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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**

B2



DATE: **AUG 23 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 May 13, 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 opera singer. 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.

In the director's decision, she determined that the petitioner only met the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii) and the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii). In counsel's brief on appeal, counsel affirms the decision of the director regarding the published material criterion and the artistic display criterion and claims that the petitioner also meets the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). Counsel does not contest the findings of the director for any of the other previously claimed criteria or offer additional arguments. The AAO, therefore, considers them 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).

1. 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)).

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).

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 Criteria²

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.

As indicated above, the director determined that the petitioner established eligibility for this criterion. However, based upon a review of the record of proceeding, the AAO must withdraw the findings of the director for this criterion.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought.” In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.³ Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that “[s]uch evidence shall include the title, date, and author of the material, and any necessary translation.”

At the outset, in response to the director’s request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), counsel claimed:

[W]e would first like to note that the criterion is “*Published material about the alien in professional or major trade publications or other major media relating to the alien’s work in the field*” [sic]. There is no requirement that the published material be about the alien – rather it must be relating to their work.

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

³ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual’s reputation outside of that county.

(Emphasis in original.)

On the contrary, 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].” Compare 8 C.F.R. § 204.5(i)(3)(i)(C) relating to outstanding researchers or professors pursuant to section 203(b)(1)(B) of the Act, which only requires published material about the alien’s work. Therefore, in order to meet the plain language of this criterion, the petitioner must submit documentary evidence reflecting published material about her relating to her work in the field. Moreover, the submission of evidence that simply mentions the petitioner’s name as one of the performers, quotes the petitioner, or is not otherwise about the petitioner fails to equate to published material about the alien relating to her work in the field. An article that is not about the petitioner 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 discussed in depth below, the petitioner submitted material that mentioned her as a performer but was not material *about* her relating to her work. The AAO is not persuaded that anytime an alien’s name is mentioned in the media the alien would automatically qualify for the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

In addition, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires the material to be published “in professional or major trade publications or other major media.” As indicated below, the petitioner submitted documentary evidence reflecting material posted on the Internet. However, the AAO is not persuaded that articles posted on the Internet from a printed publication or from an organization are automatically considered major media. In today’s world, many newspapers, publications, and organizations, regardless of size and distribution, post at least some of their stories on the Internet. To ignore this reality would be to render the “major media” requirement meaningless. However, the AAO is not persuaded that international accessibility by itself is a realistic indicator of whether a given website is “major media.” In the case here, while the petitioner failed to submit any documentary evidence regarding the websites, the petitioner failed to submit independent, objective evidence establishing that the websites are considered major media. See *Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff’d* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine’s status as major media).

A review of the record of proceeding reflects that the petitioner submitted the following documentation:

1. A partial screenshot entitled, “Mostly Unfamiliar, But Worthy, Orchestral Music by Barber.” March 14, 2005, J. Scott Morrison, www.amazon.com;
2. A partial screenshot entitled, “Reviews,” unidentified date, unidentified author, www.naxos.com;

3. An article entitled, "Trades House New Year Concert, Royal Concert Hall, Glasgow." January 2, 2002, Michael Tumelty, *The Herald*;
4. A partial article entitled, "College & Fringe Reviews." April 2002. unidentified author, *Opera*;
5. An article entitled, "Music at West End – A Special Night." November 5, 2009, Nino Pantano, *Italian Tribune*;
6. An article entitled, "Music at West End Presents Lesley Craigie and Carl Tanner in Recital." September 24, 2009, Nino Pantano, *The Italian Voice*;
7. A screenshot entitled, "French Chansons, Scots Songs and Duets From Otello, Manon Lescaut!" September 13th [unidentified year], unidentified author, www.clubfreetime.com;
8. A snippet entitled, "Must at West End." September 10-16, 2009, unidentified author, *Time Out New York*;
9. A screenshot entitled, "A Bit of Italy and the High-C at AquaMarina," unidentified date, Adam Garrett-Clark, www.manhattantimesnews.com;
10. An article entitled, "Last-Minute Hero Saves the Show." November 22, 2002, unidentified author, *Inverness Courier*;
11. An article entitled, "Young Singers Show Their Promise," unidentified date. unidentified author, unidentified publication;
12. An article entitled, "Music for a Summer Evening." May 24, 2002. unidentified author, *The Fife Free Press*; and
13. An article entitled, "Opera Sets Off Tears . . . of Laughter." February 2002. unidentified author, *Edinburgh Evening News*.

Regarding item 1, the partial screenshot reflects a music review "of Barber's orchestral music with Marin Alsop conducting the Royal Scottish National Orchestra." The petitioner is mentioned one time as being one of the soloists. As the screenshot does not reflect published material about the petitioner relating to her work, rather than a review of Barber's orchestral music, it does not meet the plain language of this criterion.

Regarding item 2, the petitioner failed to include the date and author of the screenshot as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, similar to item 3, the partial screenshot reflects multiple reviews regarding Barber's orchestral music. In fact, the petitioner is never mentioned in the partial screenshot. Clearly, the screenshot fails to reflect published material

about the petitioner relating to her work. Further, the petitioner failed to submit any documentary evidence establishing that www.naxos.com is a major medium.

Regarding items 3, the article is about the Ne'erday Trades House concert rather than about the petitioner. The petitioner is mentioned one time as being one of the performers but is not published material about the petitioner consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Notwithstanding, the petitioner submitted a screenshot from www.heraldsotland.com that indicated that *The Herald* "is one of the oldest newspapers in the world." However, the screenshot provides no evidence establishing that *The Herald* is a professional or major trade publication or other major medium, and the petitioner failed to submit any independent, objective evidence beyond the publication's website.

Regarding item 4, the petitioner failed to include the author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Furthermore, the partial article reflects a review of the performances of the Royal Scottish Academy of Music and Drama's (RSAMD) three operas rather than published material about the petitioner relating to her work. Once again, the article mentions the petitioner one time as being one of the performers in the third opera but the article is about RSAMD's performances as a whole.

Regarding items 5 and 6, the articles are essentially the same but published in two different publications. Although the articles mention the petitioner several times, the articles are about a recital performed at the West End Presbyterian Church in New York. An article that is not about the petitioner 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). In addition, the petitioner failed to submit any documentary evidence demonstrating that *Italian Tribune* and *The Italian Voice* are professional or major trade publications or other major media.

Regarding item 7, the petitioner failed to include the author and year of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Further, the screenshot reflects promotional material for a free performance with Carl Tanner and Evan Solomon rather than published material about the petitioner relating to her work. Moreover, the petitioner failed to submit any documentary evidence establishing that www.clubfreetime.com is a major medium.

Regarding item 8, the petitioner failed to include the author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, similar to item 7, the snippet simply reflects a promotional advertisement for a performance with [REDACTED] at the West End Church and is not published material about the petitioner consistent with the plain language of this regulatory criterion. The petitioner also submitted a letter from Angela Sundstrom, Assistant Consumer Marketing Manager at *Time Out New York*, who stated that the publication has a circulation of 150,000 readers. However, the AAO is not persuaded that such circulation statistics in the New York City and surrounding areas is reflective of a major trade publication or other major medium.

Regarding item 9, the petitioner failed to include the date of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, the screenshot reflects a review of the author's night at the AquaMarina rather than published material about the petitioner relating to her work. Although the author mentions the petitioner performing at the AquaMarina, the author discusses the food, overall atmosphere, and the performances as a whole at the AquaMarina. In addition, the petitioner failed to submit any documentary evidence demonstrating that www.manhattantimes.com is a major medium.

Regarding item 10, the petitioner failed to include the author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Furthermore, the article is about a review of a show by the Inverness Choral Society at the Elijah Eden Court Theatre. While the petitioner is mentioned one time as being one of the performers, the article is not about the petitioner but about the theatrical production. Moreover, the petitioner failed to submit any documentary evidence reflecting that *Inverness Courier* is a professional or major trade publication or other major medium.

Regarding item 11, the petitioner failed to include the date and author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, the petitioner failed to identify where the article was published, let alone establish that the article was published in a professional or major trade publication or other major medium. Further, the article reflects a review of a recital at the St. Brycedale's Church in which the petitioner was one of the performers.

Regarding item 12, the petitioner failed to include the author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, the article is about an upcoming summer concert in which several performers, including the petitioner, are scheduled to perform. Again, the article is not about the petitioner rather than about the upcoming summer concert. Further, the petitioner submitted a screenshot from www.britishpapers.co.uk reflecting that *The Fife Free Press* "is a weekly broadsheet newspaper sold in the central southern coast of the Kingdom of Fife, around the town of Kirkcaldy and including the smaller towns of Aberdour, Burntisland and Wemyss" and "[i]t's the lead title in a group of weekly newspapers for Fife published by Strachan & Livingston Ltd, a branch of the nationwide group of regional newspapers, Johnston Press." It appears that *The Fife Free Press* is a local or regional publication and is not reflective of a major medium.

Finally, regarding item 13, the petitioner failed to include the author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, the article reflects a review of RSAMD's performance of three operas. In fact, the petitioner is not even mentioned in the article and is not published material about the petitioner relating to her work pursuant to the plain language of this regulatory criterion.

As discussed above, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought." In this case, the petitioner's documentary evidence fails to reflect published material *about* her relating to her work

in professional or major trade publications or other major media. As such, the AAO withdraws the findings of the director for this criterion.

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

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

The director determined that the petitioner established eligibility for this criterion based on her performances at various venues. However, based upon a review of the record of proceeding, the AAO must withdraw the findings of the director for this criterion.

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.” The petitioner is an opera singer. When she is performing or singing before an audience, she is not displaying her music in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing her work, she is not displaying her work. In addition, to the extent that the petitioner is a performing artist, it is inherent to her occupation to perform. Not every performance is an artistic exhibition designed to showcase the performer’s art. In fact, on appeal, counsel claims that the petitioner’s performances also meet the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). If the AAO was to accept that a performance artist like the petitioner meets the artistic display criterion, it would render the regulatory requirement that the petitioner meet at least three criteria meaningless as this criterion would effectively be collapsed into the criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

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

Therefore, while the petitioner’s performances have evidentiary value for another criterion, they cannot serve to meet this criterion. Instead, as the petitioner’s performances are far more relevant to the aforementioned “leading or critical role” criterion set forth at the regulation at 8 C.F.R. § 204.5(h)(3)(viii), they will be discussed separately within the context of that criterion. As such, the AAO withdraws the decision of the director for this criterion.

Accordingly, the petitioner failed to establish that she 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, counsel claimed the petitioner's eligibility for this criterion and stated:

[The petitioner] performed with the *Baltimore Opera Company* [BOC] in *La Traviata* as a soprano in October 22-30, 2005 in addition to performing regularly as a part-time member and as a collaborator in the coaching of opera arias. . . . Therefore, [the petitioner's] role as a member of the Opera Chorus, as a collaborator in the coaching of opera arias and a representative of the Baltimore Opera in performances as opera arias and ensembles is clearly a critical role for this highly renowned organization. As such, [the petitioner] is clearly performing in a critical capacity. [BOC] is considered to be an organization of distinguished reputation

In addition to her experience with [BOC], [the petitioner] performed with the *New Jersey Opera Theater* in 4 shows in the summer of 2004

[The petitioner] played the role of Frasquita in *Carmen* with the Opera on a Shoestring in Glasgow UK

In addition to her performances with the above-mentioned groups of distinguished reputation, [the petitioner] has also performed as a principal role with many other groups also to be considered of high renown

In support of counsel's claims, counsel referred to the documentary evidence submitted in support of the artistic display criterion. However, in the director's request for additional documentation, the director stated that "[n]o evidence has been provided for this criterion." In response to the director's request for additional documentation, while counsel addressed the other grounds and issues by the director and submitted additional documentation, counsel did not address the director's finding or submit additional documentation regarding the leading or critical role criterion. In the director's denial of the petition, the director again indicated that "[n]o evidence has been provided for this criterion."

On appeal, counsel does not claim that the director erred because the criterion was claimed at the initial filing of the petition. Instead, counsel claims:

In the applicant's April, 2006 petition, the criteria [sic] has indeed been met. In their 2007 decision [USCIS] found that the criteria [sic] had been met based on [the petitioner's] regular performances for the [BOC]. The decision also stated that the evidence shows she is a part time member and collaborator in coaching of opera arias and that she serves a critical role. . . . [USCIS] completely disregarded this earlier finding in its recent denial.

A review of the record of proceeding reflects that on April 25, 2006, the petitioner filed a previous employment-based immigrant petition pursuant to section 203(b)(1)(A) of the Act, as an alien of extraordinary ability as an opera singer. On July 25, 2007, the Director, Nebraska Service Center,

denied the petition but found that the petitioner met the leading or critical role criterion. Specifically, the director stated:

The record shows that the petitioner performs regularly for the [BOC]. The record shows evidence that says that she is a "part-time member" and works as a "collaborator in the coaching of opera arias." Ordinarily, being a part-time member might not meet a criterion of eligibility, but given the evidence in this matter, it is clear that the petitioner serves a critical role.

While the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished AAO decisions, as well as service center decisions, are not similarly binding. Therefore, a service center director is not bound to follow a prior decision either from the same service center or from a different service center especially when the record of proceeding does not support the initial favorable finding.

Similarly, 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 an immigrant 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, in the director's prior decision, he determined the petitioner's eligibility for this criterion based solely with her roles with the [BOC]. 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 with 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, 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). Therefore, as the director based his findings on the petitioner's roles with only one organization, BOC, the petitioner failed to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

Further, as indicated above, on appeal, counsel claims the petitioner's role as "a part time member and *collaborator in coaching of opera arias* [emphasis added]" with BOC meets this criterion. Moreover, the director in the prior decision indicated that the petitioner collaborated as a coach of opera arias. The statute and regulations require the petitioner's national or international acclaim to be sustained and that she seeks to continue work in his area of expertise in the United States. *See* sections 203(b)(1)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1153(b)(1)(A)(i) and (ii), and 8 C.F.R. §§ 204.5(h)(3) and (5). While an opera singer and opera coach or teacher share knowledge of the art, the two rely on very different sets of basic skills. Thus, opera singing and opera coaching are not the same area of expertise. This interpretation has been upheld in federal court. In *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

It is reasonable to interpret continuing to work in one's "area of extraordinary ability" as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee's extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

Id. at 918. The court noted a consistent history in this area. In the present matter, the petitioner did not file her petition as an opera coach or as an opera singer and coach; rather the petitioner seeks classification as an alien of extraordinary ability solely as an opera singer. While the AAO acknowledges the possibility of an alien's extraordinary claim in more than one field, such as opera singing and opera coaching, the petitioner, however, must demonstrate "by clear evidence that the alien is coming to the United States to continue work in the area of expertise." *See* the regulation at 8 C.F.R. § 204.5(h)(5). Therefore, the petitioner's role as a "collaborator in the coaching of opera arias" will not be considered to establish her eligibility for this criterion.

Regardless, in the case here, the director did not determine that a review or reevaluation of the documentary evidence did not support USCIS' prior finding. Instead, the director erroneously concluded that the petitioner failed to submit any documentary evidence for this criterion when in fact counsel specifically claimed the petitioner's eligibility and referred to the documentation. Although counsel claims on appeal that the petitioner meets this criterion based on her role with BOC, a review of the documentary evidence, including the performance programs for various operas and recommendation letters, reflects that the petitioner performed in leading or critical roles for more than one organization or establishment with distinguished reputations. Therefore, the

petitioner minimally meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). As such, the AAO withdraws the findings of the director for this criterion.

Accordingly, the petitioner established that she meets this criterion.

B. Summary

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

III. O-1 NONIMMGRANT

The AAO notes that at the time of the filing of the petition, the petitioner was last admitted to the United States on June 5, 2009, as an O-1 nonimmigrant visa petition for an alien of extraordinary ability in the arts. Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states that “[t]he term ‘extraordinary ability’ means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(o)(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines 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 evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the petitioner’s receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Further, the AAO does not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each case must be decided on a case-by-case basis upon review of the evidence of record.

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 the alien’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. at 597. 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 at 1090, *cert. denied*, 485 U.S. at 1008.

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 at 282785, *aff'd*, 248 F.3d at 1139, *cert. denied*, 122 S.Ct. at 51.

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.⁴ 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.

⁴ 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).

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.