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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

PUBLIC COPY

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[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER Date:

JAN 11 2011

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:

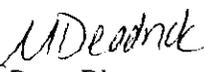
[REDACTED]

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
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on September 18, 2009, and is now before the Administrative Appeals Office (AAO) 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. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his sustained national or international acclaim.

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

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

I. Law

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

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

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

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

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

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

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

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

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

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

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

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

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 November 19, 2008, seeks to classify the petitioner as an alien with extraordinary ability as a commodities trader. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).²

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.

At the time of the original 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), the petitioner did not claim eligibility for this criterion. However, in the decision of the director, he found that the petitioner's submission of articles from www.bloomberg.net, *Bloomberg Markets*, *The New York Times*, and *Institutional Investor's Alpha* failed to establish eligibility for this criterion. We note that the petitioner submitted the documentary evidence in order to demonstrate eligibility for the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). On appeal, counsel failed to contest the decision of the director or offer additional arguments. Therefore, we will not further discuss this criterion on appeal.

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

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of 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:

[The petitioner] has made substantial contributions to the financial industry in the area of commodities trade, both in England and in the United States. Indeed, [the petitioner] is one of the financial industry's most successful and talented cutting-edge traders today, specializing in the base metals market. His analysis regarding trade activities contributes significantly to investment decisions made by governments, individual investors and institutional investors worldwide. His leadership role in the commodities trade market has earned him a loyal following from the ranks of top investment banks and financial industry executives who have recognized and applauded his outstanding achievements, while continuously relying on his innovative analysis and expertise.

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

In support of the petition, the petitioner submitted several recommendation letters. In response to the director's request for additional evidence, the petitioner submitted two additional recommendation letters. In the director's decision, he found that the petitioner's recommendation letters failed to establish eligibility for this criterion. On appeal, counsel argues that the director erred in not properly considering the "highly probative and relevant expert testimony" in the recommendation letters.

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." In compliance with *Kazarian*, the AAO must focus on the plain language of the regulatory criteria. 596 F.3d at 1121. Here, the evidence must be reviewed to see whether it rises to the level of original business-related contributions "of major significance in the field." In this case, the recommendation letters submitted by the petitioner fail to specifically identify the petitioner's original contributions. Moreover, the recommendation letters fail to indicate that the petitioner's contributions have been of major significance in the field and not limited to the business organizations in which he has worked.

We cite representative examples of the recommendation letters here:

[REDACTED], stated:

[The petitioner] is a commodities trader at [REDACTED] LP, a US based hedge fund that is uniquely positioned within the commodity investment world. As such, he is responsible for billions of dollars of assets which [REDACTED] invests on behalf of institutional and private investors to whom it holds the highest fiduciary duty. Relying on nearly 20 years of experience in the area of commodities trade, [the petitioner] has produced phenomenal results and has brought tremendous profits to [REDACTED] investors. [The petitioner] boasts a unique familiarity and expertise in the base metals market that he enabled [the petitioner] to gain recognition in all commodities markets as one of the largest and most successful participants. There are very few in the US financial services industries, who have gained the kind of knowledge and skills in this field to accurately make healthy risk adjusted investments, as [the petitioner] has.

While [REDACTED] briefly discussed the petitioner's responsibilities at [REDACTED] the petitioner's roles and responsibilities are more relevant to the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) and will be discussed later under that criterion. Moreover, [REDACTED] failed to specifically identify any original contributions made by the petitioner; instead [REDACTED] praised the petitioner's knowledge, skills, and experience. Assuming the petitioner'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 certification process. See *Matter of New York State Dep't. of Transp.*, 22 I. & N. Dec. 215, 221 (Commr. 1998). Finally, [REDACTED] refers to the petitioner's impact solely on [REDACTED] rather than to the field as a whole.

[REDACTED], a global leader in commodity related alternative investments, with nearly 4 billion dollars asset under management, [the petitioner] has been in charge of billions of dollars in investments and has earned a reputation for excellence in the area of commodities trade. His achievements thus far could only have been made by a business professional of the highest caliber, one with vision, passion and fortitude to manage risk adjusted investments of these proportions.

Again, [REDACTED] failed to identify any original contributions of major significance to the field. Instead, [REDACTED] referred to the petitioner's research and trading skills. Moreover, [REDACTED] also failed to indicate how the petitioner contributed to the field beyond his work at [REDACTED]

[REDACTED] stated:

[The petitioner] is responsible for investing and expanding the revenue of numerous institutional clients, including the endowments of key universities. His work is globally recognized as critical to enabling the US economy to recover from the nearly cataclysmic asset decline of 2008. [The petitioner] is beyond any controversy, one of the world's leading commodities trade authorities, and has been so for many years, having been a Trade Manager at the London Market.

While [REDACTED] generally stated that the petitioner's work "is globally recognized," he failed to identify any of the petitioner's specific work that is globally recognized. Furthermore, [REDACTED] failed to establish that the petitioner's work has been of major significance to the field. Instead, [REDACTED] indicated that the petitioner's work is critical "to enabling the U.S. economy to recover from the nearly cataclysmic asset decline of 2008." [REDACTED] failed to describe specific examples of the petitioner's works to demonstrate its previous or current impact or influence on the field. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 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. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. The assertion that the petitioner's work is likely to be influential and may enable the United States economy to recover is not adequate to establish that his work has already been recognized as a major contribution in the field. While [REDACTED] praises the petitioner, the fact remains that any measurable impact that results from the petitioner's work, beyond TCM, will likely occur in the future or has yet to be determined.

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)." While the recommendation letters praise the petitioner for his knowledge, skills, and talent, they fail to indicate that his contributions are of

major significance to the field. The letters provide only general statements without offering any specific information to establish how the petitioner's work has been of major significance. This regulatory criterion not only requires the petitioner to make original contributions, but also requires those contributions to be significant. We are not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the petitioner's contributions have already influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.³ The lack of supporting documentary evidence gives the AAO no basis to gauge the significance of the petitioner's present contributions.

USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Thus, the content of the writers' statements and how they became aware of the petitioner'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.

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. To be considered a contribution of major significance in the field of finance and investment, it can be expected that the petitioner's original work would be demonstrably influential beyond his employers and clients. In other words, providing sound financial or investment advice to one's clients may contribute to the client's future but is not necessarily either original or a contribution to the financial or investment field at large.

Without additional, specific evidence showing that the petitioner's work has been original, unusually influential, or has otherwise risen to the level of contributions of major significance, we cannot conclude that he meets this criterion.

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

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

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

³ *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); *Ayyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

[The petitioner] has held critical positions at [REDACTED]. Moreover, [the petitioner] has served in a critical and essential capacity for one of the most respected and powerful commodities trade hedge funds in the United States, [REDACTED]. Over the past three years [the petitioner] has substantially contributed to the generation of new investment flow of [REDACTED], establishing them as one of the largest and most successful participants across all commodities markets. Few professionals are uniformly recognized as leaders within this industry, and [the petitioner] is one of these uncommon commodities trade specialists who provide direction to the field as a whole. Simply put, only a select group of international commodities trade professionals operate at this level. [The petitioner] has provided critical direction within [REDACTED] and within the industry as a whole and has facilitated some of the most noteworthy commodities trade transactions during one of the most difficult times in market history.

In support of the petition, the petitioner submitted the previously mentioned recommendation letters. In response to the director's request for additional evidence, the petitioner submitted the following documentation:

1. An article entitled, [REDACTED] [REDACTED] March 25, 2003, in which the petitioner provided a quote for the article while employed at [REDACTED]
2. An article entitled, [REDACTED] [REDACTED] April 4, 2003; in which the petitioner provided a quote for the article while employed at [REDACTED]
3. Screenshots from www.lme.co.uk regarding the London Metal Exchange (LME);
4. *Barron's* Hedge Fund 100, dated May 11, 2009, ranking [REDACTED] as number 16;
5. An article entitled, [REDACTED] [REDACTED] March 25, 2009;
6. An article entitled, [REDACTED] [REDACTED] May 2009; and
7. An article entitled, [REDACTED] [REDACTED] 2009.

The director found that the petitioner's documentary evidence failed to establish eligibility for this criterion. On appeal, counsel argues that the recommendation letters establish the petitioner's leading or critical roles, and items 1 – 7 establish the distinguished reputations of the organizations or establishments.

A review of the recommendation letters fails to reflect that the petitioner has performed in a leading or critical role consistent with the meaning of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The letters are vague and only generally assert that the petitioner is in a leading position. For example, ██████ stated that “[the petitioner] is the leading player behind the scenes, spearheading US commodities trade” without specifically identifying the responsibilities of the petitioner or differentiating him from other employees, so as to establish a leading or critical role.

Furthermore, ██████ stated that “[the petitioner] has lead our commodities trading operation . . . including serving as Senior Trader at London Metals Exchange.” However, we are not persuaded that general statements which only indicate that the petitioner has led an operation or was a senior trader necessarily demonstrate that the petitioner has performed in a leading or critical role. ██████ failed to compare the responsibilities of the petitioner to other commodities traders at ██████, or provide other relevant evidence such as an organizational chart, so as to establish that the petitioner has distinguished himself in a leading or critical role. Simply repeating the regulatory language without providing any specific information regarding the petitioner's position provides us no meaningful way to differentiate the petitioner from others within ██████

The petitioner also submitted a letter from ██████ who stated that he served as the petitioner's immediate supervisor at ██████. In addition, ██████ stated that “[the petitioner] was instrumental in all aspects of trade negotiations and the management of two active trading books while he was at ██████” However, we are not persuaded that such statements demonstrate that the petitioner performed in a leading or critical role for ██████. In fact, it appears that the petitioner performed the routine duties of a commodities trader of an investment or financial firm.

Regarding IBL, the only evidence of the petitioner's employment with IBL were items 1 and 2 listed above. We are not persuaded that two articles that quote the petitioner equates to evidence that the petitioner has performed in a leading or critical role with ██████

The documentation submitted by the petitioner is simply reflective of the petitioner's position as a commodities trader. The petitioner failed to submit sufficient documentary evidence that is demonstrative of a leading or critical role. USCIS may, in its discretion, use as advisory opinion 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 of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the

content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Furthermore, 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. Moreover, simply submitting recommendation letters that generally state that the petitioner performed in a leading or critical position for an organization or establishment without specific evidence demonstrating that the petitioner's roles were leading or critical is insufficient to establish eligibility for this criterion.

We note that regarding items 4 – 7, the petitioner submitted documentary evidence reflecting events occurring after the filing of the petition. However, we are persuaded that [REDACTED] [REDACTED] have distinguished reputations.

Although the documentary evidence submitted by the petitioner reflects that [REDACTED] is a successful commodity-based hedge fund, the petitioner failed to submit sufficient documentary evidence establishing that he has performed in a leading or critical role for [REDACTED] as well as [REDACTED]. The petitioner failed to submit evidence showing his position in relation to that of the other commodities traders with any of these organizations. In fact, it is clear that the petitioner actually reported to those offering letters on his behalf. As there is no evidence demonstrating how the petitioner's roles differentiated him from the other commodities traders, much less from that of his superiors, the documentation is not sufficient to establish his "leading or critical role" pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

Accordingly, the petitioner failed to establish that he 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.

In the director's decision, he concluded that the petitioner established eligibility for this criterion. A review of the record reflects that the petitioner submitted sufficient documentation demonstrating that he has commanded a high salary in relation to others in his field. Therefore, we agree with the findings of the director.

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

B. Comparable Evidence

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 following regulation categories. 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. We further acknowledge that 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 her occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

On appeal, counsel claimed that the "[p]etitioner meets the 'comparable evidence' standard under 204.5(h)(4)" without providing any additional arguments or evidence. 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 commodities trader cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, counsel mentions evidence in his brief that specifically addresses three of the ten criteria at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Moreover, although the petitioner failed to claim these additional criteria, we find that a commodities trader could win lesser nationally or internationally recognized prizes and awards, and that a commodities trader could be a member of associations that require outstanding achievements, and that a commodities trader could have published material about him regarding his work.

Counsel provided no documentation as to why these provisions of the regulation would not be appropriate to the profession of a commodities trader. 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.

C. 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 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 our preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating our final merits determination, we must look at the totality of the evidence to conclude the petitioner's eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner enjoyed personal financial success as a commodities trader and has garnered the respect of some of his colleagues. However, the accomplishments of the petitioner fall far short of

establishing that he “is one of that small percentage who have risen to the very top of the field of endeavor” and that he “has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” *See* 8 C.F.R. § 204.5(h)(2), section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

The regulation at 8 C.F.R. § 204.5(h)(3) provides that “[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” The petitioner’s evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien’s field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2).

Although the petitioner failed to establish 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), the petitioner based his eligibility on almost entirely on recommendation letters. Notwithstanding the numerous opinions in the record, the fact remains that the evidence consists almost entirely of testimonial evidence. In order to establish eligibility for extraordinary ability classification, the statute requires evidence of the alien’s “sustained national or international acclaim” and evidence that the alien’s achievements have been recognized in the field of endeavor through “extensive documentation.” Section 203(b)(1)(A)(i) of the Act.

Furthermore, 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. Unusual in its specificity, section 203(b)(1)(A)(i) of the Act clearly requires “extensive documentation” of the alien’s achievements. 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 experts 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. Thus, the content of the experts’ statements and how they became aware of the petitioner’s reputation are important considerations. Here, many of the experts are personally acquainted with the petitioner, and some have worked with him as colleagues or supervisors. Even when written by independent experts, letters solicited by an alien in support of an immigrant petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of a commodities trader who has sustained national or international acclaim.

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). We are not persuaded that an individual with sustained national or international acclaim could not submit extensive evidence of his original contributions of major significance and leading or critical roles.

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 the petitioner was last admitted to the United States as an O-1 nonimmigrant on November 9, 2008. However, while USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, 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. at 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d at 1090.

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

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

IV. Conclusion

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

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

ORDER: The appeal is dismissed.