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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B2



DATE: DEC 21 2011 OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, on June 10, 2010, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

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

On appeal, counsel argues that "[t]he Director failed to meaningfully consider the evidence under the 'comparable evidence' standard, and also failed to consider the evidence taken as a whole in her evaluation of [the beneficiary's] eligibility as an alien of extraordinary ability." A review of the record of proceeding reflects that in counsel's cover letter at the initial filing of the petition, counsel claimed and submitted documentary evidence of the beneficiary's eligibility for all of the criteria at 8 C.F.R. § 204.5(h)(3) except for the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv). In addition, counsel requested that the beneficiary's documentation be considered as comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4) for the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x).

In response to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), counsel stated:

We respectfully request that you consider all the evidence not only as it pertains to the 10 enumerated categories of 8 CFR §204.5 (h) (3), but also as it pertains the **comparable evidence** [emphasis in original] provision at 8 CFR §204.5(h)(4).

* * *

Although [the beneficiary] has not won awards in his own name, please consider the comparable evidence of **criteria (i) and (v)** [emphasis in original] showing that his innovative methods were crucial to the Academy Award-winning visual effects in “The Curious Case of Benjamin Button” and to his current employer [the petitioner]. Although [the beneficiary] does not have published interviews, please consider the comparable evidence of **criteria (iii)** [emphasis in original] showing that high profile interviews with Eric Barba and Steve Preeg: although they did not include [the beneficiary’s] name, did in fact describe the work performed by [the beneficiary’s] department (Human Texture) as part of the overall, award-winning process. Please also consider the evidence previously submitting showing the distinguished reputations of both Digital Domain and [the petitioner], along with testimonials, expert opinions, and [the petitioner’s] supporting letters describing [the beneficiary’s] leading and crucial role at these organizations, as comparable evidence of **criteria (viii)** [emphasis in original].

In the director’s decision, she determined that the beneficiary failed to meet any of the criteria at 8 C.F.R. § 204.5(h)(3) except for the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). In counsel’s appellate brief, counsel argues:

Despite the petitioner’s request for consideration under the comparable evidence standard, the Director failed to do so. In fact, the only time the Director mentioned “comparable evidence” was in the Decision, page 6, stating, “Counsel has submitted additional witness letter but no additional evidence in the form of comparable evidence.”

* * *

If the “comparable evidence” provision is meant to act as a kind of safety net to catch those qualified individuals who, because of the nature of their particular profession, “slip through the cracks” because they cannot specifically and literally satisfy 3 out of the 10 criteria of 8 CFR §204.5 (h) (3), then the Director abused her discretion by not meaningfully considering the evidence presented under this alternate standard.

Although the director briefly mentioned comparable evidence in relating to her discussion of the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii) and only in terms that “no additional evidence in the form of comparable evidence” was submitted, the director did not address counsel’s arguments at the initial filing of the petition and in response to the director’s request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) regarding comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). More importantly, however, the director failed to indicate if comparable evidence could even be considered.

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

In response to the director’s request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) and in counsel’s appellate brief, counsel refers to a letter from [REDACTED] who stated:

[I]t is important to remember that the computer graphics and video game animation industry is extremely cutthroat and competitive and original contributions made in this field are not typically shared with other companies in the industry. Typically, experts in the field keep a low public profile with few articles published or interviews granted in every attempt to preserve their proprietary knowledge and techniques. They specifically don’t want others to know what they are doing and a lot of money hinges on them specifically not revealing their research and innovations.

The letter from [REDACTED] is not persuasive evidence that the regulatory criteria at 8 C.F.R. § 204.5(h)(3) do not readily apply to the beneficiary’s occupation in multi-media arts and animation. [REDACTED] only addressed two out of the ten criteria – the published material criterion (8 C.F.R. § 204.5(h)(3)(iii)) and the original contributions criterion (8 C.F.R. § 204.5(h)(3)(v)). Regarding the published material, 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.” This regulatory criterion does not require the beneficiary to be interviewed by the media; instead the regulation requires published material about the beneficiary relating to his work. In fact, the petitioner submitted documentary evidence reflecting published material about others in the beneficiary’s field such as [REDACTED]. Therefore, published material does exist in the beneficiary’s occupation; there just is not any published material about the beneficiary relating to his work. Moreover, regarding the original contributions criterion, 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.” This regulatory criterion does not

require the beneficiary's work to be shared with others; rather the regulation requires that the beneficiary make original contributions of major significance in the field.

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the beneficiary's occupation as a cinematic look development supervisor cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, the director determined that the beneficiary met at least one of the criteria (high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix)). Moreover, as indicated above, counsel initially claimed the beneficiary's eligibility for nine of the ten criteria at 8 C.F.R. § 204.5(h)(3) and also requested consideration for comparable evidence for four of the criteria. An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the beneficiary's occupation.

Furthermore, counsel's reliance on documentary evidence reflecting the recognition of the work of others, such as [REDACTED] winning the 2008 Academy Award for "Best Achievement in Visual Effects" for *The Curious Case of Benjamin Button* or an interview conducted with [REDACTED] where the beneficiary is never even mentioned, fails to demonstrate how the evidence should be comparatively analyzed to determine if the beneficiary meets any of the criteria. The regulation at 8 C.F.R. § 204.5(h)(4) is not a provision to simply allow an alien to circumvent the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) when an alien is unable to meet or submit documentary evidence of the criteria. Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. As the petitioner submitted documentary evidence reflecting that many of the beneficiary's colleagues could have met some of the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), the record clearly reflects that the submission of comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4) cannot be considered to determine the beneficiary's eligibility.

In the AAO's analysis of the evidentiary criteria below, the AAO will determine whether the documentary evidence meets the requirements of the plain language of the criteria at 8 C.F.R. § 204.5(h)(3).

II. 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.

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).

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).

III. Analysis

A. Evidentiary Criteria

The petitioner has submitted evidence pertaining to the following criteria under the regulation at 8 C.F.R. § 204.5(h)(3).²

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

The 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].” As indicated above, the petitioner claimed the beneficiary’s eligibility for this criterion based on receipt of the 2008 Academy Award in “Best Achievement in Visual Effects” category for *The Curious Case of Benjamin Button*. Although the petitioner submitted a letter from [REDACTED] who stated that the beneficiary “was a crucial member of that team, and was recognized as such,” the petitioner submitted screenshots from IMDbPRO reflecting that the recipients of the Academy Award were: [REDACTED]. [REDACTED] The beneficiary is not credited as being one of the recipients. As such, the petitioner failed to establish “the alien’s receipt” of the award.

Similarly, the petitioner submitted additional screenshots from IMDbPRO reflecting numerous nominations and awards won by *The Curious Case of Benjamin Button*. While the screenshots specifically list the recipient(s), the beneficiary is not listed as being a recipient for any award. Although the screenshots from IMDbPRO do not equate to primary evidence as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(2), the AAO cannot conclude that awards that were not specifically presented to the beneficiary are tantamount to his receipt of nationally or internationally recognized awards; it cannot suffice that the beneficiary was one member of a large group that earned collective recognition. As 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 prizes or awards, the submission of documentary evidence reflecting awards won by movies in which the beneficiary

² The petitioner does not claim the beneficiary meets or submits evidence relating to the criteria not discussed in this decision.

contributed in some capacity or awards that were specifically presented to other individuals is insufficient to demonstrate that the beneficiary received nationally or internationally recognized awards for excellence in the field. There is no documentary evidence establishing that the beneficiary was individually recognized for his work.

Accordingly, the petitioner failed to establish that the beneficiary 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.

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.

At the initial filing of the petition, counsel claimed the beneficiary’s eligibility for this criterion based on opinion letters from ██████████ and ██████████

██████████ Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada (IATSE) and The Animation Guild and Affiliated Optical Electronic and Graphic Artists (AGAOEGA)). Neither letter indicated that the beneficiary was a member of any of the associations, nor did the petitioner submit any documentary evidence demonstrating that membership in the associations require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

In response to the director’s request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the petitioner submitted a letter from ██████████ Visual Effects Society (VES), who stated:

[VES] is a professional organization comprised of artists and technologists who are professionally committed to the specialized industry of visual effects. VES is the world’s largest organization of distinguished visual effects professionals. VES was formed in order to provide a platform for these distinguished artisans to communicate, educate, and recognize each other and their shared vision of the

current and future state of visual effects industry. Therefore VES does serve as the global reference point for visual effects practitioners.

Likewise, Ms. Bromley's letter failed to indicate that the beneficiary is a member of VES and failed to reflect that outstanding achievements, as judged by recognized national or international experts in their disciplines or fields, are requirements for membership with VES.

Even if the petitioner submitted documentary evidence reflecting that the beneficiary is a member of any of these associations, the petitioner failed to demonstrate that any of the associations require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii). It is the petitioner's burden to establish eligibility for every element of this criterion.

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

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

The 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 beneficiary 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 Moreover, 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 previously discussed, the petitioner submitted documentary evidence of published material about the beneficiary's colleagues; however the petitioner failed to submit any documentary evidence reflecting published material about the beneficiary relating to his work. As the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “[p]ublished material *about the alien* [emphasis added]” the submission of published material about co-workers and colleagues, let alone material that does not even mention the name of the beneficiary, is insufficient to meet the elements of this criterion.

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.

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

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

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.” Here, the evidence must be reviewed to see whether it rises to the level of original artistic-related contributions “of major significance in the field.” The phrase “major significance” is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

A review of the record of proceeding reflects that the petitioner submitted several recommendation letters. While the recommendation letters make general statements regarding both the originality and quality of the beneficiary’s work, they fail to identify any specific original contributions of major significance in the field. For example, ██████████ stated that the beneficiary “has succeeded in bringing new skills, a new art approach, and an extraordinary level of experience in digital effects to the industry.” ██████████ failed to identify the beneficiary’s “new skills” and “new art approach” and how they have somehow affected the field in a significant manner. Moreover, ██████████ stated that the beneficiary “consistently provided the most accomplished and innovative digital visual effects.” Again, ██████████ failed to specifically identify any “accomplished and innovative digital visual effects” that were developed by the beneficiary and how they have widely influenced the field rather than limited to the movies in which the beneficiary contributed. Furthermore, ██████████ stated that the beneficiary’s “creative and technical skills were essential to tackling many of the intricate challenges in various high-profile projects.” Likewise, ██████████ failed to pinpoint a creative and technical skill that could be considered an original contribution of major significance in the field as a whole. In addition, ██████████ stated that the beneficiary “is an expert in digital visual effects and is renowned in the industry for his stellar work, strong dedication to innovative quality, and critical contributions to the success of a project.” However, ██████████ failed to identify the beneficiary’s “critical contributions” and how they have impacted the field.

The letters provide only general statements without offering any specific information to establish the beneficiary’s original contributions and how they have been of major significance in the field. The lack of specific information fails to provide a basis for determining that the beneficiary has made original contributions of major significance in the field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v). The authors of the letters, for example, failed to provide specific examples of the beneficiary’s original work and how they have influenced, impacted, or affected the field, so as to establish original contributions of major significance in the field. Simply submitting recommendation letters that merely indicate that the beneficiary worked on projects for various movies are insufficient to demonstrate that the beneficiary’s original contributions have been of major significance in the field.

The record of proceeding also contains recommendation letters from individuals who work for and represent the petitioner. Again, the recommendation letters fail to provide specific information and provide only general statements regarding the significance of the beneficiary's contributions. For example, ██████████ stated that the beneficiary "greatly improved the efficiency of our creative pipeline." Once again, ██████████ failed to indicate how the beneficiary improved the efficiency of the "creative pipeline," and how it is of major significance in the field as a whole rather than limited to the impact on the petitioner. Moreover, ██████████ stated that "[s]ince [the beneficiary's] arrival our look dev[elopment] and surfacing has increased productivity by at least 5 times" and the beneficiary "has applied his knowledge and experience to create systems and policies that have given us this increase in productivity." ██████████ however, discussed the beneficiary's contributions as they related to the petitioner rather than to the field as a whole, and he failed to specifically identify or provide details regarding the "systems and policies" created by the beneficiary.

Finally, the recommendation letters refer to the skills and talents of the beneficiary. For example, Erik Nash stated that the beneficiary's "unique blend of artistic taste, technological expertise, and zeal for efficiency make him essential to any production." Assuming the beneficiary's skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment labor certification process. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 (Comm'r 1998).

While those familiar with the beneficiary and his work generally describe it as "innovative" and "extraordinary," there is insufficient documentary evidence demonstrating that the beneficiary's work is of major significance. This regulatory criterion not only requires the beneficiary to make original contributions, the regulatory criterion also requires those contributions to be of major significance. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the beneficiary's contributions are original and have already influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The lack of supporting evidence gives the AAO no basis to gauge the significance of the beneficiary's contributions.

Further, 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 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the beneficiary'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; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008). Thus, the content of the writers' statements and how they became aware of the beneficiary's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in

support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance.

Again, 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* [emphasis added].” Without additional, specific evidence showing that the beneficiary’s work has been unusually influential, widely applied throughout his field, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that he meets this criterion.

Accordingly, the petitioner failed to establish that the beneficiary 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 initial filing of the petition, counsel claimed the beneficiary’s eligibility for this criterion based on his thesis entitled, “The Influence of a Japanese Contemporary Director on the Work of Song Tiang Teo,” at the Savannah College of Art and Design. 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].” The petitioner failed to submit any documentary evidence demonstrating that the beneficiary’s thesis was published in a professional or major trade publication or other major media. Therefore, the petitioner failed to establish that he meets all of the elements of the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi).

Moreover, even if the petitioner were to submit supporting documentary evidence showing that the beneficiary’s thesis meets the elements of this criterion, which it has not, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires more than one scholarly article. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of “letter(s).” Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS’ ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for “a” bachelor’s degree or “a” foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials). In this, the petitioner only submitted one scholarly article that was authored by the beneficiary.

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

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

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.” A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence reflecting that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Therefore, the AAO withdraws the findings of the director for this criterion.

Accordingly, the petitioner established that the beneficiary meets the plain language of the regulation for this criterion.

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

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a *leading or critical role* for organizations or establishments that have a distinguished reputation [emphasis added].” 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.

On appeal, the petitioner refers to the previously discussed recommendation letters as evidence of the beneficiary’s eligibility for this criterion. Regarding Digital Domain, the petitioner submitted letters from [REDACTED]

Regarding the petitioner, it submitted letters from [REDACTED]

and [REDACTED]

Although the letters indicated that the beneficiary was “critical,” “invaluable,” and “crucial” to Digital Domain and to the petitioner, they fail to reflect that the beneficiary has performed in a leading or critical role consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). In fact, it appears from their job titles that these individuals who wrote recommendation letters on behalf of the beneficiary performed in a far more leading or critical role. The petitioner failed to submit any organizational charts, for example, to demonstrate that the beneficiary’s roles were leading or critical when compared to other employees at the organizations. Again, the AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the beneficiary’s roles were leading or critical. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff’d*, 905 F. 2d at 41; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5. The lack of supporting evidence gives the AAO no basis to gauge the significance of the roles performed by the beneficiary.

The AAO notes that the petitioner submitted selective screenshots from *Yahoo! Movies* regarding the some of the cast and crew for *The Curious Case of Benjamin Button*. The screenshot credits the beneficiary as the “Texture Paint Lead.” However, the screenshot lists numerous Digital Domain employees who also worked on the movie such as Eric Beaver (Lead Composer), [REDACTED]. The petitioner failed to submit any documentary evidence that distinguishes the beneficiary’s role and position to the other Digital Domain employees, as well as the other cast and crew members, so as to establish that the beneficiary’s role was leading or critical. Moreover, the fact that [REDACTED] were acknowledged by winning the 2008 Academy Award reflects that their visual effects roles were substantially leading or critical in relation to the beneficiary’s subordinate role as a “Texture Paint Lead.”

Again, 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.” The burden is on the petitioner to establish that the beneficiary meets every element of this criterion. Without documentary evidence demonstrating that the beneficiary has performed in a leading or critical role for organizations or establishments that have a distinguished reputation, the AAO cannot conclude that the beneficiary meets this criterion.

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

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

As indicated previously, the director determined that the petitioner established the beneficiary’s eligibility for this criterion. However, based on a review of the record of proceeding, the AAO must withdraw the findings of the director for this criterion. The petitioner submitted the following documentation:

1. A letter, dated June 9, 2008, addressed to the beneficiary from [REDACTED] the petitioner, who stated:

We are pleased to offer you a starting annual base salary of . . . (\$110,000.00USD); and a one-time signing bonus of . . . (\$15,000.00USD), less applicable taxes. Further, you will be eligible to (i) receive up to a . . . (10%) annual bonus at the end of each calendar year;

2. A screenshot from www.flcdatcenter.com reflecting the median Level 4 wages for “Multi-Media Artists and Animators” is \$73,653 per year;
3. Screenshots from www.jobbankusa.com reflecting that the median wages for “Professional Multi-Media Artists” in Los Angeles, CA is \$83,000;

4. Screenshots from www.payscale.com reflecting the median salary for “Multi-Media Artist or Animator” from California, Florida, Massachusetts, Pennsylvania, Ohio, Texas, and New York ranging from approximately \$30,000 to \$70,000;
5. A screenshot from www.salarylist.com reflecting various salaries for “Multi-Media Artist and Animator” in California ranging from \$40,872 to \$90,000; and
6. Screenshots from www.bls.gov reflecting 90th percentile of wages for “Multi-Media Artists and Animators” is \$100,390.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires “[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.” In other words, the petitioner must not only submit evidence of the beneficiary’s salary but also submit evidence that the beneficiary’s salary is high when compared to others in the field.

Moreover, the regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits.

Regarding item 1, the document reflects an offer of employment and salary rather than evidence that the beneficiary actually earned those wages. The petitioner failed to submit any primary evidence, such as paystubs or income tax documentation, of the beneficiary’s salary. Furthermore, the petitioner failed to submit any documentary evidence reflecting that primary and secondary evidence do not exist or cannot be obtained.

Notwithstanding the above, the petitioner seeks to classify the beneficiary as a cinematic look development *supervisor*, and the petitioner offered the beneficiary a position as a cinematic look development *supervisor*. However, regarding items 2 – 6, the petitioner submitted documentary evidence reflecting the salaries of multi-media artists and animators. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires “[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, *in relation to others in the field* [emphasis added].” While cinematic look developers are similar to qualify them as multi-media artists and animators, the petitioner failed to submit any documentary evidence reflecting the salaries of multi-media artist or animator *supervisors* or cinematic look development *supervisors*. See *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002) (upholding a finding that competitive athletics and coaching are not within the same area of expertise). As such, the petitioner failed to demonstrate that the beneficiary commands a high salary “in relation to others in the field” of cinematic look development supervision.

Furthermore, regarding items 2 – 5, the documentary evidence reflects median wage statistics both in the United States as a whole and in select regional areas. However, median or average statistics do not meet the requirement that the beneficiary commands a high salary “in relation to others in the field.” Similarly, regarding item 6, while the petitioner’s salary as a supervisor places him barely in the 90th percentile of multi-media artists and animators, the AAO is not persuaded that the beneficiary’s salary was high when 10% of others made more than the beneficiary’s offered salary. There is no evidence reflecting the top salaries in the beneficiary’s field, so as to compare the beneficiary’s salary to the highest earners. The evidence submitted by the petitioner does not establish that the beneficiary has commanded a high salary in relation to experienced professionals in his occupation. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm’r 1994) (considering a professional golfer’s earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer’s salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). The AAO notes 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 Racine’s ability with that of all the hockey players at all levels of play; but rather, Racine’s 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.

The AAO notes that the petitioner offered the beneficiary a \$15,000 signing bonus, as well as a bonus of up to 10% of the beneficiary’s annual salary. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) also provides that the petitioner can submit evidence that the beneficiary has commanded “other significantly high remuneration for services, in relation to others in the field.” However, the record contains no evidence comparing the beneficiary’s sign-on bonus or annual bonus to other cinematic look development supervisors, so as to reflect that the beneficiary has commanded other significantly high remuneration for services.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires “[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.” For the reasons discussed, the petitioner failed to submit sufficient documentary evidence establishing the beneficiary’s salary, and that he has commanded a high salary in relation to others in the field consistent with the plain language of this regulatory criterion. Therefore, the AAO withdraws the decision of the director for this criterion.

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

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

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 [emphasis added].” The beneficiary is not a performing artist; rather the beneficiary is a cinematic look development supervisor. The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. As the beneficiary’s occupation is not “in the performing arts,” such as an actor or singer, the beneficiary fails to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix).

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

B. Final Merits Determination

In accordance with the *Kazarian* opinion, the AAO 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 beneficiary met the plain language of 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 the AAO’s preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating the AAO’s final merits determination, the AAO must look at the totality of the evidence to determine the beneficiary’s eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the beneficiary has participated in successful movies and video games. However, the personal accomplishments of the beneficiary 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 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).

The AAO 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 claims eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) and the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii) based on documentary evidence of the awards and published material of others in beneficiary’s field without submitting any documentary evidence demonstrating that the beneficiary has won any awards or has had any published material about him relating to his work. Likewise, the petitioner submitted documentary evidence regarding memberships in associations pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), but the documentary evidence failed to even reflect that the beneficiary was a member of the associations, let alone that the associations require outstanding achievements of their members. Moreover, the petitioner based the beneficiary’s eligibility for the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v) and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) entirely on recommendation letters that failed to reflect that the beneficiary has made original contributions of major significance in the field and that the beneficiary has performed in a leading or critical role. 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 submission of letters from individuals, especially when they are colleagues of the beneficiary without any prior knowledge of his work, supporting the petition 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 795-796; see also *Matter of V-K-*, 24 I&N Dec. at 500, n.2. Similarly, the petitioner claimed the beneficiary’s eligibility for the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix) without submitting any primary evidence of the beneficiary’s salary, as well as any documentary evidence comparing his salary as a cinematic look development supervisor to others in his field. Likewise, the petitioner claimed the beneficiary’s eligibility for the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi) based on the submission of one article and without establishing that the article was ever published in a professional or major trade publication or other major media. The AAO is not persuaded that such evidence equates to “extensive documentation” and is demonstrative of this highly restrictive classification. The truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) citing *Matter of E-M-* 20 I&N Dec. 77, 80 (Comm’r 1989).

The evidence of record falls short of demonstrating the beneficiary's sustained national or international acclaim as a cinematic look development supervisor. The regulation at 8 C.F.R. § 204.5(h)(3) requires "[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and this his or her achievements have been recognized in the field of expertise." While the petitioner submitted documentation demonstrating that the beneficiary has contributed to various movies and video games, the documentary evidence is not consistent with or indicative of sustained national or international acclaim.

USCIS has long held that even athletes performing at the major league level do not automatically meet the statutory standards for immigrant classification as an alien of "extraordinary ability." *Matter of Price*, 20 I&N Dec. at 954; 56 Fed. Reg. at 60899. While the petitioner need not demonstrate that there is no one more accomplished than the beneficiary to qualify for the classification sought, it appears that the very top of his field of endeavor is far above the level the beneficiary has attained. For example, [REDACTED] have won the Academy Award for "Best Achievement in Visual Effects." When compared to the beneficiary, the references are far more impressive and have established themselves as that "small percentage at the very top of the field of endeavor."

The conclusion the AAO reaches by considering the evidence to meet each category of evidence at 8 C.F.R. § 204.5(h)(3) separately is consistent with a review of the evidence in the aggregate. Ultimately, the evidence in the aggregate does not distinguish the beneficiary as one of that small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The beneficiary seeks a highly restrictive visa classification, intended for individuals at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. In this case, the petitioner has not established that the beneficiary's achievements at the time of filing the petition were commensurate with sustained national or international acclaim, or that he was among that small percentage at the very top of the field of endeavor.

IV. O-1 Nonimmigrant Admission

The AAO notes that at the time of the filing of the petition, the beneficiary was admitted to the United States as an O-1 nonimmigrant on July 6, 2008. However, while USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL

1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director 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).

V. Conclusion

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