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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B2

DATE: AUG 10 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on June 27, 2011, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability as an acrobat. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of 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 received a one-time achievement and meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. LAW

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

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
>
> > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> >
> > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

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

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

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's 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 ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

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)).

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 this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

A. One-Time Achievement

The director determined that the petitioner failed to establish that he had a one-time achievement pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). On appeal, counsel claims that the "[d]irector erred in concluding that two silver medals from [the] Volkov Cup are not a major internationally recognized event in sports acrobatics, a non-Olympic discipline." A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence reflecting that he placed second at the 2002 and 2005 Volkov Cup. Therefore, the remaining issue is whether the petitioner's second place finishes at the Volkov Cup are considered one-time achievements; that is, major, internationally recognized awards.

A review of the record of proceeding reflects that the petitioner submitted a letter from [redacted] (Realis Gymnastics Accademy, LLC), screenshots from http://pravda.ru, www.acrobaticsports.com, and an invitation letter and directives for the 2009 Volkov Cup. While [redacted] opined that the "Volkov Cup is considered a World Cup in Sports Acrobatics" and "athletes from many countries competed," letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. *Black's Law Dictionary* 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about facts, such as whether something occurred or did not occur, based on the witness' direct knowledge. Id. (defining "written testimony"); see also id at 1514 (defining "affirmative testimony"). Moreover, depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." Id. If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

[redacted] failed to provide specific information demonstrating that awards received from the Volkov Cup can be considered major, internationally recognized awards. Further, the AAO is not persuaded that every award that is received from a competition "where athletes from many countries competed" automatically equates to a major, internationally recognized award. In addition, the screenshots do not establish that the petitioner's second place finishes can be considered one-time achievements pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). According to the screenshot from www.pravda.ru of an article dated August 19, 2002, "[t]he competition for the Vladislav Volkov cup has not been held for several years," and the screenshot from www.acrobaticsports.com of an article dated September 2, 2006, reflects that "[t]he results of this Volkov Cup will be used to select the Russian team that will compete at the upcoming European Team Championship." Considering the fact that the Volkov Cup has not consistently been held and appears to be a qualifying competition for the European Team Championship, any awards from the Volkov Cup fall far short in establishing that they are major, internationally recognized awards.

Given Congress' intent to restrict this category to "that small percentage of individuals who have risen to the very top of their field of endeavor," the regulation permitting eligibility based on a one-time achievement must be interpreted very narrowly, with only a small handful of awards qualifying as major, internationally recognized awards. *See* H.R. Rep. 101-723, 59 (Sept. 19, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 1990 WL 200418 at *6739. Given that the House Report specifically cited to the Nobel Prize as an example of a one-time achievement, examples of one-time awards which enjoy major, international recognition may include the Pulitzer Prize, the Academy Award, and (most relevant for athletics) an Olympic Medal. The regulation is consistent with this legislative history, stating that a one-time achievement must be a *major, internationally recognized* award. 8 C.F.R. § 204.5(h)(3). The selection of Nobel Laureates, the example provided by Congress, is reported in the top media internationally regardless of the nationality of the awardees, is a familiar name to the public at large and includes a large cash prize.

While an internationally recognized award could conceivably constitute a one-time achievement without meeting all of those elements, it is clear from the example provided by Congress that the award must be global in scope and internationally recognized in the alien's field as one of the top awards in that field. The AAO is not persuaded that the petitioner's second place finishes are remotely comparable to such major, internationally recognized awards as the Pulitzer Prize, the Academy Award, or an Olympic Medal.

Accordingly, the petitioner failed to establish that he had a one-time achievement pursuant to the regulation at 8 C.F.R. § 204.5(h)(3).

B. Evidentiary Criteria[2]

> *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 established 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." A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence to minimally meet the plain language of this regulatory criterion.

Accordingly, the petitioner established 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.*

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[2] On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

The director determined that the petitioner established eligibility for this criterion based on his membership with the National Team of the Republic of Kazakhstan from 1998 to 2006. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires "[d]ocumentation of the alien's membership in associations in the field for which is classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields." Although the AAO concurs with the director that the petitioner's membership with the Republic of Kazakhstan's national team meets the elements of this criterion, the AAO must withdraw the findings of the director.

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)(ii) requires membership in more than one association. 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). Here, the petitioner claimed his eligibility for this criterion based on his membership with only one association.

A review of the record of proceeding reflects that at the initial filing of the petition, counsel also claimed the petitioner's eligibility for this criterion based on his employment with Cirque du Soleil and submitted an employment contract and a letter from [redacted], who stated:

> In terms of our recruiting performing artists, coaches and other support personnel, Cirque du Soleil looks specifically for those who are at the very top of their chosen fields, whether they are performers, coaches, designers, or musicians. Each year, Cirque du Soleil's talent scouts cross the globe, searching for the world's top performers and personnel. In any given year, over 8,000 candidates (all-highly skilled) audition for Cirque du Soleil's casting department. However, on average, between 100 and 150 (roughly 1.25-1.875%) are asked to stay and train at our studio in Montreal. Of these, some still will never make it to the stage.
>
> Cirque du Soleil's casting methods are highly rigorous, which helps to ensure that our shows have only the best of the given discipline. Many of our artists and coaches have won Olympic medals or international championships (some disciplines are not Olympic sports).

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires "[d]ocumentation of the alien's *membership* in associations in the field for which is classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields [emphasis added]." Here, the petitioner is not a member of Cirque du Soleil; rather the petitioner is an employee of Cirque du Soleil. In other words, the petitioner was not granted membership to Cirque du Soleil; instead the petitioner was hired to perform for Cirque du Soleil.

Furthermore, in order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. The overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation. While [redacted] indicated that Cirque du Soleil has a "highly rigorous" casting method, he did not indicate that outstanding achievements, as judged by recognized national or international experts in their disciplines or fields, are required for employment with Cirque du Soleil. Although [redacted] indicated that many of its artists won Olympic medals or international championships, there is no evidence to establish that employment with Cirque du Soleil requires outstanding achievements. The fact that some employees with Cirque du Soleil are Olympic medalists does not necessarily mean that the association requires outstanding achievements as an essential condition for employment. In addition, [redacted] failed to establish whether the hiring committee is comprised of recognized national or international experts in their disciplines or fields.

Recognized national or international experts in the field do not judge the achievements of circus hopefuls. Rather, they are selected for the circus by the equivalent of casting directors, or, in smaller circuses, the owner. While the AAO does not question that auditions to tour with Cirque du Soleil are very competitive, being hired for a job in one's field is simply evidence of an ability to work in one's field. Employment, even in a highly competitive industry, is not evidence of membership in associations which require outstanding achievements of their members as judged by recognized national or international experts.

For the reasons discussed above, the petitioner failed to establish that his employment with Circus du Soleil meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii). As the petitioner claimed eligibility for this criterion based on only one association, the AAO withdraws the decision of the director for this criterion.

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

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

Although a review of the record of proceeding fails to reflect that the petitioner claimed eligibility for this criterion at the initial filing of the petition or in response to the director's request for

additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the director determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel states:

> Evidence submitted to meet the 'leading or critical role' criterion, which petitioner claimed, was erroneously applied to the criterion of 'original contributions of major significance,' which petitioner never claimed.

As counsel does not claim on appeal the petitioner's eligibility for the original contributions criterion, the AAO, therefore, considers this criterion to be abandoned. *See 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).

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 "[n]o evidence has been provided for this criterion." As discussed under the previous criterion, counsel asserts that the petitioner claimed eligibility for this criterion. However, a review of the record of proceeding fails to reflect that the petitioner claimed eligibility for this criterion at the initial filing of the petition or in response to the director's request for additional evidence, nor did counsel specify on appeal which evidence was submitted and how the petitioner qualifies for this criterion. A passing reference without substantive arguments is insufficient to raise that ground on appeal. *Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. 433, 435 (11th Cir. 2009).

Notwithstanding the above, the record of proceeding contains a letter from [redacted] of Simply Circus, Inc., who provided his personal expert statement "to address [the petitioner's] qualifications, the significance of his membership in the cast of Kooza, Cirque du Soleil, and the significance of his role for this major touring attraction." A review of [redacted] opinion statement appears to reflect that [redacted] was asked to review selected documentary evidence and provide his professional opinion. It does not appear that [redacted] was aware of the petitioner prior to being contacted for his opinion. His determination that the petitioner is an alien of extraordinary ability is not based on his prior knowledge of the petitioner or his work but merely on the evaluation of the documents given to him.

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. In reviewing [redacted] letter, he based his opinion on assumptions of the petitioner's role with Cirque du Soleil rather than factual accounts of the petitioner's leading or critical role. For example, [redacted] stated:

> While I cannot speak for Cirque du Soleil, I strongly believe that [the petitioner's] remarkable accomplishments as a sport acrobat are among the key reasons why he was offered the opportunity to become one of Cirque du Soleil's performers, and as I am sure you know, Cirque du Soleil is known world-wide for hiring only the best performers in the world.

Simply being hired to perform with Cirque du Soleil is insufficient to demonstrate that the petitioner performed in a leading or critical role. [redacted] provided no information, for example, that distinguished the petitioner from the other performers with Cirque du Soleil, so as to demonstrate that the petitioner's role is leading or critical. Moreover, [redacted] claimed:

> [The petitioner] and his partner created the Hand Balancing act that is a major feature of Kooza today. It should be noted that if this act were to be placed into an international Sports Acrobatics competition today, it would easily be expected to medal. And this is an act performed in front of a live audience on a daily basis.

While [redacted] highly praises the petitioner's Hand Balancing act, he assumes that the petitioner would medal in a fictional international competition at some point in the future. Regardless, [redacted] failed to explain how the petitioner's performance can be considered a leading or critical role to Cirque du Soleil as a whole. Again, there is no evidence that distinguishes the petitioner's performances or acts from the other performers that would be demonstrative of a leading or critical role. [redacted] also claimed:

> It is my opinion that [the petitioner's] position with Cirque du Soleil, the level of his performance, the unique nature of his performance skills and his cultural value is rather conclusive indications that while he left competitive sports acrobatics, he remains one of the best in this discipline to this day.

Merely having talent or a unique skill set is not reflective of performing in a leading or critical role. Rather, the record must be supported by evidence that the petitioner has already used those unique skills to perform in a leading or critical role. Furthermore, assuming the petitioner's skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment labor certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm'r 1998).

While [redacted] generally described the petitioner as "extraordinary," there is insufficient evidence demonstrating that the petitioner's role with Cirque du Soleil is leading or critical. Similarly, as discussed previously, the petitioner submitted a letter from [redacted] who generally stated that the petitioner is an integral part of Cirque du Soleil and "plays a substantial role in the production." However, [redacted] provided no further information to reflect that the petitioner's role is leading or critical. This regulatory criterion not only requires the petitioner to perform in a role for organizations or establishments that have a distinguished reputation, the regulatory criterion

also requires the role to be leading or critical. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the petitioner's role is leading or critical. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, 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 petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *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 petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence.

Even if the petitioner demonstrated that his role with Cirque du Soleil is leading or critical, which he clearly did not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires the petitioner to perform in a leading or critical role for more than one organization or establishment. There is no evidence of the petitioner performing in a role for any other organization or establishment that has a distinguished reputation, let alone a leading or critical role.

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

C. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

III. P-1 NONIMMIGRANT ADMISSION

Since the filing of the petition, the petitioner was admitted to the United States as a P-1 nonimmigrant, a visa classification that requires the alien to perform as an entertainer as an integral and essential part of the performance of an entertainment group that has been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time and the alien seeks to enter the United States "temporarily and solely for the purpose of performing as such a performer or entertainer or as an integral and essential part of a performance." *See* section 214(c)(4)(B) of the Act, 8 U.S.C. § 1184(c)(4)(B). While USCIS has approved at least one P-1 nonimmigrant visa petition filed on behalf of the beneficiary, 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).

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 See Soltane v. DOJ, 381 F.3d 143, 145 (3d Cir. 2004)* (noting that the AAO conducts appellate review on a *de novo* basis).

IV. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be 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" 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." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.[3] Rather, the proper conclusion is that the

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[3] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act;

petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).