over the world.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought." In 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.[2] Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that "[s]uch evidence shall include the title, date, and author of the material, and any necessary translation."

As indicated by counsel above, the petitioner submitted an article entitled, [redacted] January 15 – 21, 2009, by [redacted], from *Forum*. The petition was filed on December 17, 2007. Eligibility must be established at the time of filing. As the article was published after the filing of the petition, we will not consider this item as evidence to establish the petitioner's eligibility. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. We note that the article is an interview conducted with the petitioner in which the petitioner merely responds to the reporter's questions. The article is not *about* the petitioner relating to his work. Furthermore, the petitioner failed to submit any documentary

[2] 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.

evidence establishing that *Forum* is a professional or major trade publication or other major media.

In addition, the petitioner submitted screenshots of a Press Release from the Center of the Arts' website entitled, [redacted], Nov. 17 and 18," October 15, 2007, by [redacted] A review of the press release reflects that it is an announcement for [redacted] upcoming performances and not about the petitioner relating to his work. In fact, the petitioner is not even mentioned in the press release. Furthermore, the petitioner failed to submit any documentary evidence establishing that the website is considered major media. We are not persuaded that a press release posted on the Internet is automatically considered major media. In today's world, many businesses and organizations have websites and advertise and post information on the Internet. However, we are not persuaded that international accessibility by itself is a realistic indicator of whether a given website is "major media."

Finally, as indicated above on appeal, counsel claimed that online testimonials were submitted from *YouTube* regarding the Georgian National Ballet. However, a review of the record of proceeding fails to reflect that the testimonials were ever submitted at any time during the proceeding. 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). Nonetheless, we further note that in a supplemental brief, counsel referred to the website of *YouTube* and provided the following website address: http://www.youtube.com/watch?V=PtpmxTIfLng. However, when the AAO attempted to access the website provided by counsel, the website was directed to the home page of *YouTube*.[3] Regardless, testimonials of the performances by the Georgian National Ballet do not meet the plain language of the regulation requiring published material about the petitioner relating to his work. Even if counsel submitted the claimed testimonials or the provided website reflecting testimonials, counsel indicated that they were about the Georgian National Ballet and not about the petitioner. *See, e.g., Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D.Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor).

As discussed above, the documentary evidence submitted by the petitioner fails to reflect published material about him regarding his work in professional or major trade publications or other major media. As such, the petitioner failed to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)3)(iii).

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

> *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.*

[3] Accessed on February 10, 2011, and incorporated into the record of proceeding.

On appeal, counsel argues that the petitioner is eligible for this criterion based on "submitted copies of the awards [the petitioner] received as a leader of the Georgian National Youth Ensemble 'Gelati' where he was teaching the students and organizing competitions for them."

Regarding counsel's reference to the petitioner's "awards," they have already been considered under the regulation at 8 C.F.R. § 204.5(h)(3)(i), and we will not presume that evidence relating to or even meeting the awards criterion is presumptive evidence that the petitioner also meets this criterion. Because the regulatory criteria under the regulation 8 C.F.R. § 204.5(h)(3) are separate and distinct from one another, USCIS clearly does not view these criteria as being interchangeable. If evidence sufficient to meet one criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three criteria would be meaningless.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires "[e]vidence 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." In a supplemental brief, counsel again claimed the petitioner's eligibility for this criterion and submitted a letter, dated May 4, 2009, from [redacted] who stated that the petitioner "*will* participate as an instructor and choreographer in our NEA-funded children's program that includes a children's dance school and performance ensemble [emphasis added]." Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. at 114, that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. The petitioner failed to establish that he participated as an instructor and choreographer for Dancing Crane, Inc. prior to the filing of the petition. Moreover, the record of proceeding contains numerous letters from parents, colleagues, and community leaders praising the petitioner for teaching children and students how to dance. We note that the letters were submitted on appeal and fail to reflect if the events occurred prior to the filing of the petition.

Regardless, the petitioner submitted a letter from [redacted] who indicated that the petitioner was a teacher of dance for the School-Gymnasium EAP-School from 2005 – 2007. However, the petitioner failed to submit any documentary evidence reflecting that he has judged the work of others. While the reference letters reflect that the petitioner instructed children and students, the petitioner failed to submit any other documentary evidence demonstrating that his teaching equates to the judging of others. Further, we are not persuaded that "organizing competitions," participating as a choreographer, or serving as a leader in a dance ensemble, equates to participating as a judge of the work of others. The petitioner failed to submit, for example, documentary evidence demonstrating that he has served as a judge or carried out the responsibilities of a judge. Submitting documentary evidence that merely reflects that the petitioner has taught children without evidence establishing that he has judged the work of others is insufficient to meet the plain language of this criterion.

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

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

On appeal, counsel argues the petitioner's eligibility for this criterion based on the petitioner's "participat[ion] in all the spectacles of the Georgian National Ballet for the period 2004 – 2008 performed worldwide. He took part of numerous artistic performances as a solo dancer of the Georgian State troupe."

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at artistic exhibitions or showcases." The petitioner is a dancer. When he dances before audiences, he is not displaying his dancing in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing his work, he is not displaying his work. In addition, to the extent that the petitioner is a performing artist, it is inherent to his occupation to perform. Not every performance is an artistic exhibition designed to showcase the performer's art. If we were to accept that a performance artist like the petitioner meets this criterion, it would render the regulatory requirement that the petitioner meet at least three criteria meaningless as this criterion would effectively be collapsed into the criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. This interpretation has been upheld by at least one district court. *See Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 8-9. (finding that the AAO did not abuse its discretion in finding that a performance artist should not be considered under the display criterion). While we acknowledge that a district court's decision is not binding, the court's reasoning indicates that the AAO's interpretation of the regulation is reasonable.

Therefore, while the petitioner's performances have evidentiary value for other criteria, they cannot serve to meet this criterion. Instead, as the petitioner's performances are far more relevant to the aforementioned "leading or critical role" criterion set forth at the regulation at 8 C.F.R. § 204.5(h)(3)(viii), they will be discussed separately within the context of that criterion.

Accordingly, the petitioner failed to establish 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.

A review of the record of proceeding reflects that the petitioner submitted the following documentation:

1. A certificate from [redacted] who certified that the petitioner was a ballet-dancer for the Georgian National Ballet (GNB);

2. A letter from [redacted] who stated that the petitioner was a soloist for GNB;

3. A letter from [redacted] who stated that the petitioner was a dancer-artist (soloist) of the Georgian National Dance Ensemble, [redacted]

4. A testimonial from [redacted] who stated that the petitioner headed the children's choreographic ensemble, [redacted]

5. A letter from [redacted] who stated that the petitioner worked as a teacher of dance at the [redacted]; and

6. Numerous letters stating that the petitioner worked in the ensembles [redacted]

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment. Based on the submitted documentary evidence listed above, we are not persuaded that the petitioner has performed in a leading or critical role consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The petitioner failed to submit any documentary evidence reflecting that his roles for GNB or School-Gymnasium EAP-School were leading or critical. Merely submitting documentary evidence demonstrating that he performed for the GNB or worked as a teacher for a school is insufficient to establish that he performed in a leading or critical role. We are not persuaded that performing as a soloist in an ensemble also demonstrates a leading or critical role when compared to GNB as a whole, as well as working as a teacher when compared to the school as a whole. The petitioner failed to submit any documentary evidence comparing his roles for GNB to that of the other performers or individuals with GNB. We note here that the petitioner submitted another letter from [redacted] who indicated that he was "the leader of the ensemble '[redacted]'" It appears that the petitioner was subordinate to [redacted] Furthermore, it appears that [redacted] and [redacted] are the leaders of the GNB. Clearly, the petitioner has not performed in a leading or critical role for GNB, when compared to Mr. [redacted]

Moreover, the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires that the petitioner perform in a leading or critical role "for organizations or establishments that have a distinguished reputation." The petitioner failed to submit any documentary evidence regarding School-Gymnasium EAP-School, so as to establish that it has a distinguished reputation. Regarding GNB, the petitioner submitted documents that appeared to be brochures and advertisements from GNB; however the petitioner failed to submit translations, let alone certified translations pursuant to the regulation at 8 C.F.R. § 103.2(b)(3). Regardless, the petitioner failed to submit independent, objective evidence demonstrating the distinguished reputation of GNB. We note that the petitioner submitted screenshots from the website of the Internet Broadway Database for the Georgian State Dance Company. The petitioner failed to submit any documentary evidence establishing

that he performed for the Georgian State Dance Company, let alone that he performed in a leading or critical role.

On appeal, counsel claims the petitioner's eligibility for this criterion based on the claim that he "is a dance instructor in two local NY based dancing schools." A review of the record of proceeding reflects that he submitted a letter, dated October 7, 2010, from [redacted] who stated:

> [The petitioner] is a uniquely talented dancer who has been associated with [redacted] programs since he arrived in the United States in 2007. He has an impeccable background as a soloist with Georgia's premier dance ensemble, the [redacted]t. He is a consummate performer and a featured soloist in our dance concerts. He is a specialist in all of the Georgian dance styles, and is able to combine subtlety, elegance and strength in his interpretations, as evidenced by his special mastery of the dances Kartuli (considered the most subtle and difficult Georgian dance, for two soloists – man and woman), Parikaoba (a courtship and battle dance) and Svanuri (a men's dance with complex techniques on the toes). We are fortunate to include a dancer of [the petitioner's] training and talent in our ongoing program.

[redacted] President of [redacted] stated:

> Please be advised I . . . have known [the petitioner] since September of 2008, he was a referral by [redacted]. At the time my company and I were in dire need of a great choreographer/dancer and teacher that was phenomenal at what they did. A prior experience as well as attained a degree in such field was a must and in addition, the grave importance to advance my school.
>
> I am very pleased and proud to have [the petitioner] on our team he is a great asset to my company and my children. [The petitioner] has taught so much to my children in such a short time. [The petitioner] is a talented gentleman with a very bright future. He is a major key to our company we desperately need him and can not afford to loose him.

As indicated earlier, [redacted] failed to indicate that the petitioner was ever employed by [redacted] Moreover, the second letter from [redacted] referenced above merely indicates that the petitioner was "associated with [redacted] programs since he arrived in the United States in 2007." The petitioner failed to establish that he was employed by [redacted] prior to the filing of the petition. Furthermore, the letter from [redacted] refers to knowing the petitioner since September 2008, after the filing of the petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. at 114, that we cannot "consider facts that

come into being only subsequent to the filing of a petition." *Id.* at 176. Regardless, the letters fail to reflect that the petitioner performed in a leading or critical, and the petitioner failed to submit any documentary evidence establishing that [redacted]. and [redacted] Jewish Youth Center have distinguished reputations. USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 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 of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795.

For the reasons discussed above, the petitioner failed to establish that he performed in a leading or critical for organizations or establish that have a distinguished reputation pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

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

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

In evaluating our final merits determination, we must look at the totality of the evidence to conclude the petitioner's eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner has performed as a dancer for GNB, and the majority of the petitioner's documentation relate to children and youth ensembles. However, the accomplishments of the petitioner fall far short of establishing that he "is one of that small percentage who have risen to the very top of the field of endeavor" and that he "has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." *See* 8 C.F.R. § 204.5(h)(2), 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 regulation at 8 C.F.R. § 204.5(h)(3) provides that "[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." The petitioner's documentary evidence must be evaluated in terms of these requirements. The weight

given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

Although we found that the petitioner failed to establish eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the petitioner's documentary evidence reflected certificates involving the petitioner's youth performances. Awards derived from youth ensembles and competitions do not reflect that "small percentage who have risen to the very top of the field of endeavor." *See* 8 C.F.R. § 204.5(h)(2). There is no indication that the petitioner faced significant competition from throughout his field, rather than mostly limited to a few individuals in youth level status or other similarly limited competition. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.[4] Likewise, it does not follow that a dancer like the petitioner who has been acknowledged as participating in youth ensembles should necessarily qualify for an extraordinary ability employment-based immigrant visa. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor." Similarly, while we found that the petitioner failed to establish eligibility for the judging criterion pursuant to the regulation at 8 C.F.R. 204.5(h)(3)(iv), the petitioner claimed eligibility based on teaching students and children. Judging local, amateur, or student competitions is not indicative of "that small percentage of individuals that have risen to the very top of their field of endeavor." See, e.g., *Matter of Price*, 20 I&N at 954. Evaluating the work of accomplished dancers as a member on a national panel of experts is of far greater probative value than evaluating the work of students and children. Likewise, counsel claimed the petitioner's eligibility for the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) based on

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[4] While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

> [T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of [redacted]s ability with that of all the hockey players at all levels of play; but rather, [redacted] ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

the petitioner's teaching of children. We note that the petitioner intends to continue to work in the United States teaching and working with children.

We also cannot ignore that the statute requires the petitioner to submit "extensive documentation" of the petitioner's sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Although we found that the petitioner failed to establish eligibility for the published material criterion, the petitioner claimed eligibility based on an interview in a local paper after the filing of the petition, a press release that did not mention the petitioner, and *YouTube* testimonials that that were not submitted. A dancer, such as the petitioner with sustained national or international acclaim should have substantial published material about him and his work. Further, the record of proceeding contains several letters reflecting the petitioner's participation as a dancer but do not distinguish the petitioner as "one of that small percentage who have risen to the very top of the field of endeavor." It must be emphasized that the favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim. Again, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe,* 25 I&N Dec. at 376 citing *Matter of E-M-* 20 I&N Dec. 77, 80 (Comm'r. 1989).

The petitioner failed to submit evidence demonstrating that he "is one of that small percentage who have risen to the very top of the field." In addition, the petitioner has not demonstrated his "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).

The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

III. P-1 Nonimmigrant Admission

Finally, we note that at the time of the filing of the petition, the petitioner was last admitted on September 29, 2007, to the United States as a P-1 nonimmigrant, a visa classification that requires the alien to perform as an entertainer as an integral and essential part of the performance of an entertainment group that has been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time and the alien seeks to enter the United

States "temporarily and solely for the purpose of performing as such a performer or entertainer or as an integral and essential part of a performance." *See* section 214(c)(4)(B) of the Act, 8 U.S.C. § 1184(c)(4)(B). The current record is devoid of any evidence to indicate that the petitioner is performing as an entertainer at an internationally recognized level or that he is in the United States "temporarily and solely" for the purpose of performing as such an entertainer. While USCIS has approved at least one P-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

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

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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

IV. Conclusion

Review of the record does not establish that the 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.

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

ORDER: The appeal is dismissed.