

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

[REDACTED]

DATE: **DEC 18 2012** OFFICE: TEXAS SERVICE CENTER [REDACTED]

IN RE: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

If you believe the 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center, 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 actress. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate “sustained national or international acclaim” and present “extensive documentation” of his or her achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific evidence. 8 C.F.R. §§ 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel claims that the petitioner 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 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.*

---

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

## II. ANALYSIS

### A. Evidentiary Criteria<sup>2</sup>

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

The director determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires “[d]ocumentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.” Based on a review of the record of proceeding, the petitioner submitted sufficient documentary evidence demonstrating that she received two lesser nationally recognized prizes for excellence. Thus, the petitioner minimally met the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

Accordingly, the petitioner established that she meets this criterion.

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

In the director’s decision, she determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires “[d]ocumentation of the alien’s membership in associations in the field for which is classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.” In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association’s overall reputation.

On appeal, counsel claims the petitioner’s eligibility for this criterion based on her membership with the Film Artistes Association of Nepal (FAAN). At the outset, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires membership in more than one association. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single

---

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

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). Even if the petitioner were to submit supporting documentary evidence showing that her membership with FAAN meets the elements of this criterion, which she did not and will be discussed further below, on appeal counsel only claimed the petitioner’s eligibility for this criterion based on her membership with one association. It is noted that the petitioner previously submitted a letter indicating her membership with the Non-Resident Nepali Association (NRNA); however, the petitioner failed to submit any documentary evidence demonstrating that her membership with NRNA meets all of the elements of the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii), nor did counsel claim the petitioner’s eligibility for this criterion on appeal. 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).

Notwithstanding the above, the petitioner submitted a letter, dated December 8, 2010, from [REDACTED], [REDACTED], who stated:

This is to confirm that [the petitioner] is the Life time member of [FAAN]. It is the only representative organization of professional film artists [REDACTED] FAAN bestows general membership to any artist professionally involved in [REDACTED] Industry. However, Life Membership is granted to those artists who have outstanding achievements in the Film industry. Life members must have played main role in more than five films. In addition to this, outstanding performances, popularity, contribution in the respective field are other criteria of Life Membership which is not necessary to renew unlike general membership.

In support of the petitioner’s motion to reopen and reconsider the director’s initial decision, the petitioner submitted another letter, dated May 13, 2011, from [REDACTED], who stated that there are different levels of membership including general membership, provisional membership, honorary membership, associate membership, and life membership. Moreover, [REDACTED] claimed that eligibility for life membership is reserved for [a]ny popular professional film artist, who has played in more than five movies” and “[t]he artist *should* have made outstanding achievements, and the artist’ [sic] contribution to the film industry and FAAN *should* be recognized by the nationally recognized experts [emphasis added].” Finally, [REDACTED] claimed that “a panel, consisting of senior and highly accomplished artists, reviews and makes the decision.”

The petitioner also submitted a screenshot from [www.nepalfilmartists.com](http://www.nepalfilmartists.com), which stated that “[a]ny artist professionally involved in the Nepalese Film Industry is entitled to be a member of this association.” In addition, the screenshot briefly mentioned criteria for provisional membership, honorary membership, and full membership; however there is no mention of life membership.

The petitioner failed to submit the bylaws or similar documentation for FAAN to support the claims of [REDACTED]. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Moreover, letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one’s well-qualified belief or idea, rather than direct knowledge of the facts at issue. *Black’s Law Dictionary* 1515 (8th Ed. 2007) (defining “opinion testimony”). Written testimonial evidence, on the other hand, is testimony about facts, such as whether something occurred or did not occur, based on the witness’ direct knowledge. *Id.* (defining “written testimony”); see also *id.* at 1514 (defining “affirmative testimony”). Furthermore, depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is “self-serving.” See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: “We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available.” *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). It is noted that in the director’s notice of intent to deny the petition on November 23, 2010, and in the director’s decision denying the petition on April 19, 2011, the petitioner was informed that she failed to submit FAAN’s bylaws or similar documentation to support Ramesh Budhathoki’s claims; yet the petitioner still did not submit such documentation on appeal.

Although [REDACTED] is the chairman of FAAN, the assertions in the letters are not supported by [REDACTED]. Without supporting evidence, such as the bylaws, the petitioner failed to establish that she is a life member of FAAN and that life membership with FAAN requires outstanding achievements as judged by recognized national or international experts in their disciplines or fields consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii). In addition, as indicated above, [REDACTED] stated that an artist *should* have made outstanding achievements, and those achievements *should* have been recognized by national experts thereby indicating that outstanding achievements are not required for life membership with FAAN and are not required to be judged by recognized national experts in the field. For these reasons, the petitioner failed to demonstrate that her purported life membership with FAAN meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

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

*Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is*

sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

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

Although counsel submitted numerous documents at the initial filing of the petition, in response to the director’s notice of intent to deny the petition, and in the petitioner’s motion to reopen and motion to reconsider, on appeal counsel specifically addressed only two articles. Regarding the article [REDACTED] the translation claims that the article was published in *Kamana* in 1996. However, the translation fails to include the author of the article as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, regarding *Kamana*, the petitioner submitted a letter from [REDACTED] who stated that “[REDACTED] is a [sic] very popular among the readers (with the country and abroad) and highly circulated monthly cine [sic] magazine published by the [KNPPL].” In addition, the petitioner submitted a promotional brochure from KNPPL claiming circulation statistics of 42,000. However, the petitioner failed to submit any independent, objective evidence demonstrating that *Kamana* is a professional or major trade publication or other major medium. See *Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff’d* 317 Fed. Appx. 680 (C.A.9) (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).” Further, the AAO is not persuaded that such purported circulation statistics are reflective of a major medium.

Regarding the article, [REDACTED] on appeal counsel claims that the article was published in [REDACTED]. However, the translation is unclear as to whether [REDACTED] is an actual publication or a section within a publication. The documentary evidence submitted does not establish that the article was actually published in the magazine “Kollywood” as claimed by counsel. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). The AAO must look to the plain language of the documents executed by the petitioner and not to subsequent statements of counsel. *Matter of Izummi*, 22 I&N Dec. 169, 185 (Comm’r 1998).

<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.

Regardless, the petitioner failed to submit any documentary evidence establishing that “Kollywood” is a professional or major trade publication or other major medium. Moreover, the translation fails to include the date and author of the article as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

Again, counsel specifically addressed only two articles on appeal but made broad references to the previously submitted documentation such as “[the petitioner] submitted numerous published materials that primarily covered her work as a popular film actress of Nepal” and “various news articles submitted originally with the petition, attached in response to our response to the service center’s Notice of Intent to Deny and the new ones annexed thereto with motion to reopen and reconsider, meets the regulatory requirement for this requirement.” An appellant who presents only a generalized statement without explaining the specific aspects of the decision that the alien considers to be incorrect, has failed to meaningfully identify the reasons for the appeal. In order to review the appeal, it would therefore be necessary to search through the record and speculate on what possible errors the alien claims. Without a specific statement, the AAO is forced to guess at how the alien disagrees with the decision. It is insufficient to merely assert an improper conclusion on the director’s part. *Cf. Matter of Valencia*, 19 I&N Dec. 354 (BIA 1986) (citing *Reyes-Mendoza v. INS*, 774 F.2d 1364 (9th Cir. 1985)). *See also Sano v. Holder*, 331 F. App’x 799, 800 (2d Cir. 2009) (finding that an alien who merely asserts that: “[t]he Immigration Judge erred on the facts and the law in denying relief pursuant to Immigration and Naturalization Section 208 and 243(h),” falls far short of the standard for specificity on appeal.)

As the documentation claimed on appeal fails to meet all of the elements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the petitioner failed to demonstrate that she meets the plain language of this regulatory criterion.

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

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

In the director’s decision, she determined that the petitioner established eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.” A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence to minimally meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). As such, the AAO concurs with the decision of the director for this criterion.

Accordingly, the petitioner established that she meets this criterion.

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

The director determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel states:

We reaffirm and present our preceding argument from the “Motion to Reopen and Reconsider” that as we do not have any additional evidence, therefore, we leave it to “AAA” [sic] for your review on this criterion.

In reviewing counsel’s brief in support of the motion to reopen and motion to reconsider, counsel claimed:

We disagree with USCIS’s determination. Petitioner is the best actress and most popular actress of Nepal her work product has been published widely. See above paragraphs and exhibits for details.

The reason for filing an appeal is found at 8 C.F.R. § 103.3(a)(1)(v) - that the previous decision contains an erroneous conclusion of law or statement of fact. Without such an error specifically identified within the appeal, the affected party has failed to identify the basis for the appeal. If the petitioner does not explain the specific aspects of the decision that he/she considers to be incorrect, he/she has failed to meaningfully identify the reasons for taking an appeal. In order to review the appeal, it would therefore be necessary to search through the record and speculate on what possible errors the petitioner claims. *Matter of Valencia*, 19 I&N Dec. at 355.

It is insufficient to merely assert that the preceding authority made an improper determination. Within an appeal, it should be clear whether the alleged impropriety in the decision lies with the interpretation of the facts or the application of legal standards. Where a question of law is presented, supporting authority should be included, and where the dispute is on the facts, there should be a discussion of the particular details contested. *Id.* This is contrary to the reason the regulation at 8 C.F.R. § 103.3(a)(1)(v) was promulgated; to allow the AAO to promptly deal with appeals where the reasons given for the appeal are inadequate to inform the AAO of the particular basis for the claim that the director’s decision before us is wrong. *Cf. Matter of Valencia*, 19 I&N Dec. at 355. The petitioner must identify all of the errors made by the director as it relates to each of the claimed criteria. Otherwise, the AAO must speculate on what error the petitioner alleges. Failure to identify the error in law or error in fact for each criterion contested on appeal, equates to an insufficient claim of eligibility within the appellate proceeding. Such a failure essentially amounts to the petitioner’s abandonment of the eligibility claim regarding this criterion. *Cf. Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. 433, 435 (11th Cir. 2009) (a passing reference in the arguments section of a brief without substantive arguments is insufficient to raise that ground on appeal). Counsel provides essentially the same assertion of eligibility on appeal that was presented previously; this is insufficient as there is no error identified that can be attributed to the director’s decision.

On motion, counsel simply disagreed with the director’s decision and claimed that the petitioner was the best actress and most popular in Nepal and referred to his assertions made under the

published material criterion. Counsel failed to identify any of the petitioner's original contributions of major significance in the field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

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

*Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.*

The director determined that the petitioner established eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires "[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field." Based on a review of the record of proceeding, the AAO must withdraw the findings of the director for this criterion.

At the initial filing of the petition, the petitioner submitted the following documentation:

1. A contract, dated August 21, 2009, between [REDACTED] and the petitioner reflecting that the petitioner would be paid in the amount of Nepalese Rupees 175,000 for her role in the film, *Pratibimba*;
2. An undated contract between [REDACTED] and the petitioner reflecting that the petitioner would be paid in the amount of Nepalese Rupees 151,000 for an unidentified film;
3. An "Employment Certificate," dated October 5, 2007, from [REDACTED] reflecting that the petitioner has been employed since January 10, 2005, and earning a monthly salary of Japanese Yen 450,000 as a managing director and instructor;
4. An agreement, dated March 17, 1999, between [REDACTED] and the petitioner reflecting in the amount of Nepalese Rupees 500,000 for the film, *Mukundo*; and
5. An agreement, dated February 9, 1994, between [REDACTED] and the petitioner reflecting in the amount of Nepalese Rupees 451,000 for her role in *Swarg*.

In response to the director's notice of intent to deny, the petitioner submitted a letter, dated December 6, 2010, from [REDACTED] Chairman of the Nepal Film Producer's Association, who claimed:

[The petitioner] is a highly established name in [REDACTED]. She acts only in few Movies due to her selective character. Average Nepali Actress earns up to

3,00,000.00 [300,000.00] (\$1=72.42 NRs) however [the petitioner] is a selective renowned actress who only plays quality movies and charges 4,00,000.00 [400,000.00] to 5,00,000.00 [500,000.00] Rs. per film.

Moreover, the petitioner submitted an affidavit and claimed that she signed a contract to play a role in *Pratibimba* for Nepalese Rupees 175,000 and a role in *Pinda* for Nepalese Rupees 151,000.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires “[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, *in relation to others in the field* [emphasis added].” In other words, the petitioner must not only submit evidence of her salary but also submit evidence that her salary is high when compared to others in the field.

The only evidence submitted by the petitioner that compared her claimed earnings to others in the field was the letter from [REDACTED]. The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. In this case, while the petitioner submitted a letter, the petitioner failed to submit any documentary evidence demonstrating that primary evidence and secondary evidence do not exist or cannot be obtained. Regardless, the letter that has been provided is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (9th Ed., West 2009). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. *See also INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980) (finding that unsworn statements made in support of a motion are not affidavits and thus are not entitled to any evidentiary weight). Moreover, the plain language of the regulation at 8 C.F.R. § 103.2(b)(2)(i) requires more than one affidavit in which the petitioner submitted only one letter.

In this case, [REDACTED] failed to indicate the source of his assertions or to submit any documentary evidence supporting his claim of the earnings of the average Nepali actress. Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The BIA has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. at 1332. The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. at 1136. Regardless, as the plain language of the regulation requires the petitioner to establish that her salary is high when compared to others in the field, the average Nepalese actress' salaries do not meet this requirement. Simply submitting a letter and

claiming that the petitioner earns more than the average Nepalese actress is insufficient without supporting documentation. There is no evidence reflecting the top salaries in the field, so as to compare the petitioner's salary to the highest earners.

The evidence submitted by the petitioner does not establish that she has commanded a high salary in relation to experienced professionals in her occupation. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a professional golfer's earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). The AAO notes that in *Matter of Racine*, 1995 WL 153319 at \*4 (N.D. Ill. Feb. 16, 1995), the court stated:

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

For the reasons discussed above, the petitioner failed to submit sufficient documentary evidence comparing her salary to others in the field, so as to establish that she commands a relatively high salary. 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 of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.*

The director determined that "[n]o evidence has been provided for this criterion." On appeal, counsel claims:

As we discussed in [the] Motion to Reopen and Reconsider that the Service Center clearly has not reviewed the file properly. The NOID response clearly included documentary evidence that showed that [the petitioner] has been part of movies that have attained commercial success . . . .

Again, [the petitioner] is a very popular female actor in Nepal. She has played in more than 80 movies and several tele [sic] films. Many of her movies are super hits and she is a great commercial success. Her movie "Kanyadan" played for more than 100 days. Similarly, several other movies did extremely well. The fact that she is compensated at much higher rates compared to her competitors is also the indicator of her commercial success.

Although the director indicated that the petitioner failed to submit any evidence for this criterion, a review of the record of proceeding reflects that the petitioner did submit documentary evidence at the initial filing of the petition and in response to the director's notice of intent to deny. Specifically, the petitioner submitted the following:

1. A photograph of a trophy indicating the 100<sup>th</sup> day of the movie, *Basanti*;
2. Screenshots from Bookworm's Library indicating that *Basanti* is listed as the 2<sup>nd</sup> top seller on the website;
3. Screenshots from the NHK Asian Film Festival regarding the background for the movie, *Mukundo*;
4. A letter from Shambhu Pradhan, Director of Ishwari Arts International, who stated that the petitioner's movies, *Saraswati* and *Swara*, were "blockbusters."

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires "[e]vidence of commercial successes in the performing arts, as shown by *box office receipts* or record, cassette, compact disk, or video *sales* [emphasis added]." In other words, this regulatory criterion requires evidence of commercial successes in the form of "box office receipts" or "sales." The record of proceeding fails to reflect that the petitioner submitted any documentary evidence regarding the box office receipts of her performances or the sales of her DVDs. For example, there is no evidence showing that the petitioner's performances consistently drew record crowds or resulted in greater sales than other actors or actresses. Regarding item 1, the submission of a trophy acknowledging the 100<sup>th</sup> day for a film is not persuasive evidence of commercial successes, let alone evidence of box office receipts or sales. It is noted that while counsel claimed that the petitioner received a trophy for *Kanyadan*, the translation submitted by the petitioner indicates that it was for *Basanti*. Moreover, regarding item 2, the submission of a screenshot reflecting that *Basanti* is the 2<sup>nd</sup> top selling movie on a single website is not indicative of commercial successes without the actual sales of the movie as a whole. Further, regarding item 3, the screenshot provides no evidence of box office receipts or sales for the movie *Mukundo*. Finally, regarding 4, merely submitting a letter stating that the movies were "blockbusters" is insufficient to demonstrate commercial successes without evidence of box office receipts or sales.

Without documentary evidence reflecting the commercial successes of the petitioner, the AAO cannot conclude that the petitioner meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x).

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

#### B. Summary

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

### III. 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.

---

<sup>4</sup> The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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).