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**U.S. Department of Homeland Security**  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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**U.S. Citizenship  
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Services**

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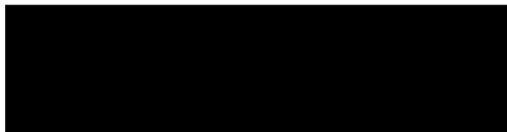


IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

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

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

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, on February 23, 2010, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an art director/graphic designer of extraordinary ability. The director determined that the petitioner had not established the beneficiary's requisite extraordinary ability and failed to submit extensive documentation of her 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 beneficiary meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). Moreover, counsel argues in his brief that the director failed to consider the petitioner's comparable evidence for 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 leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x). The regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the following regulation categories. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. The AAO further acknowledges that the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to the beneficiary's occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In counsel's brief, he does not explain why the regulatory criteria at 8 C.F.R. § 204.5(h)(3) are not applicable to the beneficiary's occupation. Instead, counsel simply argues that comparable

evidence was submitted for the original contributions criterion, the artistic display criterion, the leading or critical role criterion, and the commercial successes criterion. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the beneficiary's occupation as an art director/graphic designer cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, counsel discusses evidence in his brief that specifically addresses four of the ten criteria at 8 C.F.R. § 204.5(h)(3) that relates to the beneficiary's occupation. An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the beneficiary's occupation. Moreover, although counsel failed to claim these additional criteria, we find that an art director/graphic designer could have published material about her pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii) and could command a high salary pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). Counsel provided no documentation as to why these provisions of the regulation would not be appropriate to the profession of an art director/graphic designer. Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. In the AAO's analysis of the evidentiary criteria below when comparable evidence is claimed, the AAO will determine whether the documentary evidence meets the requirements of the plain language of the criteria at 8 C.F.R. § 204.5(h)(3)(v), (vii), (viii), and (x).

## **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).

## II. Advisory Opinion

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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).

The AAO notes that at the initial filing of the petition, the petitioner submitted an advisory opinion letter from [REDACTED] who stated that the beneficiary “has demonstrated that she has met at least three of the criteria for certification as an immigrant of extraordinary ability in Graphic Design.” A review of the advisory opinion reflects that [REDACTED] was asked by counsel to review selected documentary evidence and provide his professional opinion. It does not appear that [REDACTED] was aware of the beneficiary prior to being contacted by counsel. His determination that the beneficiary is an alien of extraordinary ability is not based on his prior knowledge of the beneficiary or her work but merely on the evaluation of the documents given to him by counsel.

USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters of support from the beneficiary’s personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien’s eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. at 500, n.2 (BIA 2008). Thus, the content of the writers’ statements and how they became aware of the beneficiary’s reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence.

### III. Translations

While not addressed by the director in his decision, the record of proceeding reflects that the petitioner submitted numerous non-certified English language translations and foreign language documents without any English language translations. 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.

The AAO notes that although at the time of the original filing of the petition the petitioner submitted a single certified translation, it is unclear which documents, if any, to which the certification pertains. The submission of a single translation certification that does not identify the document or documents it purportedly accompanies does not meet the requirements of the regulation at 8 C.F.R. § 103.2(b)(3). Because the petitioner failed to comply with the regulation at 8 C.F.R. §103.2(b)(3), the AAO cannot determine whether the evidence supports the petitioner's claims. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

### IV. Analysis

**A. Evidentiary Criteria**

This petition, filed on April 24, 2009, seeks to classify the beneficiary as an alien with extraordinary ability as an art director/graphic designer. 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.*

In the director's decision, she determined that the petitioner failed to establish the beneficiary's eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence demonstrating that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requiring "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor." Therefore, the AAO withdraws the findings of the director for this criterion.

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

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

The director determined that the petitioner failed to establish the beneficiary's eligibility for this criterion because the documentary evidence "was not consistent with an individual who is one of those at the very top of his or her field of endeavor." The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires "[e]vidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought." Pursuant to *Kazarian*, 596 F.3d at 1121-22, the petitioner submitted sufficient documentation establishing that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). Therefore, the AAO withdraws the findings of the director for this criterion.

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

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

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

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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.

language of the regulatory criteria. 596 F.3d at 1121. Here, the evidence must be reviewed to see whether it rises to the level of original artistic-related contributions “of major significance in the field.” 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 (3<sup>rd</sup> Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2<sup>nd</sup> Cir. Sep 15, 2003).

While the petitioner claimed the beneficiary’s eligibility for this criterion at the initial filing of the petition, the petitioner did not identify any original contributions of major significance in the field made by the beneficiary or refer to any submitted documentary evidence. As such, the director issued a request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) and requested the petitioner to identify specific contributions made by the beneficiary and how they have impacted the field. In response, counsel referred to the documentary evidence submitted in support of the awards criterion; screenshots from Wikipedia regarding Time Warner, Home Box Office (HBO), and Cinemax; and numerous purported samples of the beneficiary’s work. It is noted that with the exception of a few, there is no indication that the samples are, in fact, of the beneficiary’s work. Moreover, the petitioner failed to submit any English language translations pursuant to the regulation at 8 C.F.R. § 103.2(b)(3). In the director’s decision, she determined:

The petitioner’s response established that the beneficiary works as a free-lance graphic designer for many types of businesses, but a single contribution which is acknowledged as one of major significance to her field was not established, including the work for which she received two bronze awards. The petitioner made no response to USCIS’ request for it to identify a specific contribution which the beneficiary has made which has proven to be of major significance to her field, and to submit documentary evidence of this impact, other than to note that she has given a workshop and a talk.

On appeal, counsel argues:

As for the fifth criterion [original contributions of major significance], the only comparable original contribution to one’s field as graphic designer is the original design work one creates for those who seek one’s services as such. A graphic designer does not discover cure for diseases or solutions for scientific problems. There is no doubt, however, that, through the Beneficiary’s original graphic design work for reputable companies, such as HBO and Cinemax, these prominent companies were granted awards for creative work aired on television. Furthermore, with the assistance of the Beneficiary, who HBO qualifies as “an important player in its marketing objectives and success” . . . , it selected its corporate identity for an important event such as its 15<sup>th</sup> anniversary.

As it relates to counsel’s references to the beneficiary’s awards, the regulations contain a separate criterion regarding nationally or internationally recognized prizes or awards for excellence. 8 C.F.R. § 204.5(h)(3)(i). The AAO will not presume that evidence relating to or even meeting the

awards criterion is presumptive evidence that the beneficiary also meets this criterion. To hold otherwise would render meaningless the regulatory requirement that a beneficiary meet at least three separate criteria. While the beneficiary's awards will not be considered under this criterion, the awards criterion has already been addressed above.

Furthermore, while the petitioner submitted a letter from [REDACTED] Vice President of Creative Services for HBO and Cinemax Latin Services, stating that the beneficiary worked on marketing projects, there is no indication that the beneficiary's work has been of major significance in the field as a whole rather than limited to the employers and companies whom she has worked as a free-lance graphic designer, such as HBO and Cinemax. In other words, the petitioner failed to demonstrate that the beneficiary's work has impacted or influenced the field beyond HBO or Cinemax.

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]." Merely submitting purported samples of the beneficiary's work is insufficient to demonstrate eligibility for this criterion without establishing that the beneficiary's work has been of major significance in the field. Without additional, specific evidence showing, for example, that the beneficiary's work has been unusually influential, widely imitated throughout her field, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that the beneficiary meets this criterion. Therefore, the AAO concurs with the findings of the director for this criterion.

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

*Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.*

At the initial filing of the petition, the petitioner claimed the beneficiary's eligibility for this criterion without specifically identifying or submitting any documentary evidence that related to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) that requires "[e]vidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media." In the director's request for additional evidence, the director requested the petitioner to "submit copies of the articles which [the beneficiary] authored which were published in major media accompanied by evidence that these articles were scholarly." As indicated in the director's decision, the petitioner failed to submit any evidence for this criterion in response to the director's request for additional evidence.

In counsel's brief, he did not contest the decision of the director or offer additional arguments. The AAO, therefore, considers this issue to be abandoned and will not further discuss this criterion on appeal. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005).

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

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

In the director's decision, she concluded that the petitioner failed to establish the beneficiary's eligibility for this criterion. On appeal, counsel argues:

[C]omparable evidence of the display of the Beneficiary's graphic design work was submitted in the form of the work that she performed for HBO and Cinemax, that was exhibited on television and for which awards were granted; dozens of products' designs displaying her work and several letters confirming authorship. . . . Among these products' designs were graphic design works for worldwide renown companies such as Nestle, Coca-Cola, Pepsi-Cola and Bayer.

Counsel further refers to a letter submitted on appeal by [REDACTED] Marketing Manager for Coca-Cola, who stated that the beneficiary "provided services in marketing studies and new design elaboration for a line of existing fruit drinks."

A review of the record of proceeding reflects that the petitioner submitted numerous purported samples of the beneficiary's work but only demonstrated that a few of the samples actually were designed by the beneficiary. Moreover, the samples failed to contain English language translations pursuant to the regulation at 8 C.F.R. § 103.2(b)(3). The petitioner did submit documentary evidence establishing that the beneficiary participated in the design of the HBO advertising campaign, "Filhos do Carnaval," and of the Cinemax advertising campaign, "Photo Boot." Furthermore, the petitioner submitted several noncertified reference letters that briefly indicated work that was performed by the beneficiary on behalf of various companies. Nonetheless, the letters reflect that the beneficiary performed work for the [REDACTED] Book Cover, the Editorial Juridica Venezolana, Bayer Germany, SC-Tools, Inc., and Nera.

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]." Again, counsel failed to submit any documentary evidence demonstrating that this regulatory criterion is not readily applicable to the beneficiary's occupation. 8 C.F.R. § 204.5(h)(4). In the case here, the documentary evidence submitted by the petitioner fails to establish that the beneficiary's work has been displayed at artistic exhibitions or showcases such as galleries or museums. While the beneficiary's work was used on products and in television commercials, there is no evidence indicating that the petitioner's work was artistically displayed at exhibitions or showcases consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

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

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

At the initial filing of the petition and in response to the director's request for additional documentation, counsel referred to the previously mentioned reference letters. Again, the petitioner failed to submit any certified English language translation pursuant to the regulation at 8 C.F.R. § 103.2(b)(3). The director found that the petitioner failed to establish the beneficiary's eligibility for this criterion. On appeal, counsel argues:

The Beneficiary indeed worked on a free-lance basis, but this did not prevent her from performing an essential function for distinguished organizations. As comparable evidence for the eighth criterion, we submitted under . . . the original filing letters about the Beneficiary's critical work. [USCIS] cannot dispute the reputation and importance of any non-profit organization whose mission is to help youngsters from low-income families to stay off the streets by providing them with educational and vocational orientation courses. It is a problem that afflicts not only the U.S., but also countries such as Venezuela where the organization in this case, [REDACTED] is located. Its letter attested that the Beneficiary performed in a critical role for its organization, and it now reiterates the Beneficiary's leading and critical role with an updated letter. . . . The fact that the Beneficiary performed volunteer work does not diminish its value.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a *leading or critical role* for organizations or establishments that have a distinguished reputation [emphasis added]." In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment.

Although the petitioner submitted uncertified translations of the letters, they merely reflect that the beneficiary worked on packaging and advertisements for various companies and businesses mentioned above. There is no indication from the letters that the beneficiary performed in a leading or critical role consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The AAO notes that the director requested specific information from the petitioner regarding the beneficiary's roles. Specifically, the director requested the petitioner to identify "which establishments or organizations did [the beneficiary] perform in a leading or critical role." The director also requested the petitioner to "[s]ubmit an organizational chart which depicts the position which the beneficiary filled relative to positions filled by others in that organization who also performed in leading or critical roles." The director further requested the petitioner to "[i]nclude verification from the president [or] CEO of that organization that the beneficiary performed in a leading or critical role which also explains the basis for that conclusion." The petitioner failed to submit any of the requested information in response to the director's request for additional evidence. Simply submitting letters indicating that the beneficiary designed products and advertisements as a free-lance graphic designer is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) without evidence demonstrating that the beneficiary's roles were leading or critical to the distinguished organizations. There is no evidence comparing the roles of the beneficiary from the CEO of Coca-Cola or Bayer, for example, so as to demonstrate that the beneficiary performed in a

leading or critical role. The AAO is not persuaded that sporadic, occasional, or one-time employment is reflective of leading or critical roles for organizations or establishments as a whole.

Regarding the beneficiary's volunteer work, the petitioner submitted two letters from [REDACTED] who stated:

In 1999 [the beneficiary] was part of this personnel and taught courses and workshops on ethics and graphic design, while exhibiting superior humanitarian qualities, since she worked "Ad Honorem": she volunteered her work to share her knowledge and to teach Graphic Design to low-income young students, as part of a pilot project developed by our Institute.

\* \* \*

Our professional staff counts with the support and collaboration of [the beneficiary], who is not only a voluntary instructor but also a financial contributor, so that we can continue our educational program. I was asked to write about the results of her work in our Institute. I can proudly say that two of our current instructors were her pupils, thanks to her effort, love and dedication.

The petitioner filed the employment-based immigrant petition to classify the beneficiary as an alien with extraordinary ability as an art director/graphic designer. The regulation at 8 C.F.R. § 204.5(h) requires the beneficiary to "continue work in the area of expertise." As the beneficiary intends to continue working as an art director/graphic designer, the petitioner must demonstrate that her occupation is within her area of "expertise." The petitioner has not demonstrated that teaching "courses and workshops on ethics and graphic design" is within her area of expertise. *See Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002) (upholding a finding that competitive athletics and coaching are not within the same area of expertise).

Regardless, the letters from [REDACTED] indicate only that the beneficiary taught some courses in a volunteer capacity rather than that the beneficiary performed in a leading or critical role for [REDACTED]. Again, the petitioner failed to submit any other documentary evidence that compared the roles of the beneficiary to others at the institute, so as to establish that the beneficiary's role was leading or critical. Furthermore, the petitioner failed to submit any documentary evidence establishing that the [REDACTED] has a distinguished reputation pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The AAO cannot presume that every non-profit or charitable organization has a distinguished reputation. The petitioner failed to submit, for example, documentary evidence distinguishing the institution from other charitable organizations, so as to establish that it has a distinguished reputation pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

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

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

A review of the record of proceeding fails to reflect that the petitioner claimed the beneficiary's eligibility for this criterion at the time of the original filing of the petition or in response to the director's request for additional evidence. On appeal, counsel is now claiming the beneficiary's eligibility for this criterion. As such, the director could not have erred in his decision as counsel is only claiming the beneficiary's eligibility for this criterion for the first time on appeal. Specifically, in arguing the beneficiary's eligibility for the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), counsel referred to the previously mentioned letter from [REDACTED] and claimed that the letter reflected "the direct impact of [the beneficiary's] work in the increase of [Coca-Cola's] sales, which is also comparable evidence of commercial success."

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires "[e]vidence of commercial successes in the *performing arts*, as shown by box office receipts or record, cassette, compact disk, or video sales [emphasis added]." The beneficiary's field is in the graphic arts rather than the performing arts such as an actor or singer. The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. Moreover, the petitioner failed to submit any evidence of commercial successes in the form of "box office receipts or record, cassette, compact disk, or video sales."

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

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

***B. Final Merits Determination***

In accordance with the *Kazarian* opinion, the AAO must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the [ir] field of endeavor,” 8 C.F.R. § 204.5(h)(2); and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” See section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). See also *Kazarian*, 596 F.3d at 1115. The beneficiary met the plain language requirements for two 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 performing the AAO’s final merits determination, the AAO must look at the totality of the evidence to conclude the beneficiary’s eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the beneficiary has won two lesser nationally recognized awards and has served as a judge on three occasions. However, the accomplishments of the beneficiary fall far short of establishing that she “is one of that small percentage who have risen to the very top of the field of endeavor” and that she “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 petitioner demonstrated that the beneficiary won two Promax/BDA awards in 2006 and 2007. Moreover, while the AAO determined that the beneficiary met the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), an evaluation of the significance of the beneficiary’s judging experience is sanctioned under *Kazarian*, 596 F. 3d at 1121-11 to determine if such evidence is indicative of the extraordinary ability required for this highly restrictive classification. In the case here, the petitioner submitted documentary evidence establishing that the beneficiary served as part of the jury for HBO Latin America to choose the “HBO 15 Years Logo” in 2006, that the beneficiary served a judge for Representaciones Aquatrece C.A. in the selection of the image product for “Hydrofresh” in 2005, and the beneficiary served as a judge for the Association of Graphic Arts Companies’ “AIAG Image Contest” in 2001. The beneficiary’s limited judging experience is restricted to judging products for companies and organizations. Without evidence pre-dating the filing of the petition that sets

the beneficiary apart from others in her field, such as evidence that she has served as a judge of acclaimed graphic designers in a national or international competition rather than inter-company evaluations, the petitioner failed to demonstrate that the beneficiary “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).

Furthermore, the AAO cannot ignore that the statute requires the petitioner to submit “extensive documentation” of the beneficiary’s sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). In this case, the petitioner claimed the beneficiary’s eligibility for the original contributions criterion pursuant to the regulation at 8 C.F.R. 204.5(h)(3)(v) without demonstrating any original contributions of major significance in the field made by the beneficiary. In fact, the petitioner submitted numerous purported samples of the beneficiary’s works without establishing that they were actually the works of the beneficiary. Moreover, the petitioner submitted uncertified English language translations for the reference letters. Regardless, none of the letters indicated a single original contribution that has been of major significance in the field, as well as no evidence that the beneficiary performed in a leading or critical role pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). It must be emphasized that the favorable opinions of experts in the field, while not without evidentiary weight, are not a sound basis for a successful extraordinary ability claim. Again, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. USCIS is, however, ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters from individuals, especially when they are colleagues of the beneficiary without any prior knowledge of her work, supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien’s eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. at 500, n.2. The petitioner also claimed the beneficiary’s eligibility for the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii) without submitting any documentary evidence to demonstrate that the beneficiary’s work has been artistically displayed at exhibitions or showcases in a manner consistent with sustained national or international acclaim. 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).

The evidence of record falls far short of demonstrating the beneficiary’s sustained national or international acclaim as an art director/graphic designer. The regulation at 8 C.F.R. § 204.5(h)(3) requires 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.” While the petitioner submitted documentation demonstrating that the beneficiary has won two lesser internationally recognized

awards, 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 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.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, 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 beneficiary, who has not offered any evidence that distinguishes herself from others in her 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 beneficiary as one of that small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The petitioner seeks a highly restrictive visa classification for the beneficiary, intended for individuals at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. In this case, the petitioner has not established that the beneficiary’s achievements at the time of filing the petition were commensurate with sustained national or international acclaim, or that she was among that small percentage at the very top of the field of endeavor.

## **V. Conclusion**

Review of the record does not establish that the beneficiary has distinguished herself to such an extent that she may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of her field. The evidence is not persuasive that the petitioner’s achievements set her significantly above almost all others in her 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.