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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

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**U.S. Citizenship  
and Immigration  
Services**

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[REDACTED]

DATE: **NOV 25 2011** OFFICE: NEBRASKA SERVICE CENTER FILE: [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, Nebraska Service Center, on February 12, 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. 723 101<sup>st</sup> 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.<sup>1</sup> 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 (9<sup>th</sup> 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).

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<sup>1</sup> 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 December 21, 2009, seeks to classify the petitioner as an alien with extraordinary ability as an extreme entertainer/event coordinator. The AAO notes that the petitioner failed to submit any documentary evidence regarding the field of event coordination. Instead, the documentary evidence reflects that the petitioner's occupation as a monster truck driver and television and movie performer. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).<sup>2</sup>

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

The director determined 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)(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.

The petitioner claims eligibility for this criterion based on his finishes at Monster Jam competitions, as well as awards won by movies in which the petitioner appeared. At the outset, while not addressed by the director in her decision, the regulation at 8 C.F.R. § 103.2(b)(2) provides in pertinent part:

(i) The non-existence or other unavailability or required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the fact at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

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

As indicated above, 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 secondary evidence, such as screenshots from websites, as well as reference letters, the petitioner failed to submit any documentary evidence demonstrating that primary evidence does 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), and the AAO will not consider the petitioner's secondary evidence. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Notwithstanding the above, regarding the petitioner's Monster Jam competitions, the director found:

[I]n reviewing the evidence it does not appear that winning these races has resulted in the petitioner receiving an award. This is similar to other sports such as basketball or baseball where winning a regular season games does not constitute an award. It appears that the petitioner did compete in a national finals event but did not finish with a high enough placing to receive an award.

On appeal, counsel argues:

This is an example of using an incorrect analogy to diminish the significance of the award. Monster Truck competitions are tournaments where thirty professional drivers compete to win prize money based on their final standings. This is akin to professional golf, where actually winning a tournament is a rarity. It is not like a regular season baseball or basketball game.

Counsel failed to submit any documentary evidence supporting his assertions that "Monster Truck competitions are tournaments where thirty professional drivers compete to win prize money based on their final standings." 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). The record of proceeding contains no evidence of the dynamics of the Monster Jam tour such as the bylaws or internal governing procedures. Nonetheless, the AAO generally agrees with the director that in a sport where winning regular season competitions in which one individual is not distinguished from one another does not demonstrate evidence of a receipt of a prize or award. However, in a sport or event where individuals compete at tournaments and the winners or finishers are distinguished or specifically recognized, such as by the awarding of prize money for each finish, it would generally constitute evidence of a prize or an award. In the case here, the documentary evidence submitted by the petitioner fails to reflect the composition of the Monster Jam tour, so as to establish that prizes or awards are garnered for finishes at the events. Moreover, while the petitioner submitted various screenshots from [www.monsterjam.com](http://www.monsterjam.com) reflecting that the petitioner competed at five Monster Jam events, the screenshots fail to establish that the petitioner garnered any prizes or awards.

The petitioner submitted insufficient documentary evidence to demonstrate that he received any prizes or awards from his competitions.

The AAO notes that the petitioner submitted a blog from <http://tmbinsider.blogspot.com> in which the author offered his opinion that the petitioner should win the Monster Jam “Rookie of the Year” award. However, the petitioner failed to submit any documentary evidence, let alone primary evidence, demonstrating that he actually won the award. Moreover, the petitioner failed to submit any documentary evidence establishing that the award is nationally or internationally recognized for excellence in the field.

Regarding the movie awards, the director found:

The mere fact that the petitioner appeared in these award winning films is insufficient to meet this criterion. To find otherwise would be to indicate that anyone who has ever appeared in an award winning film meets this criterion.

On appeal, counsel argues that the director’s “reasoning is at odds with AAO precedent regarding applicability of criterion [sic] (i) to collaborative international awards.” However, counsel cites in his brief to unpublished decisions by the AAO. While the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, the specific facts of the case, which include, for instance, information on the awards and recipients, are not in the record. Without the records, it cannot be determined whether the facts of any other case are similar to those of the present case. Regardless, the AAO generally agrees that “[t]he [AAO] does not disregard Olympic team medals” as long as there is specific information establishing that the alien was recognized as being one of the recipients of the award. As cited in the decision in counsel’s brief, where an individual is a member of a relay team, he “was personally awarded the bronze medal and was one of the relay swimmers to compete in the relay race.” In that case, the individual was specifically recognized as a relay team member by being presented with a medal at the Olympics.

In the case here, the petitioner failed to submit primary evidence of his purported awards pursuant to the regulation at 8 C.F.R. § 103.2(b)(2). Regardless, the petitioner submitted screenshots from various websites and reference letters reflecting that

Although the petitioner submitted a letter from

who stated that the petitioner “was critical to the film’s winning of the X-Dance Best Film Award,” and the petitioner’s “stunt-work and acting played a key role in the success of the films and were critical in winning the three awards,” the AAO cannot conclude that awards that were not specifically presented to the petitioner are tantamount to his receipt of nationally or internationally recognized awards; it cannot suffice that the petitioner was one member of a large group that earned collective recognition. As the plain language of the regulation at 8 C.F.R.

§ 204.5(h)(3)(i) requires “[d]ocumentation of the alien’s receipt” of prizes or awards, the submission of documentary evidence reflecting awards won by movies in which the petitioner contributed in some capacity is insufficient to demonstrate that the petitioner received a nationally or internationally recognized award for excellence in the field. It is noted that the petitioner submitted a screenshot from <http://motocross.transworld.net> reflecting that the Xtremey Awards recognize individual performances, such as Best Sportbike Freestyle Performance and Best MX Freestyle Performance in a Video. There is no documentary evidence establishing that the alien was individually recognized by the X-Dance Film Festival or Xtremey Awards for his performances and stunt-work in any of the movies.

As discussed, the plain language of this regulatory criterion specifically requires that the petitioner demonstrate his receipt of nationally or internationally recognized prizes or awards for excellence in his field. The petitioner failed to demonstrate that he has received any prizes or awards, let alone nationally or internationally recognized prizes or awards for excellence in the field.

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

*Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.*

In the director’s decision, she determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel argues that the petitioner’s participation with *Nitro Circus* and Monster Jam demonstrates his eligibility for this criterion.

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 classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields [emphasis added].” While the petitioner submitted recommendation letters from acclaimed individuals, such as [REDACTED] attesting to the petitioner’s participation with *Nitro Circus* and Monster Jam, the petitioner failed to submit any documentary evidence, i.e., articles of association, so as to establish that they are *associations*. In fact, as indicated by Ronnie Renner’s letter, *Nitro Circus* is “MTV’s popular *television show* and spinoff films [emphasis added].” The petitioner failed to establish that television productions or monster truck competitions equate to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requiring *associations*. The AAO notes that there are associations in the petitioner’s field such as the Stuntmen’s Association.<sup>3</sup>

Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires that membership be “judged by recognized national or international experts in their disciplines or fields.” [REDACTED] stated that participation in *Nitro Circus* “was chosen by producers

<sup>3</sup> See <http://www.stuntmen.com/>. Accessed on October 25, 2011, and incorporated into the record of proceeding.

at MTV to be the stars of one of the most popular shows on television,” the petitioner failed to submit any documentary evidence demonstrating that MTV producers are comprised of recognized national or international experts in the petitioner’s fields. Similarly, although [REDACTED] indicated that the petitioner’s participation with Monster Jam was selected by [REDACTED] the petitioner failed to submit any documentary evidence establishing that Feld Motorsports included recognized national or international experts in their disciplines or fields.

As discussed, the petitioner cannot meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) by simply submitting documentary evidence reflecting his participation on television shows, movie productions, or in monster truck competitions. It is the petitioner’s burden to establish eligibility for every element of this criterion. The AAO cannot conclude that acting or performing stunt work on a television show, as well as driving trucks in competitions, constitutes membership in associations that require outstanding achievements as judged by recognized national or international experts.

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 determined that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that at the initial filing of the petition, counsel indicated in his letter that the petitioner was eligible for this criterion based on the following documentation:

1. A screenshot entitled, [REDACTED], unidentified date, unidentified author, [www.monsterjam.com](http://www.monsterjam.com);
2. Screenshots from [www.monsterjam.com](http://www.monsterjam.com) regarding results from Calgary, Alberta, Canada; Columbus, OH; Peoria, IL; Pittsburgh, PA; and Tupelo, MS;
3. A blog entitled, “Monster Jam World Finals: Thoughts & Analysis,” March 28, 2008, unidentified author, <http://tmbinsider.blogspot.com>;
4. An article entitled, “Cam McQueen,” unidentified date, unidentified author, *Monster Jam Year Book*;
5. A screenshot entitled, “5 Questions for World Finals Driver – Cam McQueen,” unidentified date, unidentified author, [www.monsterjamonline.com](http://www.monsterjamonline.com);

6. A screenshot entitled, "Online Video Guide," unidentified date, unidentified author, <http://video.tvguide.com>;
7. A screenshot entitled, "Fuel TV Announces New Action Comedy Series 'Thrillbillies,'" March 26, 2009, [REDACTED], <http://forum.surfermag.com>;
8. A screenshot entitled, "Cam McQueen," unidentified date, unidentified author, [www.imb.com](http://www.imb.com);
9. A screenshot entitled, "Nitro Circus > Ep. 206," unidentified date, unidentified author, [www.mtv.com](http://www.mtv.com);
10. A screenshot entitled, "Thrillbillies Double Wide," unidentified date, unidentified author, <http://www.x-tremevideo.com>;
11. A screenshot entitled, "Thrillbillies, Season 1," unidentified date, unidentified author, <http://videostore.rr.com>;
12. A screenshot entitled, "Hot Shots: NC's Andy Bell is About to Eat Dinner," October 1, 2009, Debbie Newman, <http://remotecontrol.mtv.com>; and
13. A screenshot entitled, "X-Dance Honors 2008," January 29, 2008, unidentified author, [www.x-dance.com](http://www.x-dance.com).

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

- A. A screenshot entitled, "AV Room Video Info," August 19, 2009, Rob Hamilton, [www.99x.com](http://www.99x.com);
- B. An article entitled, "Monster Job," January 21, 2010, [REDACTED], *The State*;
- C. A screenshot entitled, "Monster Truck Crushes Colts Car," January 29, 2010, [REDACTED], [www.nola.com](http://www.nola.com); and
- D. A photo of the petitioner from the *2010 Monster Jam Official Souvenir Yearbook*.

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.<sup>4</sup> 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."

The AAO notes that the petitioner's documentary evidence consists almost entirely of screenshots from the Internet. However, the AAO is not persuaded that postings on the Internet are automatically considered major media. The petitioner failed to submit any documentary evidence establishing that the websites are considered major media. In today's world, many publications, regardless of size and distribution, organizations, and bloggers advertise, post stories, and provide general information 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."

The petitioner failed to submit any documentary evidence that meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). With the exception of items 7, 12, and A – C, the petitioner failed to include the title, date, and/or author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, the petitioner failed to submit any documentary evidence demonstrating that any of the websites, the *2010 Monster Jam Official Souvenir Yearbook*, and *The State* are professional or major trade publications or other major media.

Notwithstanding the above, item 1 is the only document that reflects material about the petitioner relating to his work. However, the petitioner failed to include the date and author of the screenshot, and the petitioner failed to submit any documentary evidence demonstrating that [www.monsterjam.com](http://www.monsterjam.com) is a professional or major trade publication or other major media.

Regarding item 2, while the petitioner is mentioned as competing at events, the screenshots are about the competition results from the five events. In other words, the screenshots are not about the petitioner relating to his work; instead the screenshots are about the competitions from the five venues. 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 \*1, \*7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). Similarly, item 3 reflects a blog in which the unidentified blogger provides his thoughts to the Monster Jam World Finals and

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<sup>4</sup> 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.

briefly indicates that the petitioner should be named “Rookie of the Year.” The blog is not about the petitioner and does not discuss the petitioner relating to his work.

Regarding items 4 and 5, they reflect interviews with the petitioner in which his answers are simply recorded in the submitted material. The authors do not discuss the petitioner, and the material does not qualify as published material about the petitioner relating to his work.

Regarding items 6 – 12, the screenshots reflect promotional advertisements and announcements for the television shows and DVDs for the season series of *Nitro Circus* and *Thrillbillies*. In fact, the petitioner is mentioned only one time as being a cast member and is not published material about the petitioner relating to his work.

Regarding item 13, the screenshot is about the 2008 X-Dance Film Festival rather than about the petitioner relating to his work. Indeed, the petitioner is never mentioned in the screenshot and is clearly not published material about the petitioner relating to his work.

Regarding item A, the screenshot reflects a blog posting that the petitioner stopped by the radio station. However, the screenshot provides no further discussion and fails to reflect published material about the petitioner relating to his work. Merely submitting a screenshot reflecting that the petitioner appeared at the radio station without any further discussion about the petitioner fails to meet the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

Finally, regarding items B – D, the material was written after the filing of the petition on December 21, 2009. Eligibility must be established at the time of filing. Therefore, the AAO will not consider these items as evidence to establish the petitioner’s eligibility. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (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. The AAO notes that regarding item B, similar to items 4 and 5, the article reflects an interview conducted with the petitioner in which the petitioner’s responses are printed in the newspaper without any discussion about the petitioner relating to his work. Moreover, regarding item C, the screenshot reflects a photograph with a caption indicating that the petitioner was the truck driver crushing the car. There is no discussion about the petitioner relating to his work. Finally, regarding item D, the evidence simply reflects a photograph of the petitioner from the yearbook without any published material about the petitioner relating to his work. Photographs, posters, and promotional material do not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requiring “published material” about the petitioner relating to his work.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought.” The burden is on the petitioner to establish that he meets every element of this criterion. In this case, the petitioner

submitted one document that was published material about him relating to his work but failed to demonstrate that [www.monsterjam.com](http://www.monsterjam.com) is a professional or major trade publication or other major media and failed to include the date and author of the material.

Even if the petitioner were to submit supporting documentary evidence showing that the material from [www.monsterjam.com](http://www.monsterjam.com) meets all 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 material about the petitioner in more than one major publication. 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. Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at \*10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

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 determined that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner claims eligibility for this criterion based on his television and movie appearances, as well as his Monster Jam performances.

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 [emphasis added]." The petitioner is a television and movie cast member, stuntman, and monster truck driver. When he is performing or driving trucks before an audience, he is not displaying his work in the same sense that an artist such as a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing his work, he is not displaying his work. In addition, to the extent that the petitioner is a performing artist, it is inherent to his occupation to perform. Not every performance is an artistic exhibition designed to showcase the performer's art. If the AAO were to accept that a performance artist like the petitioner meets this criterion, it would render the regulatory requirement that the petitioner meet at least three criteria meaningless as this criterion would effectively be collapsed into the criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*1, \*7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at artistic exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

Therefore, while the petitioner's performances have evidentiary value for other criteria, they cannot serve to meet this criterion. Instead, as the petitioner's performances are far more relevant to the aforementioned "leading or critical role" criterion set forth at the regulation at 8 C.F.R. § 204.5(h)(3)(viii) and the "commercial successes in the performing arts" criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(x), they will be discussed separately within the context of those criteria.

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 determined that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner claimed eligibility for this criterion based on his roles in television shows and movies, as well as a Monster Jam driver. On appeal, counsel refers to documentary evidence that was discussed under 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), and the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

The petitioner submitted sufficient documentary evidence reflecting that he has performed in television shows, movies, tours, and monster truck competitions. However, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role *for organizations or establishments* that have a distinguished reputation [emphasis added]." The petitioner failed to demonstrate how a television show, movie, or tour equates to an "organization" or "establishment." Notwithstanding, 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. However, merely submitting documentary evidence indicating that the petitioner is a cast member for television shows such as *Nitro Circus* and *Hillbillies*, has performed stunt work in movies such as *199 Lives: The Travis Pastrana Story*, has toured with the cast of *Nitro Circus*, and has competed in Monster Jam competitions driving for the Pastrana 199 team does not meet the plain language of 8 C.F.R. § 204.5(h)(3)(viii) without demonstrating that the petitioner's roles were leading or critical.

The documentary evidence submitted by the petitioner falls short in establishing that his performances and driving are reflective of leading or critical roles. While the petitioner

submitted reference letters, such as from [REDACTED] who generally claimed that the petitioner “performs incredible stunts in movies and television,” the petitioner failed to submit any documentary evidence distinguishing his performances from the other performers or drivers, so as to establish that his roles were leading or critical. For example, the screenshots reflecting advertisements for the *Nitro Circus* and *Hillbillies* television shows simply list the petitioner as a cast member. In fact, the advertisements specifically promote Travis Pastrana as the “superstar” of the shows but only indicate that the petitioner is one of several “personalities.” When compared to the roles of Mr. Pastrana, the petitioner performs in a far less role on the television shows, movies, and tours. Without evidence establishing that the petitioner performed in a leading or critical role, it is insufficient to simply submit documentary evidence reflecting that he performed in a television, movie, or a tour-related setting. As the petitioner is an extreme entertainer, it is expected that the petitioner will perform stunt work for entertainment purposes on stage or in front of an audience. However, merely performing, even if the performance is considered noteworthy, does not equate to a leading or critical role.

Likewise, regarding the petitioner’s role as a monster truck competitor, the petitioner failed to submit any documentary evidence beyond the competitions themselves. Again, while the petitioner demonstrated that he competed in the Monster Jam series for the Pastrana 199 team, the petitioner failed to submit any documentary evidence comparing his roles to the other members of the team, as well as Monster Jam as a whole, so as to establish that he performed in a leading or critical role. It is noted that a review of the *2010 Monster Jam Official Souvenir Yearbook* reflects only one page out of 145 pages is dedicated to the petitioner, in which it contains only a photograph and the petitioner’s name. The AAO is not persuaded that such evidence is demonstrative of a leading or critical role consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.” The burden is on the petitioner to establish that he meets every element of this criterion. Without documentary evidence demonstrating that the petitioner has performed in a leading or critical role for organizations or establishments that have a distinguished reputation, the AAO cannot conclude that the petitioner meets this regulatory criterion.

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

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

In the director’s decision, she determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel does not contest the director’s findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue 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). It is noted that 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 other words, this regulatory criterion requires evidence of commercial successes in the form of “box office receipts” or “sales.” However, the record of proceeding fails to reflect that the petitioner submitted any documentary evidence regarding the box office receipts or sales of his performances.

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

In evaluating the AAO’s final merits determination, the AAO must look at the totality of the evidence to determine the petitioner’s eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner has competed in Monster Jam competitions, has participated in television shows and movies, and has been mentioned on various websites. However, 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). Again, the petitioner claimed eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) based on screenshots without submitting primary evidence as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(2). Moreover, the petitioner claimed eligibility based on movies that won awards instead of awards that were specifically garnered by him. In fact, one claim was based on a blog’s “Rookie of the Year” opinion that is clearly not indicative of someone with a career of sustained acclaim. Similarly, while the petitioner based his eligibility for the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii) for his participation in television shows, movies, and truck competitions, the petitioner failed to demonstrate that he is a member of any association requiring outstanding achievements of their members, so as to reflect that “her achievements have been recognized in the field of expertise.” *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). Furthermore, although the AAO found that the petitioner failed to meet the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the petitioner only submitted one screenshot that was about him relating to his work but failed to include the date and author of the material, as well as he failed to demonstrate that it was published in a professional or major trade publication or other major media. Regardless, the petitioner failed to demonstrate that a single screenshot is consistent with the sustained national or international acclaim for this highly restrictive classification. Finally, the petitioner’s performances for the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) was based on lesser supporting roles rather than leading or critical roles. Evidence of the petitioner’s leading or critical roles with organizations that have a distinguished reputation is far more persuasive that the petitioner “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 AAO is not persuaded that such evidence equates to “extensive documentation” and is demonstrative of this highly restrictive classification. The truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) citing *Matter of E-M*- 20 I&N Dec. 77, 80 (Comm’r 1989).

The evidence of record falls short of demonstrating the petitioner’s sustained national or international acclaim as a monster truck driver and television and movie 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 is a monster truck competitor and movie and television performer, 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 \*1, \*4 (N.D. Ill. Feb. 16, 1995), the court stated:

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

The 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.”

While the petitioner need not demonstrate that there is no one more accomplished to qualify for the classification sought, it appears that the very top of his field of endeavor is far above the level he has attained. For example, [REDACTED] is an internationally renowned daredevil and has had starring roles in *The Ringer*, *The Dukes of Hazard*, *Walking Tall*, *Lords of Dogtown*, *A Dirty Shame*, *Daltry Calhoun*, *Deuces Wild*, *Men in Black II*, *Jackass*, *Jackass Number Two*, and *Jackass 2.5*. Moreover, [REDACTED] won the [REDACTED] the [REDACTED] and [REDACTED]

[REDACTED] In addition, [REDACTED] is an [REDACTED] and star of several television shows and movies. When compared to the petitioner, the references are far more impressive and have established themselves as that “small percentage at the very top of the field of endeavor.”

The conclusion the AAO reaches by considering the evidence to meet each category of evidence at 8 C.F.R. § 204.5(h)(3) separately is consistent with a review of the evidence in the aggregate. Ultimately, the evidence in the aggregate does not distinguish the 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, whose documentary evidence reflects events occurring only since 2008, seeks a highly restrictive visa classification, intended for individuals at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. In this case, the petitioner has not established that 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 admitted to the United States as an O-1 nonimmigrant on September 8, 2009. However, while USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

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

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

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

### 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.

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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.