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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

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[REDACTED]

DATE: **NOV 15 2011** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]
[REDACTED]

IN RE: Petitioner: [REDACTED]
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, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on January 28, 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 as a visual artist. 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.

At the time of the initial filing of the petition, the petitioner submitted documentary evidence relating to the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), and the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii). On December 22, 2009, the director issued a notice of intent to deny the petition pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) describing each of the ten criteria under the regulation at 8 C.F.R. § 204.5(h)(3) and determined that the petitioner failed to establish eligibility for any of the regulatory categories of evidence. In addition, the director indicated that the petitioner submitted no evidence of a one-time major award pursuant to the regulation at 8 C.F.R. § 204.5(h)(3).

In response, the petitioner submitted additional documentation and claimed eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix), and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x). Furthermore, the petitioner claimed that he has “received many major awards” pursuant to the regulation at 8 C.F.R. § 204.5(h)(3).

In the director's decision denying the petition, the director determined that the petitioner failed to overcome any of the deficiencies in the notice of intent to deny and determined that the petitioner failed to establish eligibility for any of the regulatory categories of evidence. The director did not address the petitioner's eligibility as it pertained to the petitioner's receipt of "many major awards" pursuant to the regulation at 8 C.F.R. § 204.5(h)(3).

On Form I-290B, Notice of Appeal or Motion, counsel claimed that the director's decision was erroneous regarding the awards criterion, the published material criterion, the high salary criterion, and the commercial successes criterion. In counsel's subsequently submitted brief, counsel mentioned the petitioner's artistic exhibitions pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Furthermore, counsel referred to and submitted documentary evidence relating to the petitioner's design of a Latin American flag. As counsel failed to contest the decision of the director or offer additional arguments for the membership criterion and the judging criterion, the AAO will not further discuss these criteria on appeal. Although the director failed to discuss the petitioner's eligibility as it pertained to his eligibility for a major, nationally recognized award, counsel did not contest or address this issue on appeal. It is noted that the petitioner originally claimed eligibility for the major, nationally recognized award based on the same documentary evidence for which he claimed eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i). It is further noted that on appeal, as will be discussed below, the petitioner failed to establish eligibility for this lesser awards criterion. As the petitioner failed to establish eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), he clearly failed to establish eligibility for the higher standard of a major, nationally recognized award based on the same documentary evidence. Accordingly, the AAO considers these issues to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). While counsel did not specifically contest or address the petitioner's eligibility for the original contributions criterion on appeal, the AAO will consider the petitioner's documentary evidence relating to the Latin American flag project under that criterion.

Finally, the AAO acknowledges that counsel submitted five additional supplemental briefs, as well as additional documentary evidence, relating only to the Latin American flag project. The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that "[t]he affected party shall file the *complete* appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision [emphasis added]." Moreover, the regulation at 8 C.F.R. § 103.3(a)(2)(vii) provides that "[t]he affected party may make a written request to the [AAO] for additional time to submit a brief. The [AAO] may, for good cause shown, allow the affected party additional time to submit *one* [emphasis added]." A review of the record of proceeding reflects that counsel submitted Form I-290B on March 1, 2010, and indicated that a brief and/or additional evidence would be submitted within 30 days, which counsel did on March 30, 2010. However, as indicated above, counsel submitted five subsequent briefs with additional documentary evidence on June 21, 2010, November 5, 2010, January 7, 2011, February 15, 2011, and October 1, 2011. Counsel's multiple and subsequent briefs and additional

documentary evidence do not comply with the regulation at 8 C.F.R. §§ 103.3(a)(2)(i) and (vii). Regardless, the subsequent briefs and documentary evidence, as well as the documentary evidence submitted with counsel's initial brief, relate almost entirely to the status and coverage of the petitioner's Latin American flag project occurring after the filing of the petition. Eligibility must be established at the time of filing. Therefore, the AAO will not consider any arguments and documentary evidence relating to events occurring after the filing of the petition. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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. Furthermore, regarding the petitioner's documentary evidence relating to the Latin American flag project, the AAO will only consider the documentary evidence relating to events occurring on or before the filing date of the petition for the original contributions criterion.

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).

II. Translations

While not addressed by the director in his decision, the regulation at 8 C.F.R. § 103.2(b) provides in pertinent part:

(3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

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).

At the initial filing of the petition, the petitioner submitted numerous foreign language documents with translations that were not signed by the translator. Although the translator certified that the English language translations were true, accurate, and complete, the AAO cannot determine whether the evidence supports the petitioner's claims without the translator's certification and signature. Furthermore, the petitioner submitted several foreign language documents without any translations, let alone certified and signed translations. Finally, in response to the director's notice of intent to deny, the petitioner submitted translations that were not certified and not signed. Because the petitioner failed to comply with the regulation at 8 C.F.R. §103.2(b)(3), the evidence is not probative and will not be accorded any weight in this proceeding.

III. Analysis

A. Evidentiary Criteria

This petition, filed on October 30, 2009, seeks to classify the petitioner as an alien with extraordinary ability as a visual artist. The petitioner has submitted evidence pertaining to the following criteria under the regulation at 8 C.F.R. § 204.5(h)(3).²

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

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

At the initial filing of the petition, the petitioner submitted his curriculum vitae and claimed that he received the following awards:

1. “1987 Honor Mention. Drawing Competition. North American Peruvian Cultural Institute”;
2. “1990 Finalist [REDACTED] Competition for Young Artists”;
3. “1993 I Bienal Diamond Weddings. National School of Fine Arts Peru. The Nation Museum. Lima, Peru”;

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

4. "1994 Finalist II Bienal of National School of Fine Arts Peru. The Nation Museum. Lima, Peru";
5. "1995 Honor Mention of the II Painting Competition 'Johnny Walker' The Nation Museum. Lima, Peru";
6. "2000 Award of Excellence. North East Hispanic Catholic Center (NHCC) of New York";
7. "2000 Certificate of Appreciation 'United States Department of Justice Immigration and Naturalization Service.' In appreciation for your outstanding efforts and dedication towards the success of the New York District Multi-Cultural Diversity Celebration Hispanic Program held on September 27, 2000";
8. "2000 Special Tribute and Congratulations in recognition of contribution as a member of The Community of Mural Artist. Congress of the United States, House of Representatives. [REDACTED]";
9. "2002 Recognition and Appreciation First Ibero-American Cultural Festival. New York"; and
10. "2007 Selected 18th Annual Juried Exhibition. Viridian Gallery. New York City."

The petitioner failed to submit any documentary evidence regarding items 1 – 5. In response to the director's notice of intent to deny, the petitioner claimed eligibility for the one-time achievement standard pursuant to the regulation at 8 C.F.R. § 204.5(h)(3) based on items 6, 7, and 9, as well as the following:

11. "09/19/2009 [New Jersey] Senate Citation / Praise for outstanding contribution to the Sixth Annual Arts & Crafts Festival";
12. "10/16/2009 [New Jersey] Senate Citation, Praise as of participation in Hispanic Heritage Month"; and
13. "10/16/2009 County of Hudson, State of NJ/ award upon the first annual Latin American Flag Raising Ceremony."

In addition, the petitioner claimed eligibility for this criterion based on items 1 – 13. Again, the petitioner failed to submit any documentary evidence regarding items 1 – 5. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Regarding item 6, the petitioner submitted a certificate from the NHCC reflecting that the petitioner was presented with “The Award of Excellence” at the Second Hispanic – American Religious Art Exhibit. On appeal, counsel submitted a screenshot from <http://home.catholicweb.com> welcoming viewers to NHCC’s website. The petitioner failed to submit any documentary evidence regarding the petitioner’s award, so as to establish that it is nationally or internationally recognized for excellence in the field. Merely submitting evidence of the petitioner’s receipt of a certificate is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) without documentary evidence reflecting that the certificate is a nationally or internationally recognized prize or award for excellence in the field of endeavor.

Regarding item 10, the petitioner submitted a flyer for the Viridan Artists 18th Annual Juried Exhibition listing the petitioner along with 21 other artists for the “Director’s Choice CD Show.” There is no indication from the flyer that the petitioner received any prize or award, let alone a nationally or internationally recognized prize or award for excellence in the field. In fact, the flyer specifically lists [REDACTED] as winning first prize, [REDACTED] as winning second prize, and [REDACTED] as winning third prize. Regardless, the petitioner failed to submit any documentary evidence demonstrating that any prizes from the Viridan Artists 18th Annual Juried Exhibition are nationally or internationally recognized for excellence in the field.

Regarding the remaining items, the documentary evidence submitted by the petitioner reflects acknowledgement of the petitioner’s participation and contributions at venues, events, and festivals rather than nationally or internationally recognized prizes or awards for excellence in the field. Documentary evidence recognizing participation, including Federal, State, and local government-related acknowledgment, is not tantamount to nationally or internationally recognized prizes or awards for excellence in the field. Again, the petitioner failed to submit any documentary evidence beyond the receipt of certificates to demonstrate that the certificates are nationally or internationally recognized prizes or awards for excellence in the field.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires “[d]ocumentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.” In this case, the petitioner failed to demonstrate that his documentary evidence equates to his receipt of nationally or internationally recognized prizes or awards for excellence.

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

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

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.”

At the initial filing of the petition, the petitioner submitted the following documentation:

1. An uncertified translation entitled, “[REDACTED] And the Complex Labyrinthine Structural of Life,” May 27, 2004, [REDACTED], *El Nuevo Hudson*;
2. An uncertified translation entitled, “Painter [REDACTED] Exhibits in Colombia,” May 5, 1996, [REDACTED], *El Popular*;
3. An uncertified translation entitled, “Art From Latin America is Delighted to Present the Magic Realms of [REDACTED] From Peru,” unidentified publication;
4. An article entitled, “Fingerpainting,” January 27, 2002, [REDACTED], *The West New York Reporter*; and
5. Three articles without any translations.

In response to the director’s notice of intent to deny, the petitioner submitted four articles that were published 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. Moreover, the petitioner submitted translations for all four articles that were not certified as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(3). Furthermore, the petitioner submitted three foreign language documents without any translations as required pursuant to the regulation at 8 C.F.R. §§ 103.2(b)(3) and 204.5(h)(3)(iii).

Regarding item 1, while the petitioner submitted the purported cover of the publication in which the article appeared, the petitioner failed to submit the actual article. In addition, the petitioner failed to submit a certified translation of the article as required pursuant to the regulation at 8

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.

C.F.R. § 103.2(b)(3). Finally, the petitioner failed to submit any documentary evidence demonstrating that *El Nuevo Hudson* is a professional or major trade publication or other major media.

Regarding item 2, the petitioner failed to submit a certified translation of the article as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(3). Moreover, a review of the uncertified translation fails to reflect published material about the petitioner relating to his work. Instead, the uncertified translation reflects an interview conducted with the petitioner where he simply responds to the interviewer's questions and does not reflect published material about the petitioner relating to his work. Finally, the petitioner failed to submit any documentary evidence establishing that *El Popular* is a professional or major trade publication or other major media.

Regarding item 3, the petitioner failed to submit a certified translation of the article as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(3). Furthermore, neither the uncertified translation nor the original article identified where the article was published, let alone that it was published in a professional or major trade publication or other major media.

Regarding item 4, the article is not published material about the petitioner relating to his work. Rather, the article is about the display of the work of the students of [REDACTED] at the West New York Public Library. While the petitioner is mentioned in the article as being a partner of [REDACTED], the fact remains that the article is not about the petitioner relating to his work. In addition, the petitioner failed to submit any documentary evidence reflecting that *The West New York Reporter* is a professional or major trade publication or other major media.

Regarding item 5, the petitioner failed to submit any translations, let alone certified translations, as required pursuant to the regulation at 8 C.F.R. §§ 103.2(b)(3) and 204.5(h)(3)(iii).

The AAO notes that on appeal counsel submitted a transcript of an interview conducted by Univision of the petitioner on October 12, 2009. However, as this regulatory criterion requires "published material" in professional or major trade publications or other major media and "the title, date, and author of the material," television interviews are clearly not published material in professional or major trade publications or other major media and do not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

As discussed above, 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 this case, the petitioner's documentary evidence fails to reflect published material about him relating to his work in professional or major trade publications or other major media.

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.

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

A review of the record of proceeding reflects that the petitioner submitted numerous samples of his work. However, the petitioner failed to demonstrate that any examples of his artwork are original contributions of major significance in the field. Merely submitting samples of the petitioner’s artwork is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) without documentary evidence demonstrating that his artwork has been of major significance in the field. The petitioner provided no evidence explaining, for example, how the petitioner’s artwork has widely impacted or influenced the field, so as to establish that the petitioner has made original contributions of major significance in the field.

Moreover, the record of proceeding contains a letter from [REDACTED] for Local Project, who stated that “I am an artist, and I adore [the petitioner’s] work, which has been shown to popular and critical acclaim throughout Peru and now in USA.” Further, the petitioner submitted an unsigned letter from [REDACTED] Art Critic, who stated that the petitioner is an “excellent drawer perspective dominator, his virtuosity of detail and his wonderful colorist style lead us to mentally travel his unreal worlds of architectural super realism.” Although both individuals admire the petitioner’s work, they failed to indicate that the petitioner has made original contributions of major significance in the field. In addition, assuming the petitioner’s artistic 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 Department of Transportation*, 22 I&N Dec. 215, 221 (Comm’r 1998). This regulatory criterion not only requires the petitioner to make original contributions, the regulatory criterion also requires those contributions to be of major significance. The lack of specific information provided gives the AAO no basis to gauge the significance of the petitioner’s present contributions. Further, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm’r 1988). 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.

Finally, regarding the Latin American flag project, at the initial filing of the petition, the petitioner submitted a document entitled, "Latinamerican Flag Project," in which the petitioner described the history of his project, including why he decided to create a Latin American flag. The petitioner also submitted a "Proclamation" from Union City, New Jersey that honored the petitioner for the first annual Latin American Flag Raising Ceremony, as well as a press release of the event from the city and a DVD of the ceremony. As indicated under the published material criterion, the petitioner submitted a transcript of an interview conducted by Univision of the petitioner on October 12, 2009. A review of the transcript reflects that the petitioner described the history of the project and indicated that the first time the flag was going to be raised was the Union City, NJ ceremony on October 16, 2009.

While the petitioner's Latin American flag project may be considered as an original contribution, the petitioner failed to establish that it has been of *major significance* in the field. In fact, the documentary evidence reflecting events on or before the filing of the petition reflects that the Latin American flag has only been recognized by Union City, New Jersey. Such limited and local recognition does not reflect a contribution of major significance in the field. The petitioner failed to establish that the Latin American flag has been widely adopted or recognized, so as to establish an original contribution of major significance in the field. Again, the AAO notes that the petitioner submitted numerous documents regarding the Latin American flag on appeal, including supplemental submissions, which 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.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of *major significance in the field* [emphasis added]." Without additional, specific evidence showing that the petitioner's work has been unusually influential, widely applied throughout his field, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that he meets this criterion.

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

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at artistic exhibitions or showcases." In accordance with *Kazarian* 596 F.3d at 1122, the petitioner submitted sufficient documentary evidence reflecting that he meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Therefore, the AAO withdraws the findings of the director for this criterion.

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

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

In response to the director’s notice of intent to deny, the petitioner submitted the following documentation:

1. A copy of the front side of a check, dated July 15, 2003, from [REDACTED] to the petitioner for \$6,000 for “payment 3 paintings”;
2. An invoice from Union City, New Jersey reflecting that the city purchased the Latin American Flag for \$1,000 and one digital nylon print for \$660 on October 16, 2009;
3. A copy of the front side of a check, dated January 28, 2009, from [REDACTED] to the petitioner for \$11,000; and
4. A copy of the front side of a check, dated January 3, 2010, from [REDACTED] to the petitioner for \$2,500 for “purchase of oil painting.”

While items 1 and 2 reflect that the petitioner received remuneration for his services, item 3 does not indicate why the petitioner received the check. Moreover, item 4 reflects a check that was written after the filing date 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.

Nonetheless, the petitioner failed to submit any documentary evidence comparing his remuneration for services to others in the field, so as to establish that his remuneration is significantly high. Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires “[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, *in relation to others in the field* [emphasis added].” The petitioner’s submission of documentary evidence simply reflecting that he earned remuneration for services is insufficient to meet the plain language of the regulation without documentary evidence comparing his remuneration to others in

the field, so as to establish that the petitioner has commanded other significantly high remuneration for services.

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.

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].” In response to the director’s notice of intent to deny, the petitioner claimed eligibility for this criterion based on the previously discussed Univision interview on October 12, 2009, and the DVD of the Latin American Flag Raising Ceremony in Union City, New Jersey on October 16, 2009.

This criterion is for performing artists such as singers and actors rather than for visual artists like the petitioner. The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. Furthermore, the petitioner failed to submit “box office receipts” or “sales.” Simply submitting DVDs of a television interview and of a government-related flag raising ceremony are insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) without evidence of commercial successes in the form of “box office receipts or record, cassette, compact disk, or video sales.”

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

In evaluating the AAO’s final merits determination, the AAO must look at the totality of the evidence to determine the petitioner’s eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner has displayed his work at various venues and exhibitions and worked on a Latin American flag project. The personal 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).

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). The petitioner claimed eligibility, in part, for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) without submitting any documentary evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Moreover, the petitioner claimed eligibility for the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii) without submitting translations, let alone certified translations, pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), as well as failing to submit any documentary evidence establishing that any of the material was published in professional or major trade publications or other major media. Furthermore, the petitioner claimed eligibility for the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v) without demonstrating that he has made any original contributions of major significance in the field. In addition, the petitioner claimed eligibility for the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix) without submitting any documentary evidence comparing his remuneration to the remuneration of others in the field, so as to establish that the petitioner commanded a significantly high remuneration for his services. Finally, the petitioner relied heavily on documentary evidence that involved 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. The AAO is not persuaded that such evidence equates to “extensive documentation” and is demonstrative of

eligibility for 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).

Moreover, even though the AAO found that the petitioner met the display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), it is expected that a visual artist, such as the petitioner, would have his work displayed at exhibitions and showcases. The record contains no evidence to show, for instance, that the petitioner's exhibitions garnered any attention in a manner consistent with sustained national or international acclaim. For example, the petitioner failed to submit any documentary evidence reflecting that the exhibitions brought any critical acclaim or drew significant crowds. The AAO is not persuaded that the mere exhibition of the petitioner's work is sufficient to establish 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). Similarly, the petitioner's submission of documentary evidence reflecting his participation at various events rather than his receipt of nationally or internationally recognized prizes or awards does not demonstrate that the petitioner has a career of sustained national or international acclaim. Likewise, the lack of published material about the petitioner relating to his work and the absence of evidence comparing the petitioner's remuneration to others in his field fail to reflect that he "is one of that small percentage who have risen to the very top of the field of endeavor." See 8 C.F.R. § 204.5(h)(2).

The evidence of record falls short of demonstrating the petitioner's sustained national or international acclaim as a visual artist. 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 that his or her achievements have been recognized in the field of expertise." While the petitioner submitted documentation demonstrating that he has displayed and sold his work, the documentary evidence is not consistent with or indicative of sustained national or international acclaim.

USCIS has long held that even athletes performing at the major league level do not automatically meet the statutory standards for immigrant classification as an alien of "extraordinary ability." *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994); 56 Fed. Reg. at 60899. In *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

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

The court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable. Likewise, it does not follow that the petitioner who has not offered any evidence that distinguishes him from others in his field, should necessarily qualify for approval of an extraordinary ability employment-based visa petition. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor."

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 at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. While it is apparent that the petitioner is proud of his work with the creation of a Latin American flag, the petitioner has not established that 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.

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.

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).

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.