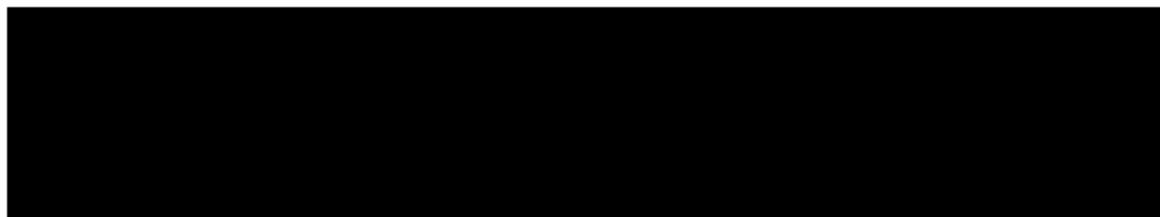


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



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



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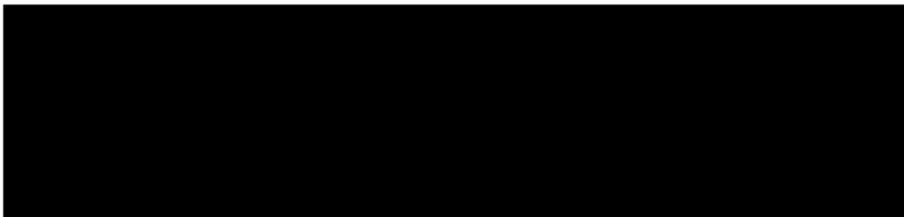
DATE: **AUG 15 2012** OFFICE: TEXAS SERVICE CENTER

FILE:

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 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 July 27, 2011, 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 alien of extraordinary ability as an assistant director of food and beverage. The director determined that the petitioner had not established the beneficiary's 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 the beneficiary's "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.

It is noted that at the initial filing of Form I-290B, Notice of Appeal of Motion, counsel indicated in Part 2, box A that he was "filing an appeal" pursuant to the regulation at 8 C.F.R. § 103.3(a). Although in Part 3 of the form, as well as the accompanying cover letter and brief, counsel refers to a motion to reopen and a motion to reconsider pursuant to the regulation at 8 C.F.R. § 103.5(a). If counsel intended to file a motion to reopen and a motion to reconsider, he should have checked box F in Part 2 of Form I-290B. As counsel filed Form I-290B requesting an appeal of the director's decision, the AAO will treat it as an appeal. The burden is not on the AAO to infer or second-guess counsel's filing intentions. It is further noted that the regulation at 8 C.F.R. § 103.3(a)(2)(iii) provides that "[t]he reviewing official shall decide whether or not favorable action is warranted," and the regulation at 8 C.F.R. § 103.5(a)(8) provides that "[t]he official who denied an application or petition may treat the appeal from that decision as a motion for the purpose of granting the motion." As the director determined that favorable action could not be taken on the appeal and she could not therefore treat the appeal as a motion, she forwarded the appeal to the AAO.

On appeal, counsel claims that the beneficiary 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.*; 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.<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.* 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

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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).

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

### A. Evidentiary Criteria<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, he determined that the petitioner failed to establish the beneficiary's eligibility for this criterion. On appeal, counsel claims:

[The beneficiary] has been the recipient of numerous awards and prizes recognizing his outstanding achievements. Under his leadership as the manager of its flagship restaurant, [the petitioner] achieved the highly sought-after AAA Five Diamond Award and the Mobil Four Star Award. Additionally, the restaurant *Maestro* that he managed received numerous top-echelon ratings from the authoritative restaurant review guide, *Zagat*.

\* \* \*

The restaurant *Maestro* that [the beneficiary] managed [for the petitioner] was awarded either the **first or second ranking for Service** (which was clearly managed by [the beneficiary] as the Restaurant Manager) out of every restaurant in the Washington, DC area, including Baltimore, Maryland, Washington, DC, and Northern and Northwestern Virginia, by the prestigious *Zagat Survey* for every year from 2003 to 2007. The *Zagat Survey* is the leading name in restaurant reviews in the United States, and its prestigious rankings are considered authoritative, and often even influence the success of restaurants.

\* \* \*

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<sup>2</sup> On appeal, the petitioner does not claim that the beneficiary meets any of the regulatory categories of evidence not discussed in this decision.

[T]he *Washingtonian Magazine's* "100 Very Best Restaurants" articles represent the upper echelons of the Luxury Food and Beverage Industry in one of the most competitive and important markets in the world. . . . [T]he magazine states that the quality of service is a key factor in its rankings. Under [the beneficiary's] expert leadership, the restaurant *Maestro* that he managed received multiple four-star ratings from *Washingtonian Magazine*.

\* \* \*

[The beneficiary] served as Restaurant Manager, and his role of being in charge of all service aspects of the restaurant is evidenced throughout the supporting materials for the petition, including all the reference letters and articles, and it has been well established and explained that service along with food and décor, are the most critical aspects of any restaurant's review, ranking, or rating. Therefore, it has been amply established that [the beneficiary] can be credited for the restaurant's awards, particularly the rankings based purely on service. Just as the director of a film can be credited for the success of the film based on his or her expert direction, [the beneficiary] should be credited for the awards received by the restaurants he managed.

(Emphasis in original.)

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 [emphasis added]." The submission of documentary evidence reflecting awards, rankings, and ratings received by restaurants where the beneficiary was employed is insufficient to demonstrate that the beneficiary received nationally or internationally recognized prizes or awards for excellence in the field. Further, the AAO cannot conclude that an award that was not specifically presented to the beneficiary is tantamount to his receipt of a nationally or internationally recognized award. It cannot suffice that the beneficiary was one member of a large group that earned collective recognition.

Therefore, while *Maestro's* accolades and the beneficiary's roles have evidentiary value for another criterion, they cannot serve to meet this criterion. Instead, they are far more relevant to the "leading or critical role" criterion set forth at the regulation at 8 C.F.R. § 204.5(h)(3)(viii) and will be discussed separately within the context of that criterion.

It is noted, as indicated in the director's decision, that the petitioner submitted additional awards such as the 1999 The Carlton London Restaurant Awards for the Starbucks Coffee Company Award for Best Young Chef and the 1999 AA Special Awards for England. The petitioner also submitted "Higher Certificates" for 1999 and 2000 from the Wine & Spirit Education Trust (WSET). In counsel's brief, he did not contest the findings of the director or offer additional arguments. The AAO, therefore, considers these issues 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). It is noted that the Carlton Award was awarded to Fabio Trabocchi for best young chef, and the AA Special Award was awarded to the restaurant, *Floriana*. Regarding the WSET "Higher Certificates," while they indicate that the beneficiary was awarded the certificates, the petitioner failed to submit any documentary evidence demonstrating that they are nationally or internationally recognized prizes or awards for excellence in the field.

Accordingly, the petitioner failed to establish that the beneficiary 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 the beneficiary's eligibility for this criterion. On appeal, counsel claims:

We submit that the fact that [the beneficiary] is named alongside [Chef ██████████ and Sommelier ██████████] does not in any way lessen the impact of [the beneficiary's] extraordinary accomplishments – in fact, just the opposite. When a major film wins an award, the director is likely credited alongside actors and actresses, production staff, and other personnel; however, this does not lessen the fact that the director is deserving of praise and recognition for his or her expert direction of the movie. Similarly, the fact that [the beneficiary] is praised alongside the Chef and the Sommelier does not lessen the nature of his accomplishments. As Restaurant Manager and Maitre d', [the beneficiary] was wholly and ultimately responsible for the service of the restaurants under his control. As such, when a major publication praises the service of a restaurant under [the beneficiary's] management, he is deserving of praise, and clearly has set himself apart from others in the restaurant industry.

\* \* \*

It is wholly remarkable that [the beneficiary] has been mentioned by name in publications as prestigious as those submitted, including *The Washington Post*. While some articles may only briefly mention him, the authoritative nature of these publications speaks volumes about the outstanding nature of [the beneficiary's] accomplishments. The vast majority of restaurant staff (even including the higher-profile chef) will never be mentioned even in a minor local publication. Restaurants that are exceptional still rarely receive recognition in national newspapers. . . . [T]he vast majority of articles praise only the chef, failing to note the accomplishments (however important) of other key managers within the restaurant. Only when the service is truly exceptional would the Restaurant Manager to be named in a major

publication is remarkable, and clearly demonstrates the outstanding nature of [the beneficiary's] achievements.

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 [emphasis added].” 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>3</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.”

As the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) specifically requires that the published material be “about the alien,” counsel’s claims that articles that praise the restaurants where the beneficiary have worked or articles where the beneficiary is mentioned briefly as one of the employees of the restaurant is insufficient to meet this criterion. An article that is not about the beneficiary does 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). In the case here, which will be indicated below, the petitioner submitted material that never mentioned the beneficiary and material that merely mentioned the beneficiary as an employee but was not material about the beneficiary relating to his work. It is insufficient to establish eligibility for this criterion based on material that simply lists, mentions, or indicates the beneficiary’s name, such as the posting of a player’s scores from a golf tournament in a newspaper, without material that is about the beneficiary relating to his work regardless if the beneficiary’s name was mentioned in *The Washington Post*. The AAO is not persuaded that anytime an alien’s name is mentioned or listed in the media the alien would automatically qualify for the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

On appeal, counsel further claims:

[T]he Service has stated that “[e]vidence of published material should clearly identify the circulation and intended audience of the publication, as well as the title, date, and author of the material. The Petitioner has failed to provide this information.” This is plainly incorrect as a matter of fact, because the title, date, and author (*where applicable*) of most of publications and/or articles in which [the beneficiary] or his work is referenced were, in fact, provided. According to 8 C.F.R. § 204.5(h)(3)(iii), “[s]uch evidence shall include the title, date, and author of the

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<sup>3</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.

material, and any necessary translation". Nowhere in the regulations is there a requirement that the Petitioner offer circulation figures for the published material provided.

(Emphasis added.)

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be in "professional or major trade publications or other major media." In other words, simply submitting published material about the alien is insufficient to meet this criterion unless the petitioner also submits evidence that the material was published in professional or major trade publications or other major media. Although the regulation does not require that the petitioner submit circulation statistics and the publication's intended audience, that information may demonstrate that the publication is a professional, major trade, or other major media. As the petitioner failed to provide such information, the petitioner failed to establish that the submitted material was published in professional or major trade publications or other major media. It is noted that counsel did not submit any documentary evidence on appeal to establish that the publications were professional, major trade, or other major media even though the issue was specifically raised in the director's decision.

Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) provides that "[s]uch evidence shall include the title, date, and author of the material, and any necessary translation." The regulation does not state that the petitioner may include the title, date, and author of the material only where it is applicable; there is no exception when the petitioner may include or may not include the information. In the instances where the petitioner failed to include the title, date, and author of the material, which will be indicated below, the petitioner failed to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

The petitioner submitted the following documentation that does not even mention the beneficiary, let alone reflect published material about the beneficiary relating to his work in professional or major trade publications or other major media:

1. An article entitled, "Hot Names Rising," Fall 2004, Jasper Perkins, *Zagat Magazine*;
2. An article entitled, "Italy's Flash in the Pan," unidentified date, unidentified author, *The Times Magazine*;
3. An article entitled, "Quantity and Some Quality Was the Recipe for the Year." December 29, 1996, Fay Maschler, *Evening Standard*;
4. An article entitled, "Never Mind the TV, What About the Cooking?" October 6, 1996, Fay Maschler, *Evening Standard*;

5. An article entitled, "Loved the Chef. Hated the Service." October 31/November 1, 1998, Nicholas Lander, *Financial Times*;
6. An article entitled, "The Editor's 'A' List," unidentified date, unidentified author, unidentified publication;
7. An article entitled, "100 Very Best Restaurants." January 2006, unidentified author, *Washingtonian*;
8. An article entitled, "100 Very Best Restaurants." January 2004, unidentified author, *Washingtonian*;
9. An article entitled, "100 Very Best Restaurants." January 2002, unidentified author, *Washingtonian*;
10. An article entitled, "Stephen Pile Survives Acts of God in Wales and SW3, and Finds Hit-And-Miss in the East End." February 1999, Stephen Pile, *Harpers & Queen*;
11. An article entitled, "Why London is Still Ruled by Italy," October 27, 1998, Fay Maschler, *Evening Standard*;
12. An article entitled, "Table Talk," unidentified date, A.A. Gill, *Style*;
13. An article entitled, "Floriana." unidentified date, unidentified author, *Time Out*;
14. An article entitled, "One Down, and Another Cross." October 2, 1998, unidentified author, *ES Magazine*;
15. A snippet entitled, "Shirley Bassey Honoured at Opening of Riccardo Mazzucchelli's Floriana Restaurant," October 16, 1998, unidentified author, *OK!*;
16. A snippet entitled, "Riccardo Mazzucchelli's Restaurant Floriana," November 13, 1998, unidentified author, *OK!*; and
17. A snippet entitled, "Floriana Dinner at Accademia Italiana." unidentified date, unidentified author, *Hello!*.

The articles are about the restaurants, *Maestro* and *Floriana*, rather than about the beneficiary relating to his work. An article that is not about the beneficiary does not meet this regulatory criterion. See, e.g., *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*7 (upholding a finding that articles about a show are not about the actor). Moreover, articles that do not even mention the

beneficiary clearly are not published material about the beneficiary relating to his work consistent with the plain language of this regulatory criterion. Furthermore, the articles indicated above that do not include the date and author of the material do not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Finally, while the AAO acknowledges the stature of *Zagat Magazine*, the petitioner failed to submit any documentary evidence establishing that the other publications are professional or major trade publications or other major media.

While the petitioner submitted the following articles that mentioned the beneficiary's name, they do not reflect published material *about* the beneficiary relating to his work:

18. An article entitled, "A Tasty Review of Healthy Dining in 2003." January 7, 2004, Michael Birchenall, *Weekender, Times Community Newspapers*;
19. An article entitled, "To Crow Over," April 2002, Jim Poris. *Food Arts*;
20. An article with a partial title, "...Food Writer Picks His 'Best,'" September 2001, Michael Birchenall, *Weekender, Times Community Newspapers*;
21. An article entitled, "Bravo, Maestro." August 2001. Robert Shoffner, David Dorsen, and Cynthia Hacinli, *Washingtonian*;
22. An article entitled, "Ritz's Maestro Offers Serious Alternative." June 27, 2001, Michael Birchenall, *Weekender, Times Community Newspapers*;
23. A screenshot entitled, "2006 Fall Dining Guide." October 15, 2006, Tom Sietsema, [www.washingtonpost.com](http://www.washingtonpost.com);
24. An article entitled, "Steaking Your Claim," March 28, 2001, Michael Birchenall, *Weekender, Times Community Newspapers*;
25. An article entitled, "Perfect Pair at Maestro." November 20, 2002. Michael Birchenall, *Great Falls Times*;
26. An article entitled, "New Restaurant Opens in Tysons Galleria." April 18-24, 2001, Joanna B. Lewis, *The Connection*;
27. An article entitled, "Maestro Creates Dishes that are a Feast for the Eye." August 23, 2001, Corinna Lothar, *The Washington Times*;
28. An article entitled, "Seeing Stars." October 19, 2003, Tom Sietsema, *The Washington Post Magazine*;

29. A snippet entitled, "Guide to America's Best Restaurants," October 2003, unidentified author, *Gourmet*; and
30. An article entitled, "Maestro: Dazzling, Professional, Perfect," July 23, 2003, Michael Birchenall, *Weekender, Times Community Newspapers*.

While the articles reflect snippets mentioning the beneficiary's name as one of the employees of *Maestro* and *Floriana*, they do not reflect published material about the beneficiary relating to his work. Again, the articles are primarily about the restaurants, *Maestro* and *Floriana*. An article that is not about the beneficiary does not meet this regulatory criterion. See, e.g., *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*7 (upholding a finding that articles about a show are not about the actor). Although some of the articles were accompanied by photographs of the beneficiary with Chef [REDACTED] the captions merely identify the individuals in the photographs and are not written, journalistic coverage of the beneficiary. Likewise, material that simply credits or briefly mentions the beneficiary as the maître d' hotel but is not "published material" about the beneficiary relating to his work is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Again, the documentation submitted by the petitioner fails to reflect any published material about the beneficiary relating to his work. Further, the articles indicated above that do not include the date and author of the material do not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Finally, while the AAO acknowledges that [www.washingtonpost.com](http://www.washingtonpost.com) is major media, the petitioner failed to submit any documentary evidence demonstrating that the other publications are professional or major trade publications or other major media.

As discussed above, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought" and "[s]uch evidence shall include the title, date, and author of the material, and any necessary translation." The burden is on the petitioner to establish every element of this criterion. In this case, the petitioner's documentary evidence fails to reflect published material about the beneficiary relating to his work in professional or major trade publications or other major media.

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

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

In the director's decision, she determined that the petitioner failed to establish the beneficiary's eligibility for this criterion. 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." Here, the evidence must be reviewed to see whether it rises to the level of original business-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).

On appeal, counsel claims that the petitioner submitted numerous recommendation letters on the beneficiary's behalf that demonstrated eligibility for this criterion. However, a review of the recommendation letters fails to indicate that the beneficiary has made original contributions of *major significance* in the field. In fact, the letters not only provide general statements but reflect bare assertions without offering any specific information to establish how beneficiary's work has been of major significance. For instance, [REDACTED] stated:

[The beneficiary] has exerted and continues to exert a tremendous influence on the field, given his leadership in excellence in service. [The beneficiary] has contributed a level of service to the industry that was previously unheard of and which continues to set the level for superlative quality. This excellence has improved the service in the industry as a whole as the industry tries to match his level to the benefit of customers worldwide. [The beneficiary] has been given the well-deserved nickname in the Hospitality Industry as "the guru of service." I am certain that his commitment to such high standards will continue to service excellence and will lead to the development of future stars within the industry.

Mr. [REDACTED] did not explain how the beneficiary has exerted tremendous influence on the field or how the beneficiary's service has somehow influenced the field, so as to demonstrate an original contribution of major significance in the field. Simply making general statements and failing to provide specific information establishing that the beneficiary's contributions have been of major significance in the field is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v). Further, Mr. [REDACTED] speculates that the beneficiary's service and commitment will develop future stars in the industry at some unspecified time in the future. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 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. A petitioner cannot file a petition under this classification based on the expectation of the beneficiary's future eligibility. The assertion that the beneficiary will make contributions that will influence the field is not adequate to establish that he has already made original contributions of major significance in the field.

Moreover, rather than discussing the beneficiary's impact or influence on the field as a whole, they discuss exclusively the beneficiary's personal accomplishments and achievements for the petitioner and its former restaurant, *Maestro*. For example, [REDACTED] stated that the beneficiary's "expertise has also been invaluable in his assignments [for the petitioner]" and "has demonstrated that he is an unmatched asset to [the petitioner], and has helped to ensure the attainment of the highest accolades for a number of our hotels." Further, [REDACTED] stated that the beneficiary's "impact was only felt within one restaurant, but in his present role, he is able to

influence the manner in which service is provided throughout the entire Food and Beverage operation [for the petitioner].” In addition, the petitioner submitted letters from [REDACTED] for the International Monetary Fund/World Bank Group, and [REDACTED] Washington Redskins, who commended the beneficiary for his banquet services that were used through the petitioner. The letters fail to indicate, for example, that the beneficiary’s contributions have been widely applied or implemented in the field as a whole rather than limited to the petitioner, and its former restaurant, *Maestro*.

Furthermore, the recommendation letters discuss far more persuasively the beneficiary’s skills, experience, performance, and talents rather than his original contributions that have been of major significance in the field. For instance, [REDACTED] referred to the beneficiary’s “outstanding commitment, selfless teamwork, and superlative abilities”; [REDACTED] referred to the beneficiary’s “superlative knowledge, an exceptional track record of accomplishments, and a sincere dedication to the development in hospitality”; [REDACTED] referred to the beneficiary’s “superlative service and important leadership” and “passion and talent”; [REDACTED] referred to the beneficiary’s “acute eye for detail and superior knowledge of food and beverage”; and [REDACTED] referred to the beneficiary’s “attention to detail, creativity, and passion for the highest level of personal service.”

However, none of the letters indicated how the beneficiary’s skills, experience, or personal traits are original contributions of major significance to the field. Merely having a diverse skill set is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the beneficiary has already used those unique skills to impact the field at a significant level in an original way. Furthermore, assuming the petitioner’s skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment labor certification process. *See Matter of New York State Dep’t. of Transp.*, 22 I&N Dec. 215, 221 (Comm’r 1998).

While those familiar with the beneficiary’s work generally describe it as “extraordinary,” there is insufficient documentary evidence demonstrating that the beneficiary’s work is of major significance. This regulatory criterion not only requires the beneficiary to make original contributions, the regulatory criterion also requires those contributions to be of major significance. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the beneficiary’s contributions have already influenced the field. Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff’d in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the AAO’s conclusion that the “letters from physics professors attesting to [the petitioner’s] contributions in the field” were insufficient was “consistent with the relevant regulatory language.” 596 F.3d at 1122. Moreover, the letters considered above primarily contain bare assertions of the beneficiary’s status in the field without providing specific examples of how those contributions rise to a level consistent with major significance in the field. 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). The lack of supporting evidence gives the AAO no basis to gauge the significance of the beneficiary's present contributions.

Further, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008). Thus, the content of the writers' statements and how they became aware of the 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 of original contributions of major significance.

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

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.*

In the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the director initially determined that the petitioner established the beneficiary's eligibility for this criterion. However, in the director's denial of the petition, the director stated that "further review indicates that the record does not include sufficient evidence demonstrating that the beneficiary has performed in a leading or critical role." On appeal, counsel claims "that the Director's decision to reverse acceptance of this criterion is patently unfair, [and] it runs contrary to federal regulations," and "the Petitioner was not granted its legally afforded opportunity to rebut what the Director now considers deficient."

The regulation at 8 C.F.R. § 103.2(b)(8) provides in pertinent part:

(ii) Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) Other evidence. If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

Moreover, the regulation at 8 C.F.R. § 103.2(b)(16) provides in pertinent part:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered . . . .

The regulation at 8 C.F.R. § 103.2(b)(8) does not require the director to request additional documentation or issue a notice of intent to deny every time that the petitioner fails to establish eligibility for an immigration benefit. Instead, the director has the discretion to deny, request additional information or evidence, *or* notify the petitioner of its intention to deny. Even if the director reevaluates her preliminary determination, the regulations do not require the director to afford the petitioner an opportunity to submit additional documentation or rebut the new determination of the director prior to the final decision. Furthermore, the regulation at 8 C.F.R. § 103.2(b)(16)(i) does not require the director to notify the petitioner prior to issuing the final decision every time the decision will be adverse. Instead, the regulation requires that the director to notify the petitioner when: (1) the decision will be adverse, (2) the decision is based on derogatory information considered by the Service, *and* (3) the applicant or petitioner is unaware of the derogatory information. In this case, the director's decision regarding this criterion was not based on derogatory information that the petitioner was unaware. Rather, the director reevaluated the documentary evidence that was initially submitted by the petitioner and determined that the evidence did not establish the beneficiary's eligibility for this criterion. Moreover, the decision was not based on derogatory information that came to light after the director's issuance of the request for additional evidence. Just as the director's initial unfavorable finding indicated in a request for additional evidence is not the final decision, the director's initial favorable finding in a request for additional evidence is also not the final decision. For these reasons, as well as counsel's failure to cite to any law, regulation, precedent decision, or USCIS policy that would prohibit the director from reevaluating her initial finding in a request for additional evidence, the AAO is not persuaded that the director is required to notify the petitioner prior to issuing a final decision when a reevaluation of the documentary fails to support a favorable finding. As such, the AAO finds that the director did not commit a procedural error regarding this issue.

While there is some merit to counsel's contention regarding the inability to rebut the director's finding prior to the denial, even if the director had committed a procedural error, it is not clear what

remedy would be appropriate beyond the appeal process itself. On appeal, the petitioner has the opportunity to supplement the record and make further arguments regarding the beneficiary's eligibility. Therefore, it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence or new arguments. Regardless, the AAO will review the record in its entirety based on the petitioner's appellate arguments regarding the beneficiary's eligibility. *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).

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. Moreover, the business or nature of the organization is not determinative; rather the issue here is the organization's overall reputation.

On appeal, counsel claims that the petitioner demonstrated the beneficiary's eligibility for this criterion based solely on the beneficiary's role with the petitioner. Based upon a review of the record of proceeding, the petitioner submitted sufficient documentary evidence to establish that the beneficiary's role with the petitioner minimally meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). However, 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)(viii) requires a leading or critical role in more than one organization or establishment. 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, USCIS 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).

The AAO notes that at the initial filing of the petition, counsel also claimed the beneficiary's eligibility for this criterion based on his role at *Floriana*. However, on appeal, counsel claims the beneficiary's eligibility for this criterion based only on the beneficiary's role with the petitioner and makes no claim that the beneficiary's role at *Floriana* meets this criterion. The AAO, therefore, considers this claim to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d at 1228 n. 2; *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*9 (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

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 [emphasis added].” The burden is on the petitioner to establish that the beneficiary meets every element of this criterion. Without documentary evidence demonstrating that the petitioner has performed in a leading or critical role for more than one organization or establishment that has a distinguished reputation, the AAO cannot conclude that the beneficiary meets this criterion.

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

### B. Summary

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

### III. O-1 NONIMMIGRANT

The AAO notes that at the time of the filing of the petition, the beneficiary was last admitted to the United States as an O-1 nonimmigrant on September 14, 2010. However, while USCIS has approved at least one O-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. at 1103. 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

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.<sup>4</sup> Rather, the proper conclusion is that the 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. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.

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<sup>4</sup> 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; 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).