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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: OFFICE: NEBRASKA SERVICE CENTER FILE: 

JUN 28 2011

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:

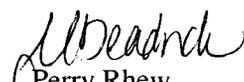


INSTRUCTIONS:

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 February 2, 2010, 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 June 4, 2009, seeks to classify the petitioner as an alien with extraordinary ability as an actor, voiceover artist, and performer. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).²

Documentation of the alien's 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.

In the director's decision, she found that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner claimed eligibility based on membership with the Screen Actors Guild (SAG) and the American Guild of Variety Artists (AGVA).

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.

Regarding SAG, at the initial filing of the petition, counsel argued that "[b]ecause of [the petitioner's] recent appearances/performances under an affiliated performers' union, he was offered membership in the [SAG] [emphasis added]." In addition, the petitioner submitted a letter, dated February 22, 2008, to the petitioner from [REDACTED] who stated that "your recent employment under an affiliated performers' union *qualifies* you for membership in [SAG] [emphasis added]," "I strongly encourage you to take this prestigious and singular opportunity to *become* a SAG member [emphasis added]," and "I hope we *will* soon welcome you to [SAG] [emphasis added]." As the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires "the alien's membership in associations," the petitioner's submission of documentary evidence requesting or encouraging the petitioner to become a member of the SAG is insufficient to demonstrate that the petitioner is a member of the SAG.

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

The AAO notes that on appeal the petitioner submitted an unsigned letter, dated March 24, 2010, from [REDACTED] and an undated letter without an original signature from [REDACTED] regarding the petitioner's application for membership with the [REDACTED] and [REDACTED] that will be discussed later in this criterion. Both [REDACTED] and [REDACTED] indicated that the petitioner "was recently [REDACTED] into the [SAG]." 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. In this case, while the petitioner submitted two unsigned letters, the petitioner failed to submit any documentary evidence demonstrating that primary evidence and secondary evidence do not exist or cannot be obtained. As such, the petitioner failed to comply with the regulation at 8 C.F.R. §103.2(b)(2)(i), and the petitioner failed to establish that he is a member of the SAG. Even if the petitioner demonstrated that he is a member of the SAG, which he did not, the employment-based petition was filed on June 4, 2009. Eligibility must be established at the time of filing. The petitioner failed to demonstrate that he was a member of the SAG at the time of the original filing of the petition. 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 USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

Notwithstanding the above, the petitioner submitted screenshots from www.sag.org regarding SAG membership requirements. A review of the documentary evidence reflects that in order to become eligible for SAG membership, an individual must meet one of the following requirements:

1. Performers may join SAG upon proof of employment. Employment must be in a principal or speaking role in a SAG film, videotape, television program or commercial. Proof of such employment may be in the form of a signed contract, or original pay stubs;
2. Upon proof of employment as a SAG-covered background player at full SAG rates and conditions for a MINIMUM of three work days subsequent to March 25, 1990. Employment must be by a company signed to a SAG Agreement under which the Producer is required to cover background actors. Proof of employment must be in the form of original paystubs or payroll printout faxed from the payroll house; or
3. Performers may join SAG if the applicant is a paid-up member of an affiliated performers' union (ACTRA, AEA, AFTRA, AGMA or AGVA) for a period of one year and has worked and been paid for at least once as a principal performer in that union's jurisdiction.

The AAO is not persuaded that SAG's membership requirements reflect outstanding achievements, as judged by recognized national or international experts in their disciplines or fields. In other words, an individual does not obtain SAG membership because recognized national or international experts review his past performances and determine that they are outstanding achievements. Moreover, based on [REDACTED] letter, the petitioner was eligible to join the SAG based on his recent employment under an affiliated performers' union (item 3). The AAO is also not persuaded that working as a principal performer at least once reflects an outstanding achievement. Therefore, the petitioner failed to establish that membership with the SAG requires outstanding achievements of its members, as judged by recognized national or international experts in their disciplines or fields.

Regarding AGVA, the petitioner submitted sufficient documentary evidence establishing that he has been a member of AGVA since February 2007. The petitioner also submitted screenshots from www.agvausa.com reflecting:

- A. If you have been offered an AGVA contract, you will be supplied with an AGVA Membership Kit and AGVA Application form which must be completed and submitted to AGVA;
- B. If you are working under an AGVA contract in a Right-To-Work State, which does not require you to join the union in order to work under AGVA contract, you may still be eligible to join; and
- C. If you are not under an AGVA contract and are interested in joining AGVA, please send a resume of your professional credits and work in the variety field to us.

The documentary evidence submitted by the petitioner fails to reflect that membership with AGVA requires outstanding achievements of its members, as judged by recognized national or international experts in their disciplines or fields. In fact, regarding items A and B, it appears that membership with AGVA is contingent upon working under or having been offered an AGVA contract. As AGVA membership is based on contractual employment with AGVA rather than outstanding achievements, the record fails to reflect that the petitioner's membership meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii). Furthermore, the documentary evidence submitted by the petitioner fails to demonstrate that membership is judged by recognized national or international experts in their disciplines or fields. Regarding item C, the screenshot reflects that "[t]he AGVA Membership Committee and AGVA Membership Department will be happy to review your professional credits and contact you if you would like to be considered for membership." The petitioner failed to demonstrate that "professional credits" equate to outstanding achievements. Moreover, the petitioner failed to submit any documentary evidence establishing that the AGVA Membership Committee and the AGVA Membership Department are comprised of recognized national and international experts in their disciplines or fields. Although the petitioner established that he is a member of AGVA, he failed

to demonstrate that membership with AGVA requires outstanding achievements of its members, as judged by recognized national or international experts in their disciplines or fields.

In addition, for the first time on appeal, counsel claimed that the petitioner “has also been *sponsored to join* the [REDACTED] [emphasis added].” The petitioner submitted a [REDACTED] Membership Application that was signed and dated by the petitioner on March 24, 2010. However, the employment-based petition was filed on June 4, 2009. Clearly, the petitioner was not a member of [REDACTED] at the time of the original filing of the petition. In fact, the documentary evidence submitted by the petitioner fails to reflect that the petitioner is currently a member of [REDACTED] as the evidence only reflects a membership application. Again, as the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires “the alien’s membership in associations,” the petitioner’s submission of an application for membership within [REDACTED] is insufficient to demonstrate that the petitioner is a member of [REDACTED]

Moreover, the petitioner submitted documentary evidence reflecting that applicants for membership within [REDACTED] must currently work and have at least five years professional experience in a creative, technical, executive role directly related to the production of either feature films theatrically distributed in the United Kingdom (UK), television programming broadcast in the UK, or video games distributed in the UK. In addition, applicants must be deemed to have made a significant contribution to the industry by the relevant Sector Committee that considers such factors as:

- i. Credits on productions which are of a recognizably high standard or which are considered particularly ground-breaking or innovative;
- ii. A large number of significant credits or a long career in the industry;
- iii. Nominations for major awards;
- iv. A professional qualification relating to a technical field; and
- v. Membership of a relevant professional guild.

A significant contribution is not necessarily an outstanding achievement. While items i – iii, may reflect outstanding achievements, items iv – v are not. However, the petitioner failed to submit any documentary evidence reflecting that the Sector Committee is comprised of recognized national or international experts in their disciplines or fields, so as to demonstrate that outstanding achievements are judged by recognized national or international experts pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii). It is the petitioner’s burden to establish every element of this regulatory criterion. In this case, the petitioner failed to do so.

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

Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which

classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The director found that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted the following documentary evidence:

1. An article entitled, "Mark Takes Opera Lead," unidentified date, unidentified author, unidentified source;
2. An article entitled, "There's Not Much Missing in Misper," unidentified date, [REDACTED] unidentified source;
3. An article with a partial title, "...Made the Transition to [REDACTED]" unidentified date, unidentified author, unidentified source;
4. An article entitled, "Love, Loneliness and Light Opera," March 2000, unidentified author, unidentified source;
5. An article entitled, "Perfect Ten Out of Teen," March 3, 2000, unidentified author, *The Times*;
6. An article entitled, "The Ideal Clone Exhibition," March 5, 2000, [REDACTED] [REDACTED] *The Observer Review*;
7. An article entitled, "Just a Stage They're Going Through," March 3, 2000, [REDACTED] *The Times*;
8. A screenshot entitled, "A Pleasant, Dutiful Account of [REDACTED] Edwardian Novel," April 10, 2004, [REDACTED] www.reviewsgate.com;
9. A television schedule for December 2nd reflecting the showing of *Zoë*;
10. An event program for *Cinderella*;
11. An event program for *Misper*;
12. An event program for *Noye's Fludde*;
13. An event program for *Zoë*;
14. An event program for *The Railway Children*;

15. An event program for *Christmas*;
16. A screenshot from www.imdb.com for *Zoë*;
17. A screenshot from <http://uk.castingcallpro.com> reflecting a profile of the petitioner;
18. A screenshot from www.actorsaccess.com reflecting a profile of the petitioner; and
19. A document from [REDACTED] reflecting a profile of the petitioner.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought.” In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.³ Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that “[s]uch evidence shall include the title, date, and author of the material, and any necessary translation.”

Regarding item 1, a review of the article reflects that it is published material about the petitioner relating to his work. However, the petitioner failed to include the date and author of the article as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, the petitioner failed to indicate where the article was published, let alone demonstrate that the article was published in a professional or major trade publication or other major media.

Regarding items 2 – 7, the articles are not about the petitioner; rather they are reviews for shows in which he has performed. Although the petitioner is briefly mentioned in the articles as being a cast member, the articles are not about the petitioner relating to his work. For example, item 2 reflects a review for the production of *Misper* and items 3 – 7 reflect reviews for the production of *Zoë*. Articles that are not about the petitioner do not meet this regulatory criterion. *See, e.g., Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). Furthermore, regarding items 2 – 5, the petitioner failed to include the title, date, and/or author of the material, as well as where the articles were published for items 2 – 4. In addition, the petitioner failed to submit any documentary evidence

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.

establishing that *The Observer* and *The Times* are professional or major trade publications or other major media.

Regarding item 8, similar to the above, the screenshot is not about the petitioner relating to his work but about a review for the production of *The Railway Children*. In fact, there is no discussion of the petitioner in the article with the exception as being listed a cast member. Moreover, the petitioner failed to submit any documentary evidence demonstrating that www.reviewsgate.com is a professional or major trade publication or other major media. The AAO is not persuaded that an article posted on the Internet from is automatically considered major media. In today's world, many newspapers and media outlets, regardless of size and distribution, post at least some of their stories on the Internet. To ignore this reality would be to render the "major media" requirement meaningless. However, the AAO is not persuaded that international accessibility by itself is a realistic indicator of whether a given website is "major media."

Regarding item 9, the document simply reflects a television schedule for December 2nd in which the production of *Zoë* was aired at 7:20 on [REDACTED]. Clearly, the document is not published material about the petitioner relating to his work. Further, the petitioner failed to include the title, date, and author, as well as where it was published.

Regarding items 10 - 15, they reflect event programs for various productions and are not reflective of published material about the petitioner relating to his work. In addition, although the programs contain short biographies for all of the performers, the petitioner failed to include the title, date, and author of the material. Moreover, the petitioner failed to submit any documentary evidence establishing that any of the event programs are professional or major trade publications or other major media.

Regarding item 16, the screenshot is regarding the television production of *Zoë*. There is no discussion of the petitioner relating to his work. In fact, the screenshot contains basic production information about *Zoë* including the country, language, and color, as well as the credited cast in which the petitioner is listed as playing the character, [REDACTED]. As the screenshot contains no published material about the petitioner relating to his work, including the lack of title, date, and author, the screenshot fails to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

Regarding items 17 - 19, the documentary evidence reflects self-promotional material for the petitioner. Clearly, they are not published material about the petitioner relating to his work and do not contain the title, date, and author of the material. Merely submitting a curriculum vitae, resumé, or an autobiography without demonstrating published material about the petitioner relating to his work in professional or major trade publications or other major media does not meet the plain language of this regulatory criterion.

The AAO notes here that the director found that "the DVD's submitted, while the Service Center is unable to review these records, it does appear they are self made copies." Although counsel addresses this issue under the commercial successes criterion pursuant to the regulation at 8

C.F.R. § 204.5(h)(3)(x), the submission of DVDs reflecting samples of the petitioner's work in the field does not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Again, this regulatory criterion requires "published material" in professional or major trade publications or other major media. As DVDs are not published material in professional or major trade publications or other major media, they clearly do not meet the plain language of this regulatory criterion.

As discussed above, the petitioner only submitted one article, item 1, that reflected published material about him relating to his work. However, the petitioner failed to include the title, date, and author of the material, and the petitioner failed to demonstrate that it was published in a professional or major trade publication or other major media. Even if the petitioner were to submit supporting documentary evidence showing that he meets the elements of this criterion, which he 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)(iii) requires published material in more than one professional or major trade publication or other major media. 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.⁴

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

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

The director determined that although the petitioner initially submitted documentary evidence reflecting that he served as a judge, the petitioner failed to respond to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) requesting that the petitioner submit "[d]ocumentary evidence to establish how the [petitioner's] participation is uncommon or otherwise noteworthy relative to others who participate in similar activities."

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires "[e]vidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought." Pursuant to *Kazarian*, 596 F.3d at

⁴ 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).

1121-22, the record of proceeding reflects that the petitioner submitted sufficient documentation establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). Therefore, the AAO withdraws the findings of the director for this criterion.

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

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

In the director's decision, she found that the petitioner failed to establish eligibility for this criterion. On appeal, counsel argues that "[t]he documentation submitted clearly indicate[s] that the petitioner's work has been highly acclaimed, and unusually influential."

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 artistic-related contributions "of major significance in the field."

A review of the record of proceeding reflects that the petitioner claimed eligibility for this criterion based entirely on recommendation letters. While the recommendation letters praise the petitioner for his work and indicate his original contributions to the field based on his performances in various productions, they fail to indicate that his contributions are of *major significance* in 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. In fact, the letters briefly highlight the petitioner's roles and performances without indicating the significance of his work in the field, let alone its major significance. For example:

██████████ stated:

Since arriving in LA, [the petitioner] has become the talented voice over for ██████████ in all their corporate training videos utilizing both his native British accent and his perfected American accent. He has starred in the ██████████ ██████████ webisodes for the horror movie ██████████ starring [sic] ██████████ and performed as a bloodthirsty ██████████ in the ██████████ ██████████

██████████ failed to indicate how the petitioner's voiceover work for ██████████ training videos has influenced the field as whole rather than being limited to ██████████. Moreover, ██████████ failed to explain the significance of the petitioner's work in ██████████ and ██████████ in the field, so as to establish that the petitioner has made original contributions of major significance in the field.

stated:

[The petitioner] is a gifted [redacted] who possesses extraordinary ability. His credits range from [redacted] which he performed at the internationally acclaimed [redacted] followed by the film version, where he played the leading role of [redacted] interest, for [redacted] UK. He has played [redacted] in the [redacted] [redacted] directed by [redacted] for the [redacted]. He has also performed as the child role of [redacted] [redacted] at the [redacted] and performed as an actor with the [redacted].

Likewise, [redacted] failed to explain the impact of the petitioner's roles in [redacted] [redacted] and [redacted] on the field as a whole instead being limited to the productions in which he has performed. It is insufficient to meet the plain language of the regulation based on recommendation letters that merely highlight the roles and productions of the petitioner without demonstrating that the petitioner has made original contributions of major significance in the field.

stated:

[The petitioner's] credits range from starring [sic] as [redacted] in the production of "Cabaret" by [redacted] UK; to the fatherly figure [redacted] for the children's internet learning programme "J-World".

[The petitioner] also performed as the [redacted] in the Opera "Dido and Aeneas" orchestrated by the famous [redacted] and performed by the [redacted].

[The petitioner] took the lead role of [redacted] in the production of "Misper", an opera performed at [redacted]. [The petitioner] also performed in the warm up act for [redacted] 'Back in the World Tour' in Birmingham, England.

Once again, [redacted] simply highlighted the petitioner's characters in productions without establishing how the petitioner's performances are considered original contributions of major significance in the field pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v). [redacted] failed to provide any information regarding the petitioner's work in *Cabaret*, *J-World*, *Dido and Aeneas*, *Misper*, and *Back in the World Tour* beyond that he performed in the productions.

stated:

Through out his career [the petitioner] has performed in such shows as 'Pravda' by [redacted] in which he stared [sic] in lead role of [redacted]; The smash musical 'Chess' written by [redacted] and [redacted] from the pop group [redacted] performed at the [redacted] and [redacted] [redacted] 'Noye's Fludde' in which he performed as [redacted] who convinced everyone to get on the Arc before the flood arrived.

I have also had the pleasure to see [the petitioner] perform in the lead role of [redacted] in the play [redacted] originally penned by the world famous Irish writer [redacted]

Although [redacted] listed the petitioner's roles in *Pravda*, *Chess*, *Noye's Fludde*, and *Dracula*, he failed to point out how the petitioner's performances have significantly impacted or influenced the field as whole. Simply submitting recommendation letters that list the petitioner's characters and productions does not demonstrate that he has made original contributions of major significance in the field consistent with the plain language of this regulatory criterion.

[redacted] stated:

[The petitioner] has performed a wide variety of roles, regarding from the [redacted] [redacted] in the Opera 'Dido and Aeneas' orchestrated by the famous [redacted] to the innocent and humble [redacted] from [redacted] 'Into the Woods'.

[The petitioner] was easily able to portray the bitter and twisted role of [redacted] without a doubt an extremely physically challenging role for any actor, in the [redacted]. He also appeared in [redacted] of [redacted] as an [redacted]

Again, [redacted] indicated the petitioner's roles in *Dido and Aeneas*, *Into the Woods*, *The Tempest*, and *Romeo and Juliet*, but he did not elaborate on the importance of the petitioner's roles in the field, so as to establish that they were of major significance. [redacted] failed to provide any information detailing the effect of the petitioner's work in the field.

While the authors of the letters described the petitioner as "talented," none of the letters indicated how the petitioner's skills or personal traits are original contributions of major significance to the field. Merely having a diverse skill set is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the petitioner has already used those unique skills to impact the field at a significant level in an original way. Furthermore, 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 labor certification process. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 (Comm'r. 1998).

The authors of the recommendation letters summarized the petitioner's roles in which he has performed in various productions without indicating any original contributions of *major significance* in the field. In addition, although the authors described the petitioner as "extraordinary," there is insufficient documentary evidence demonstrating that the petitioner's work is of major significance. This regulatory criterion not only requires the petitioner to make original contributions, the regulatory criterion also requires those contributions to be significant. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the petitioner's contributions have been of major significance in the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.⁵ The lack of supporting evidence gives the AAO no basis to gauge the significance of the petitioner's present contributions.

Moreover, 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; *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 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.

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]." The AAO must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. Without additional, specific evidence showing that the petitioner's work has been unusually influential, 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 he meets this criterion.

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

In the director's decision, she concluded that the petitioner failed to establish eligibility for this criterion. In counsel's brief on appeal, he did not contest the decision of the director or offer additional arguments. The AAO, therefore, considers this issue to be abandoned and will not

⁵ *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.).

further discuss this criterion on appeal. See *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005).

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.

The director found that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.” In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment.

At the time of the initial filing of the petition, counsel argued that the petitioner “performed in leading and critical roles for reputable studios and television networks” and “his work were [sic] exhibited in world-renowned theaters and were [sic] shown in movie theaters and national television.” As the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires that the leading or critical role be for “organizations or establishments that have a distinguished reputation,” the venues where the petitioner’s performances took place do not meet the plain language of the regulation. Instead, the petitioner must demonstrate that he performed in a leading or critical role for organizations or establishments that have a distinguished reputation. Counsel referred to the following submitted recommendation letters:

stated:

[The petitioner] moulded [sic] and helped create the original Lead role of [redacted] in the Opera ‘Zoë’ performed at the internationally acclaimed [redacted] which was founded in 1934 and played host to such legendary opera singers as, [redacted] and [redacted]. Zoe was later picked up, adapted for television and shot by [redacted] UK who kept the original cast including [the petitioner].

He has performed in the hit [redacted] musical ‘Guys and Dolls’ as [redacted] [redacted] performed at [redacted] [The petitioner] has performed as the loveable [redacted] character in the [redacted] production of [redacted] during the festive Christmas season. He has also performed in [redacted].

[redacted] indicated that the petitioner performed in a leading role for [redacted] for the [redacted] and [redacted]. The AAO notes that the petitioner submitted sufficient supporting documentation demonstrating that the petitioner performed in a leading or critical role for both productions of *Zoë*. However, the petitioner failed to submit any documentary evidence

establishing that [redacted] and [redacted] have distinguished reputations. Furthermore, while [redacted] indicated that the petitioner performed in *Guys and Dolls*, *Cinderella*, and *The Tempest*, her letter makes no reference that the petitioner's roles were leading or critical. A review of the event program for *Cinderella* fails to reflect that the petitioner was featured on the cover, compared to the other performers in *Cinderella*, so as to reflect a leading or critical role. Although the petitioner is listed as a cast member, there is no evidence distinguishing the petitioner from the other performers establishing that his role was leading or critical. The AAO also notes that the record of proceeding contains no supporting evidence for the petitioner's performances in *Guys and Dolls* and *The Tempest*. Finally, the petitioner failed to submit any documentary evidence establishing that *Guys and Dolls*, *Cinderella*, and *The Tempest* are "organizations or establishments," let alone organizations or establishments that have a distinguished reputation.

[redacted] stated:

I had the pleasure of directing [the petitioner] in his performance of [redacted] in which he played the lead role of [redacted]. He also starred in the [redacted] where he played the leading role of [redacted]. The role was also originally performed by [the petitioner] at the internationally renowned [redacted] UK. [The petitioner] has also performed with the [redacted] [sic] an [redacted] world famous ballet 'Romeo and Juliet'. He has played [redacted] in the Shakespearean play 'Loves labours lost' directed by [redacted] which was also performed at the [redacted] and he has performed as the child role of [redacted] children's classic 'The Railway Children' at the [redacted].

Although [redacted] stated that the petitioner had a lead role in his directing of [redacted] [redacted] failed to indicate that the petitioner performed in a leading or critical role for *Romeo and Juliet*, *Loves Labours Lost*, and *The Railway Children*. The record of proceeding contains the event program for *The Railway Children*. However, the petitioner is simply listed as a cast member, and there is no evidence that he performed in a leading or critical role. Furthermore, the record of proceeding fails to contain any supporting documentation regarding the petitioner's performances in *Romeo and Juliet* and *Loves Labours Lost*. Moreover, the petitioner failed to establish that the specific productions in which the petitioner performed in [redacted] *Romeo and Juliet*, *Loves Labours Lost*, and *The Railway Children* are organizations or establishments, let alone organizations or establishments that have a distinguished reputation.

[redacted] stated:

[The petitioner's] credits include Acting with the [redacted] in their rendition of [redacted] world famous 'Swan Lake', [redacted] in

██████████ opera 'Noye's Fludde' and ██████████ in the hit ██████████
██████████ musical 'Guys and Dolls' as performed at ██████████

He has also voice acted for an internet learning programme called 'J-World' in which he transformed and disguised his voice to portray several lead characters and the ██████████

Similar to the above letters, ██████████ merely indicated that the petitioner performed in *Swan Lake*, *Noye's Fludde*, and *Guys and Dolls* without demonstrating that he performed in leading or critical roles. While the record of proceeding contains the event program for *Noye's Fludde*, a review of the event program only lists the petitioner as cast member and is not indicative of a leading or critical role. The AAO notes that the record of proceeding fails to contain any supporting documentation for *Swan Lake* demonstrating the role of the petitioner, so as to establish that his role was leading or critical. In addition, the petitioner failed to submit any documentary evidence establishing that the specific productions in which the petitioner performed in *Swan Lake*, *Noye's Fludde*, and *Guys and Dolls* are organizations or establishments, let alone organizations or establishments that have a distinguished reputation. Finally, while it appears that the petitioner performed in a leading role for *J-World*, the petitioner failed to submit any documentary evidence establishing that *J-World* is an organization or establishment, let alone an organization or establishment that has a distinguished reputation.

██████████ stated:

[The petitioner] has worked continuously as a performer since he moved to LA. He has been a cheeky young British man in a comedy spoof of ██████████ "Pride and Prejudice", a nasty American Vampire in HBO's hit Series "Tru Blood" and the multitude of character voices for ██████████ training videos.

Again, ██████████ only indicated that the petitioner performed in *Pride and Prejudice*, *Tru Blood*, and ██████████ training videos without demonstrating that he performed in leading or critical roles. The AAO notes that the record of proceeding fails to contain any supporting documentation of the petitioner's performance in *Pride and Prejudice*. Regardless, the petitioner failed to submit any documentary evidence establishing that the specific production in which the petitioner performed in *Pride and Prejudice* is an organization or establishment, let alone an organization or establishment that has a distinguished reputation.

██████████ stated:

[The petitioner] has worked with some of the entertainment industries biggest companies including the ██████████
██████████ This impressive resume alone puts him in the top 5% of actors in the U.S.

only indicated that the petitioner “worked” for , but failed to state that the petitioner performed in a leading or critical role to the organizations or establishments as whole rather than limited productions within the organizations. Merely submitting a letter indicating that the petitioner worked for major companies without documentary evidence demonstrating that the petitioner performed in a leading or critical is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The lack of detailed information gives the AAO no basis to gauge the roles of the petitioner for the organizations.

stated:

I have had the pleasure of working with [the petitioner] on the “The Ruins” where he played the in the webisode stories which lead up to the release of the Hit Feature of the same title.

[The petitioner] was such a pleasure to work with and had a 110% professional attitude that we asked him back to perform as a being drained for his blood in the TV show “Tru Blood.”

indicated that the petitioner played the lead role in the webisode story version of *The Ruins*. Although the petitioner failed to submit any supporting documentation, the petitioner failed to establish that playing a lead role in a webisode story version reflects a leading or critical role for as a whole. Moreover, while indicated that the petitioner performed in *Tru Blood* for there is no indication that the petitioner’s role was leading or critical compared to the other performers for the series, as well as for

Although the majority of the petitioner’s letter indicate that the petitioner performed in various productions, the letters fail to reflect that the petitioner performed in a leading or critical role. Moreover, while the record of proceeding reflects that the petitioner has performed in leading or critical roles in some productions, the petitioner failed to submit any documentary evidence demonstrating that his leading or critical roles were for organizations or establishments that have a distinguished reputation.

In response to the director’s request for additional evidence, the petitioner also submitted three appreciation letters regarding the petitioner’s participation at the for and the . However, the last two letters appear to reflect events occurring after the filing of the petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. at 114, that USCIS cannot “consider facts that come into being only subsequent to the filing of a petition.” *Id.* at 176. Regardless, all of the letters thank the petitioner for participating at the

one-time events on behalf of the organizations. However, there is no indication that the petitioner performed in a leading or critical role for the [REDACTED] rather than limited to a one-time engagement. Notwithstanding that the [REDACTED] does not equate to an organization or establishment, the petitioner failed to submit any documentary evidence demonstrating that the [REDACTED] or the [REDACTED] have a distinguished reputation.

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.” It is the petitioner’s burden to establish every element of this regulatory criterion. In this case, the petitioner failed to do so.

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

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

A review of the record of proceeding fails to reflect that the petitioner claimed eligibility for this criterion at the time of the original filing of the petition or in response to the director’s request for additional evidence. However, on appeal, counsel is now claiming the petitioner’s eligibility for this criterion. As such, the director could not have erred in her decision as the petitioner is only claiming eligibility for this criterion for the first time on appeal.

On appeal, counsel argues that the petitioner’s submission of three DVDs reflecting samples of the petitioner’s work establishes his eligibility for this criterion. Specifically, the petitioner submitted samples for *Zoë*, *Shoepers*, and *Busdriver “Me Time.”* 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].” As this regulatory criterion requires evidence of commercial successes in the form of “box office receipts” or “sales,” the petitioner’s submission of DVDs reflecting his performances do not meet the plain language of this regulatory criterion. While counsel argued on appeal that “[a]lthough the DVDs were only released on TV, MTV and the internet, they were seen by millions,” counsel failed to submit any documentary evidence supporting his assertions. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). Regardless, the record of proceeding fails to reflect any commercial successes in the form of receipts or sales of the petitioner’s work.

Accordingly, the petitioner failed to establish that he 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 petitioner established that he met the plain language of the regulation for one of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in the preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating the final merits determination, the AAO must look at the totality of the evidence to conclude the petitioner’s eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner has demonstrated that he has performed in his field as an actor and voiceover artist. 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 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 AAO found that the petitioner met the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), an evaluation of the significance of the petitioner’s judging experience is sanctioned under *Kazarian*, 596 F. 3d at 1121-11 to determine if such evidence is indicative of the extraordinary ability required for this highly restrictive classification. The petitioner submitted a letter from [REDACTED] who thanked the petitioner for his participation as a judge of “young actors” at the [REDACTED]. It is noted that the petitioner also submitted a letter from [REDACTED] for [REDACTED] who stated that the petitioner “judg[ed] the potential of prospective actors and actresses during our hiring process which resulted in the hiring of the most qualified applicants.” The documentary evidence reflects that the petitioner’s claimed achievements as the judge of the work of others involved judging the work of young, inexperienced and prospective actors. The

petitioner failed to submit evidence demonstrating that he judged acclaimed actors rather than students and up-and-coming actors. *Cf.*, *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899 (USCIS has long held that even athletes performing at the major league level do not automatically meet the “extraordinary ability” standard). Without evidence pre-dating the filing of the petition that sets the petitioner apart from others in his field, such as evidence that he has judged acclaimed actors in the field rather than his minimal participation as a judge of young and potential actors, the AAO cannot conclude that the petitioner is among that small percentage who has risen to the very top of the field of endeavor. *See* 8 C.F.R. § 204.5(h)(2).

Moreover, the AAO cannot ignore that the statute requires the petitioner to submit “extensive documentation” of his sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Although the AAO found that the petitioner failed to meet the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the petitioner based his eligibility on membership with SAG and BAFTA without submitting documentary evidence establishing that he was a member at the time of the initial filing of the petition. Further, while the AAO found that the petitioner did not meet the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x), the petitioner claimed eligibility without offering any evidence of the regulatory requirement of box office receipts or sales. Moreover, the petitioner failed to meet the regulatory requirement of including the title, date, and/or author of the material, as well as demonstrating that the material was published in professional or major trade publications or other major media, for the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The AAO is not persuaded that such evidence that fails to comply with the basic regulatory requirements 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).

In addition, while the AAO found that the petitioner failed to meet the published material criterion, the petitioner only submitted one article that was published material about him relating to his work but failed to establish that it was published in a professional or major trade publication or other major media. It is noted that while the petitioner failed to include the date of the article, it indicated that the petitioner was 19 years old. As such, the article was published approximately 10 years prior to the filing of the petition. The AAO is not persuaded that a single article published 10 years prior to the filing of the petition is reflective of the sustained national or international acclaim for this highly restrictive classification. As the petitioner’s field often receives media coverage, the petitioner’s single article is not consistent with “that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). It is further noted that the last article that was about the productions in which the petitioner performed was in 2004, approximately five years prior to the initial filing of the petition.

Furthermore, while the AAO found that the petitioner failed to meet 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 claims of eligibility almost entirely on recommendation letters. 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 petitioner without any prior knowledge of the petitioner's 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. Again, regarding the original contributions criterion, none of the letters submitted on behalf of the petitioner reflect any original contributions of major significance made by the petitioner. Furthermore, regarding the leading or critical role criterion, while the petitioner established that he has performed in leading or critical roles in such performances such as *Zoë*, the petitioner failed to establish that he performed for organizations or establishments that have a distinguished reputation.

In this matter, the evidence of record falls short of demonstrating the petitioner's sustained national or international acclaim as an actor, voiceover artist, and performer. 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 he performed in various productions, mainly at the youth level, the petitioner failed to submit any documentation establishing that his performances are of such a caliber that they are consistent with or indicative of sustained national or international acclaim. For example, the petitioner failed to submit documentation demonstrating that his performances garnered any critical acclaim or favorable press reviews or otherwise drew a significant level of attendance compared to other performances in a manner consistent with sustained national or international acclaim.

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 petitioner 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 petitioner seeks a highly restrictive visa classification, intended for individuals already 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 his 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.

III. O-1 Nonimmigrant Admission

The AAO notes that at the time of the filing of the petition, the petitioner was last admitted to the United States on January 6, 2009, as an O-1 nonimmigrant visa petition for an alien of extraordinary ability in the arts. Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states that “[t]he term ‘extraordinary ability’ means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(o)(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines extraordinary ability as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the petitioner’s receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Further, the AAO does not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each case must be decided on a case-by-case basis upon review of the evidence of record.

It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of the alien’s qualifications).

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

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

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

IV. Conclusion

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

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

ORDER: The appeal is dismissed.