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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**

PUBLIC COPY

B₂

[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: OCT 04 2010

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on August 13, 2009, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 as a magician. 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). In addition, counsel argues that the director failed to apply the proper standard of proof, a preponderance of the evidence, pursuant to *Matter of Chawathe*, USCIS Adopted Decision, January 11, 2006.

I. Law

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

(1) Priority workers. -- Visas shall first be made available ... to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

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

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

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

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

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

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

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

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

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

Id. at 1119.

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

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

II. Analysis

A. Evidentiary Criteria

This petition, filed on August 29, 2008, seeks to classify the petitioner as an alien with extraordinary ability as a magician. The petitioner has submitted evidence pertaining to the following criteria under 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.

At the time of the original filing of the petition, counsel claimed the petitioner's eligibility for this criterion by stating:

In March of 2008, [the petitioner] competed amongst the most well-known Latin American Magicians in the world at a Latin-American Magic Competition held in Buenos Aires, Argentina [REDACTED]

In [REDACTED] [the petitioner] competed amongst other renown international and national Magicians within the U.S. at a Florida State Magic Competition by the name of [REDACTED] where he placed [REDACTED]

In [REDACTED], [the petitioner] received the honor of being named the [REDACTED]

In support of counsel's claims, she submitted the following documentation:

1. A photograph of the petitioner holding a trophy with a caption claiming "Winner of the [REDACTED]"
2. A photograph of a trophy;
3. A photograph of the petitioner holding a trophy with a caption claiming [REDACTED]
4. A photograph of a trophy; and
5. A letter from [REDACTED] confirming the petitioner's [REDACTED]

On April 24, 2009, the director issued a request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8). Specifically, the director requested evidence establishing the national

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

or international recognition of the petitioner's awards and to "submit evidence in support of [the petitioner's] response." In response, regarding [REDACTED] counsel submitted a document entitled, [REDACTED]. However, a review of the document reflects that it appears to be a self-compiled document from counsel. Counsel failed to identify the origin of the document and/or source of the information contained therein. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 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).

Regarding Magic on the Beach, counsel submitted a document entitled, [REDACTED], which also appears to be a self-compiled document from counsel. However, a review of the document reflects that counsel indicated that "[m]ore information can be found at the website: [REDACTED]". A further review of this website reflects that some of the information from the website was pieced together to create the document. Nonetheless, we find that the letter, as indicated in item 5 above, is sufficient to establish the petitioner's [REDACTED].

At this point, we must address the evidentiary weight of counsel's self-compiled documents and the petitioner's burden of proof. We are not persuaded that the submission of documents that are created by counsel from information from websites or other sources and then portrayed as official documentation can be considered having evidentiary weight in this proceeding. Furthermore, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); section 291 of the Act; 8 U.S.C. § 1361. We also are not persuaded that providing a website and expecting the director to verify the information by navigating through numerous links within the website satisfies the petitioner's burden of proof. Instead of piecing together information from a website and providing a website address, counsel should have simply submitted screenshots of the website. While we find it within our discretion to verify any evidence in support of the petition, it is not our burden to search for evidence on behalf of the petitioner.

Moreover, the regulation at 8 C.F.R. § 204.5(h)(3)(i) also requires that the petitioner receive "lesser nationally or internationally *recognized* prizes or awards for excellence [emphasis added]." Even if we would accept counsel's self-compiled documentation, which we do not, the documents do not reflect that the petitioner's awards are nationally or internationally recognized for excellence. Regarding [REDACTED] while the document claims that it is "one of the highest honors" and "it is considered a very prestigious magic award," the petitioner failed to support these assertions with any independent, objective documentary evidence. Merely submitting a document that claims the [REDACTED] is a high honor or prestigious is insufficient to establish that a receipt of a [REDACTED] is a nationally or internationally recognized award for excellence. Similarly, the document for [REDACTED] claims that "[t]his is price [sic] is considered the most important in all Florida State." Even if we would accept this document, the document only reflects the award's recognition within Florida and not as a recognized national award.

We note here that a review of the record of proceeding fails to reflect any documentary evidence of counsel's claim at the time of initial filing of the petitioner "being named the [REDACTED] [REDACTED] nor was there any documentary evidence submitted demonstrating the national or international recognition for excellence for this claimed award or prize. We also note that in response to the director's request for evidence, counsel claimed the petitioner's eligibility based on his receipt of an award from the Latin American Federation of Society of Magicians (FLASOMA) in February 2009. However, the petition was filed on August 29, 2008. This claimed award occurred after the filing of the petition. Eligibility must be established at the time of filing. Therefore, we will not consider these items 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. Notwithstanding, we must note that as evidence of the petitioner's receipt of this award, counsel submitted a picture of a trophy and an apparent self-created document regarding the nature of the award. The documentary evidence submitted for FLASOMA is insufficient to establish that the petitioner received this award and that the award is nationally or internationally recognized for excellence.

On appeal, counsel argues that the director erred in stating that "[t]he awards and prizes must be internationally or nationally recognized by all in the entertainment industry" and "[t]he competition must have been among those individuals that have demonstrated sustained national or international acclaim and whose achievements are widely known throughout the field." We agree with counsel that the regulation at 8 C.F.R. § 204.5(h)(3)(i) does not require that the petitioner's awards be recognized by "all in the entertainment industry," instead the petitioner's awards must be nationally or internationally recognized for excellence.

Regardless, for the reasons stated above, the petitioner falls far short of establishing by a preponderance of the evidence that he meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). Specifically, the submitted documentary evidence fails to establish that he received any of the claimed awards, and those awards are recognized nationally or internationally for excellence in his field.

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

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.

At the time of the original filing of the petition, the petitioner claimed eligibility for this criterion based on his membership with the International Brotherhood of Magicians (IBM) and the Society of American Magicians (SAM). The petitioner submitted the following documentation:

1. A certificate from IBM indicating that the petitioner was elected a member of IBM in December 2005;
2. A recommendation letter from [REDACTED] of IBM;
3. Screenshots from the website www.magician.org regarding the general background of IBM;
4. A certificate of SAM indicating that the petitioner was elected a member of SAM on April 25, 2006;
5. A recommendation letter from [REDACTED] of SAM; and
6. Screenshots from the website www.magicsam.com regarding the general background, purpose, and mission of SAM.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires “[d]ocumentation of the alien’s membership in associations in the field for which is classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.” In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association’s overall reputation.

In this case, the documentary evidence submitted by the petitioner establishes that he is a member of IBM and SAM. However, the documentary evidence fails to demonstrate that membership with IBM and SAM requires outstanding achievements of its members, as judged by recognized national or international experts.

Regarding IBM, the petitioner submitted a letter from [REDACTED] who stated:

For a young man, [the petitioner] has extraordinary ability and displays a high level of expertise in the art of magic. He is considered to be one of the top magicians from South America. In April 25 of 2006, he joined The Society of American Magicians, the oldest and most prestigious magic society in the world which was started in 1902 in New York City and whose most notable President, Harry Houdini, served for 9 years.

While [REDACTED] is the [REDACTED] of IBM, he discussed the petitioner’s membership with SAM and not IBM. In fact, besides identifying himself as holding the [REDACTED] [REDACTED] failed to provide any information regarding IBM, let alone information indicating that membership with IBM requires outstanding achievements of its

members as judged by national or international experts. Furthermore, while the screenshots from www.magician.org indicate that IBM has “13,000 members worldwide with over 300 local groups in more than 73 countries” and announce conventions and awards of members, they fail to indicate any of the membership requirements of IBM.

Regarding SAM, the letter from [REDACTED] dated January 2, 2006, prior to the petitioner’s membership, stated almost verbatim to Mr. Silver’s letter:

Although [the petitioner] is only 26 years old he shows extraordinary ability and level of expertise in the art of magic. He is now considered as one of the top 10 magicians from South America. He has started his membership process to join the Society of American Magicians, the oldest and most prestigious magic society in the world which was started in 1902 in New York City and whose most notable President served for 9 years until his death, Harry Houdini.

While [REDACTED] praised the accomplishments of the petitioner, she failed to indicate any of the membership requirements of SAM, so as to establish that membership with SAM requires outstanding achievements of its members as judged by recognized national or international experts. Likewise, while the screenshots from www.magicsam.com provide some background information about the organization, they do not reflect any of the membership requirements for SAM.

On appeal, counsel claims:

As documented within Exhibit “2” of the I-140 Package, the Petitioner is a member of two of the most well-respected professional associations for Magicians in the world: [IBM] and [SAM]. Although these organizations may have open membership to all magicians, by submitting letters of recommendation written by officers within these organizations which document his many achievements, the Petitioner has proven that HE is a member who has accomplished outstanding achievements within his field of expertise. Therefore where there are no organizations which do require outstanding achievements of their members, then comparable evidence as to the history and prestigious reputation of the organizations of which the Petitioner is a member should be considered along with the Petitioner’s outstanding achievements as a member of said organization.

We are not persuaded by counsel’s arguments on appeal. First, counsel concedes that membership with IBM and SAM do not require outstanding achievements of its members, and therefore, do not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii). Second, the recommendation letters submitted by [REDACTED] and [REDACTED] do not reflect that the petitioner “has accomplished outstanding achievements within his field of expertise.” Instead, as previously stated above, the recommendation letters merely describe general accomplishments of the petitioner and fall far short of demonstrating outstanding achievements. Finally, counsel’s argument that the petitioner’s membership with IBM and SAM should be considered as comparable evidence because there are no organizations in his field is unconvincing. Counsel

failed to submit any documentary evidence supporting her assertions that there are no organizations in the petitioner's field that requires outstanding achievements of its members. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. The regulation at 8 C.F.R. § 204.5(h)(4) provides “[i]f the above standards do not readily apply to the [petitioner’s] occupation, the petitioner may submit comparable evidence to establish the [petitioner’s] eligibility.” It is clear from the use of the word “shall” in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner’s burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x). In this case, an inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner’s occupation. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner’s occupation as a magician cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to meet or submit documentary evidence of a single criterion, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. In addition, membership in a non-exclusive association is not “comparable” to membership in an exclusive association simply by securing a recommendation letter.

For the reasons stated above, the petitioner failed to establish that his membership with IBM and SAM demonstrate eligibility for this regulatory criterion. Merely submitting documentation reflecting membership in organizations in the petitioner’s field, without documentary evidence establishing that those organizations require outstanding achievements of their members as judged by recognized national or international experts, is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

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:

The underlying Denial erroneously states that “the articles must discuss the merits of the beneficiary’s work, the beneficiary’s standing in the field, or any significant impact that his work had or has on the field.” There is no such requirement with 8

CFR § 204.5(h)(3)(iii). Requiring evidence that is not listed within a specific section of the Code of Federal Regulations goes beyond the scope of the given section and also goes outside the perimeters of the Petitioner's Burden of Proof.

* * *

Within the underlying I-140, the Petitioner submitted SUBSTANTIAL documentation relating to the many published materials about him in professional and/or major media which consisted of articles about him and his magic featured in newspapers and magazines around the world. The record consists of over 60 articles published within the past decade in some of the most important newspapers and magazines within the U.S. and Latin America.

While the director may have overreached in his decision requiring that the petitioner's articles to reflect his standing or impact in the field, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought." In other words, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about" the petitioner relating to his work. 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 determining the petitioner's eligibility for this criterion, we will evaluate the petitioner's documents to determine if they are published material about him relating to his work in professional or major trade publications or other major media.

We note here that although counsel claims that the record consists of over 60 articles, the record, in fact, reflects 56, which are listed below:

1. An uncertified summary translation of an advertising poster entitled, "INKA Magic 2008," unidentified date, unidentified author, unidentified source;
2. An uncertified summary translation of an advertising poster entitled, "Magic Fest 2008," unidentified date, unidentified author, unidentified source;
3. An uncertified summary translation of an advertising poster entitled, "INKA Magic 2007," July 2, 2007, unidentified author, unidentified source;

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.

4. An uncertified summary translation of a crossword puzzle entitled, [REDACTED], unidentified author, Peru 21;
5. A summary translation of a crossword puzzle entitled, [REDACTED], unidentified author, *Ojo*;
6. An uncertified summary translation of an advertisement entitled, [REDACTED], unidentified author, [REDACTED];
7. A partial translation of an article entitled, [REDACTED], unidentified author, [REDACTED];
8. A partially translated article entitled, [REDACTED], [REDACTED], [REDACTED];
9. A picture of the petitioner in the article entitled, [REDACTED], 16 – 29, 2006, unidentified author, [REDACTED];
10. A picture of the petitioner in the article entitled, [REDACTED], unidentified date, unidentified author, [REDACTED];
11. A picture of the petitioner in the article entitled, [REDACTED], August 3, 2003, unidentified author, [REDACTED];
12. An advertising flyer entitled, "Animagic," unidentified date, unidentified author, unidentified source;
13. An advertising flyer entitled, [REDACTED] "The Magician'," unidentified date, unidentified author, unidentified source;
14. An advertising flyer entitled, [REDACTED] "The Magician," unidentified date, unidentified author, unidentified source;
15. An advertisement entitled, [REDACTED], November 5, 2003, unidentified author, [REDACTED];
16. An advertisement entitled, [REDACTED], November 5, 2004, unidentified author, [REDACTED];
17. An advertisement entitled, [REDACTED], November 7, 2004, unidentified author, [REDACTED];
18. An advertisement entitled, [REDACTED], May 7, 2004, unidentified author, [REDACTED];
19. An advertisement entitled, [REDACTED], May 4, 2004, unidentified author, [REDACTED];
20. An advertisement entitled, [REDACTED], January 23, 2004, unidentified author, [REDACTED];
21. An advertisement entitled, [REDACTED], January 30, 2004, unidentified author, [REDACTED];
22. An advertisement entitled, [REDACTED], November 28, 2003, unidentified author, [REDACTED];
23. An advertisement entitled, [REDACTED], July 4, 2003, unidentified author, [REDACTED];
24. An advertisement entitled, [REDACTED], May 30, 2003, unidentified author, [REDACTED];

25. An advertisement entitled, [REDACTED] January 31, 2003, unidentified author, [REDACTED]
26. An advertisement entitled, [REDACTED] January 30, 2003, unidentified author, [REDACTED]
27. An advertisement entitled, [REDACTED] June 11, 2001, unidentified author, [REDACTED]
28. An advertisement entitled, [REDACTED] May 3, 2001, unidentified author, [REDACTED]
29. An advertisement entitled, [REDACTED] September 18, 2001, unidentified author, [REDACTED]
30. An advertisement entitled, [REDACTED] May 2, 2001, unidentified author, [REDACTED]
31. An advertisement entitled, [REDACTED] April 30, 2001, unidentified author, [REDACTED]
32. An advertisement entitled, [REDACTED] April 19, 2001, unidentified author, [REDACTED]
33. An advertisement entitled, [REDACTED] June 2004, unidentified author, [REDACTED]
34. An advertisement entitled, [REDACTED] February 2003, [REDACTED]
35. A snippet entitled, [REDACTED] May 6, 2000, unidentified author, [REDACTED]
36. A snippet entitled, [REDACTED] February 14, 2000, unidentified author, [REDACTED]
37. A snippet entitled, [REDACTED] February 9, 2000, unidentified author, [REDACTED]
38. A snippet entitled, [REDACTED], February 4, 2000, unidentified author, [REDACTED]
39. An article entitled, [REDACTED] October 8, 2007, unidentified author, [REDACTED]
40. An article entitled, [REDACTED] July 11, 2008, unidentified author, [REDACTED]
41. An article entitled, [REDACTED] July 20, 2008, unidentified author, [REDACTED]
42. An article entitled, [REDACTED] June 5, 2007, unidentified author, [REDACTED] and [REDACTED]
43. An article entitled, [REDACTED] unidentified author, November 15, 2003, [REDACTED]
44. An article entitled, [REDACTED] July 10, 2003, unidentified author, [REDACTED]

45. A snippet entitled, [REDACTED] July 6, 2003, unidentified author, [REDACTED]
46. An advertisement entitled, [REDACTED] April 27, 2003, unidentified author, [REDACTED]
47. An advertisement entitled, [REDACTED] May 10, 2001, unidentified author, [REDACTED]
48. An article entitled, [REDACTED] April 22, 2001, unidentified author, [REDACTED]
49. An article entitled, [REDACTED] December 2001, unidentified author, [REDACTED]
50. A snippet entitled, [REDACTED] September 17, 2000, unidentified author, [REDACTED]
51. An article entitled, [REDACTED] September 8, 2000, unidentified author, [REDACTED]
52. An article entitled, [REDACTED] August 18, 2000, unidentified author [REDACTED]
53. A article entitled, [REDACTED] August 17 – 23, 2006, [REDACTED]
54. An article entitled, [REDACTED] in Lima, January 18, 2002 [REDACTED]
55. An article entitled, [REDACTED] December 3, 2001, [REDACTED]
56. An article entitled, [REDACTED] June 17, 1999, [REDACTED]

Regarding items 1 – 8, the plain language of the regulation at 8 C.F.R. § 103.2(b)(3) requires that “[a]ny document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.” In addition, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that such evidence include “any necessary translation.” The petitioner failed to submit certified and/or full translations for the documents. Because the petitioner failed to comply with 8 C.F.R. §§ 103.2(b)(3) and 204.5(h)(3)(iii), the AAO cannot determine whether the evidence supports the petitioner’s claims. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

We acknowledge that a review of items 34, 39, 42, 48, and 51 – 52 reflects that they contain published material about the petitioner relating to his work. However, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) also provides that “[s]uch evidence shall include the title, date, and author of the material, and any necessary translation.” Regarding items 1 – 52, the petitioner failed to include the date and/or author of the material. We simply cannot ignore the regulatory requirements and will not accord any weight to this evidence to establish the petitioner’s eligibility for this criterion.

Furthermore, as 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,” the petitioner’s submission of advertisements of his performances or classes in the form of posters and flyers, as well as photographs of the petitioner accompanying articles, the appearances of the petitioner’s name in crossword puzzles, and snippets mentioning the petitioner are not sufficient to establish eligibility for this criterion.

Regarding item 53, a review of the article, which was only a partial submission, reflects that it is about an individual named [REDACTED] and not about the petitioner. While the petitioner provided some commentary on [REDACTED] performance, the article is not about the petitioner relating to his work.

Regarding items 54 and 55, the articles are not about the petitioner relating to his work. Instead, the articles are about children learning magic at the [REDACTED]. While the articles credit the petitioner as being the director and principal teacher of the [REDACTED] and the petitioner provided quotes on behalf of the students, it remains that these articles are not about the petitioner relating to his work.

Regarding item 56, a review of the article fails to reflect that it is primarily about the petitioner relating to his work. Instead, the article generally discusses the influence of magic in the present-day culture. While the petitioner is quoted in the article, the article falls far short of being about the petitioner relating to his work.

Notwithstanding the above, this regulatory requires that the material be published “in professional or major trade publications or other major media.” However, regarding items 1 – 3 and 12 – 14, there is no evidence demonstrating that these documents were ever published, let alone published in professional or major trade publications or other major media. Regarding the remaining items, the petitioner failed to submit any documentary evidence demonstrating that the petitioner’s material was published in professional or major trade publication or other major media prior to filing the appeal.

On appeal, counsel submitted a self-compiled document, which claims to provide background information about [REDACTED]

[REDACTED] Counsel failed to identify the origin of the document and/or source of the information contained therein. Without documentary evidence to support the claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. We note that counsel also indicates that “more information can be found” at various websites. However, when some of these websites were accessed, they were in the Spanish

language.⁴ Without certified translations of these websites, we can not confirm that the claims of counsel are true. Moreover, even if the information from counsel's self-compiled document were derived from these media's websites, we simply cannot rely on information alone from publications themselves whose purposes are to promote and market themselves in order to increase distribution. *See Braga v. Poulos*, No. CV 065105 SJO (C.D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009). While the information may provide a description of its readers and refers to its circulation statistics, the record contains no independent evidence to demonstrate whether such circulation amounts to major media.

We also note that the petitioner failed to submit any documentary evidence regarding the *Miami New Times*, *Universal News*, *La Razon*, *Etece*, and *Sol De Oro* so to demonstrate that they are professional or major trade publications or other major media. In addition, while the petitioner submitted articles appearing on the websites of media outlets, such as www.rpp.com and www.abn.info.ve, we are not persuaded that articles posted on the Internet from a printed publication are automatically considered major media. The petitioner failed to submit independent, supporting evidence establishing that the websites are considered major media. In today's world, many newspapers, regardless of size and distribution, post at least some of their stories on the Internet. To ignore this reality would be to render the "major media" requirement meaningless. However, we are not persuaded that international accessibility by itself is a realistic indicator of whether a given website is "major media."

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.

The director determined that the documentation submitted by the petitioner failed to establish eligibility for this criterion. 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." The petitioner submitted sufficient documentation demonstrating that he meets the plain language of the criterion. As such, we withdraw the findings of the director for this criterion.

Accordingly, the petitioner established that he meets the plain language for this criterion.

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

At the time of the original filing of the petition, counsel claimed the petitioner's eligibility for this criterion by stating:

⁴ For example, see [REDACTED]. Accessed on August 3, 2010, and incorporated into the record of proceeding.

[The petitioner] has already offered more original contributions to the world of Magic than most people will ever give back to their field of endeavor. He is constantly seeking a new way to inspire in others a love for Magic.

One original contribution that [the petitioner] has been working on for the past decade is to formalize the education and training of Magicians throughout the world.

* * *

Another original contribution that [the petitioner] has made within his field of expertise is his use of magic as a motivational tool within the corporate world. Within the past five years, more than nine big corporations have utilized his program with a great deal of success. Some of those companies are: LAN Airlines, TELMEX Del Peru, IBM, BelCorp, Bellsouth Peru, Merck Lab., Admiral Casinos, Roche Lab., and Mercedes Benz. Peru.

On appeal, counsel argues:

The underlying Denial goes on to erroneously state "In order to qualify for the classification sought, however, the petitioner must demonstrate that the beneficiary is recognized not only by his direct acquaintances, but also among others in the entertainment field through the international community." This supposed requirement is found nowhere within 8 CFR § 204.5(h)(3)(v). Yet again this basis of the Denial is outside the scope of 8 CFR § 204.5(h)(3)(v) and goes beyond the Petitioner's burden of proof.

A review of the decision of the director states:

The beneficiary submitted several testimonials [sic] letters which indicate that the beneficiary has made significant original contributions to this field of endeavor. The petitioner submitted witness letters from individuals who all have direct ties to the beneficiary. In order to qualify for the classification sought, however, the petitioner must demonstrate that the beneficiary is recognized no [sic] only by his direct acquaintances, but also among others in the entertainment field through the international community.

However, a review of the record of proceeding fails to reflect that the petitioner submitted any testimonial or witness letters. In fact, the record reflects, as specifically indicated by counsel at the time of the original filing of the petition and in response to the director's request for additional evidence, what appears to be self-compiled documentation from counsel regarding the petitioner's School of Magic, magic camps, and motivational seminars to corporations. As stated previously, counsel failed to identify the origin of the document and/or source of the information

contained therein. Without documentary evidence to support the claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. We simply cannot accept documentation created by counsel, without any supporting objective documentation, as evidence of the petitioner's original contributions of major significance. We note that counsel also submitted photographs of the petitioner and documents in a foreign language without any translations, let alone certified translations.

Notwithstanding the above, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires “[e]vidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.” While the documentation claims that the petitioner “founded the first and unique [redacted] “implemented for the first time his original [redacted]” and created a motivational “program magic to communicate,” this regulatory criterion not only requires the petitioner to make original contributions, the regulatory criterion also requires those contributions to be of major significance. While counsel argues on appeal that the director’s reasoning that “the petitioner must demonstrate that [he] is recognized not only by his direct acquaintances, but also among others in the entertainment field through the international community” is not found in the regulation, we concur with the director’s reasoning in this portion of the decision for this criterion. Simply submitting evidence of the petitioner’s original contributions without evidence demonstrating that the petitioner’s work has been of major significance to his field is insufficient to meet the plain language of this regulation. Even submitting documentary evidence reflecting that the petitioner has impacted his immediate students is not persuasive in demonstrating that his work has impacted the field as a whole. While the petitioner’s [redacted] and motivational magic programs may reflect original contributions, the petitioner failed to establish that his work has influenced or impacted his field outside the students who attended the school or camp or employees participating in the motivational programs.

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien’s contributions must be not only original but of major significance. We must presume that the phrase “major significance” is not superfluous and, thus, that it has some meaning. Without extensive documentation showing that the petitioner’s work has been unusually influential or widely accepted throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

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

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

At the time of the original filing of the petition, counsel claimed the petitioner’s eligibility for this criterion by stating:

[The petitioner] has authored several articles within his field of expertise within the past seven years. We hereby submit articles authored by [the petitioner] regarding the Art of Magic. These articles cover various topics of importance within the World of Magic including: The concern for secrecy and the exposure of magic tricks; How to produce a Magic Convention; and How to promote magic. We also submit a series of articles he authored within the [redacted] [redacted] titled [redacted] where he taught magic to readers.

A review of the record of proceeding reflects that the petitioner submitted uncertified translations along with recreated documents, which are not original documents or copies of the original documents, of the following.

1. An article entitled, [redacted]
2. An article entitled, [redacted]
3. An article entitled, [redacted]
4. An article entitled, [redacted]

In addition, counsel submitted six magazine covers and articles without any translations and claimed for all of them that they were from the [redacted] and that the petitioner "contributed with his knowledge and experience to the most important magazine for children and teenagers in Peru."

However, regarding items 1 - 4, the English translations accompanying the articles fail to comply with 8 C.F.R. § 103.2(b)(3), which requires that "[a]ny document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Furthermore, as the petitioner failed to submit the original articles or copies of the original articles, we cannot conclude that the petitioner, in fact, wrote these articles or that they appeared in professional or major trade publications or other major media. Regarding, the claimed articles from Magazine Aventuras De Genios, the petitioner failed to submit any translations, let alone certified translations. Because the petitioner failed to comply with 8 C.F.R. § 103.2(b)(3), the AAO cannot determine whether the evidence supports the petitioner's claims. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Nonetheless, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires "[e]vidence of the alien's authorship of *scholarly articles* in the field, in professional or major trade publications or other major media [emphasis added]." Generally, scholarly articles are written by and for experts in a particular field of study, are peer-reviewed, and contain references to sources used in the articles. In this case, the documentary evidence does not contain the characteristics of scholarly articles and appears to be more for entertainment than scholarly purposes. There is no evidence demonstrating that the articles have attracted scholarly attention. As there is no evidence demonstrating that the documentation were peer-reviewed, contain any

references to sources, or were otherwise considered “scholarly,” the petitioner’s documentation are insufficient to meet this criterion. Furthermore, the petitioner failed to establish that *Perumagia* and *Magazine Aventuras De Genios* are professional or major trade publications or other major media.

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.

At the time of the original filing of the petition, counsel claimed the petitioner’s eligibility for this criterion by stating:

[The petitioner’s] art, talent, and expertise as a Professional Magician are constantly on display via the numerous exhibits and magic-shows he performs annually. We hereby submit a list of shows he has performed in or will perform in from 2007 – 2009. His work has been on display on National and International Television and within the National and International Newspapers and Magazines as evidenced herein.

On appeal, counsel argues:

The Texas Service Center erred in refusing to consider the extensive documentation as to the Petitioner’s work having been on display at artistic exhibitions or showcases as per 8 CFR § 204.5(h)(3)(vii).

The Texas Service Center mistakenly states “this element pertains to aliens in the performing arts. It cannot be found to apply here.” MAGIC is considered to be a “performing art.” Please see Exhibit “6” wherein Wikipedia defines Magic as follows:

Magic is a performing art that entertains an audience by creating illusions of seemingly impossible or supernatural feats, using purely natural means. These feats are called magic tricks, effects or illusions.

Regarding counsel’s submission of Wikipedia’s definition of magic, there are no assurances about the reliability of the content from this open, user-edited Internet site. As such, we will not assign weight to information from Wikipedia. *See Laamilem Badasa v. Michael Mukasey* 540 F.3d 909 (8th Cir. 2008).⁵

⁵ See also the online content from http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on August 3, 2010, and copy incorporated into the record of proceeding is subject to the following general disclaimer:

Nevertheless, we agree that magic is in the performing arts. However, we disagree with the director's conclusion that this criterion "pertains to aliens in the performing arts." 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." Therefore, this criterion does not relate to the performing arts. It is inherent for the performing artist to perform before an audience. We find that the petitioner's performances are best considered under the commercial successes in the performing arts criterion at 8 C.F.R. § 204.5(h)(3)(x), which are discussed later in this decision.

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

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

In the director's decision, he indicated that this criterion applies to the performing arts. However, while we agree with the director, the director erroneously stated that "[i]t cannot be found to apply here." As stated previously, the petitioner is a magician, and the petitioner's field is in the performing arts. As such, the regulation at 8 C.F.R. § 204.5(h)(3)(x) falls within the purview of the petitioner's occupation.

On appeal, counsel argues:

The underlying record at Exhibit "8" of the I-140 Package clearly establishes the Petitioner's commercial success in the performing art[s] as evidenced by his having been featured on Peruvian and International television over 100 times on prominent networks and shows such as CNN, Telemundo, and Univision's Despierta America, and as further evidenced by his having performed as a Professional Magician for numerous large corporations including: (1) Nextel; (2) Continental Airlines; (3) Coca-Cola; (4) IBM; (5) Samsung Electronics; (6) Dunkin Donuts; (7) Lan Peru Airlines; (8) United Nations World Food Program; (9) Daewoo; (10) Telmex Peru; (11) PGA Tour; (12) Universal Studios, and many others.

WIKIPEDIA MAKES NO GURANTEE 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.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires “[e]vidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.” As this regulatory criterion specifically requires the petitioner’s commercial successes “as shown by box office receipts or record, cassette, compact disk, or video sales,” the petitioner’s television appearances and corporate performances do not meet the plain language of the regulation.

Furthermore, while counsel submitted what appears to be a self-compiled list of the petitioner’s performances at various venues, the petitioner submitted some DVDs of his television appearances on such show as “CNN En Espanol,” “El Vacilon,” “Zona Zero,” and “Quiereme Descalzi.” However, merely submitting evidence reflecting that the petitioner performed at numerous events without documentary evidence demonstrating “commercial successes” is insufficient to meet the plain language of the regulation. The petitioner failed to submit any documentary evidence in form of “box office receipts or record, cassette, compact disk, or video sales” to demonstrate his commercial successes. There is no evidence showing that petitioner’s performances consistently drew record crowds or were regular sell-out performances.

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 established eligibility for one of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

The regulation at 8 C.F.R. § 204.5(h)(3) provides that “[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” The petitioner’s evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criterion at 8 C.F.R. § 204.5(h)(3)(i), 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). While the petitioner failed to

establish eligibility under the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), we note that the most recent article was published on November 7, 2007, almost one year prior to the filing of the petition. In addition, the majority of the documents reflect material from 2001 – 2004, with little material occurring after 2004. For these reasons, we do not find that such evidence demonstrates sustained national or international acclaim.

Moreover, we cannot ignore that the statute requires the petitioner to submit “extensive documentation” of the beneficiary’s sustained national or international acclaim. See section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). In this case, the petitioner relies on counsel’s self-compiled documentation without providing any independent, objective evidence for the source of counsel’s claims. In addition, the petitioner submitted evidence that failed to contain full and certified translations. Further, while the petitioner claimed to have performed extensively nationally and internationally, the only evidence submitted was a self-compiled list of performances. An individual who has sustained national or international acclaim as a magician should be able to produce documentary evidence reflecting commercial successes.

While the petitioner established eligibility for the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the petitioner established his eligibility based on judging at the [REDACTED]. The only evidence submitted in support of these events was a letter from [REDACTED] who generally stated that [REDACTED] brings the best entertainers from around the world to perform and lecture.” However, the documentation is insufficient to establish that the petitioner is “that small percentage of individuals that have risen to the very top of their field of endeavor.” *Cf.*, *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899 (USCIS has long held that even athletes performing at the major league level do not automatically meet the “extraordinary ability” standard). We would be more persuaded by evidence specifically reflecting that the petitioner judged nationally or internationally acclaimed magicians rather than a general claim from a reference letter stating that the petitioner judged the best entertainers from around the world.

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. O-1 Nonimmigrant Admission

We note that at the time of the filing of the petition, the petitioner was last admitted to the United States on July 27, 2008, as an O-1 nonimmigrant visa petition 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 that “[t]he 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 petitioner’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 case 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).

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.