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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

**PUBLIC COPY**



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DATE: **JAN 05 2012**

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

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner seeks classification as an “alien of extraordinary ability” as a “Race Car Driver/Team Manager,” pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien’s “sustained national or international acclaim” and present “extensive documentation” of the alien’s achievements. *See* section 203(b)(1)(A)(i) of the Act; and 8 C.F.R. § 204.5(h)(3); *see also* H.R. 723 101<sup>st</sup> Cong., 2d Sess. 59 (1990). 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 of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective 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, the petitioner submits a statement and offers additional evidence. For the reasons discussed below, the AAO upholds the director’s ultimate determination that the petitioner has not established his eligibility for the classification sought.

## **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 following ten categories of evidence.

- (i) Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) Evidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
- (v) Evidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

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

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

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

*Id.* at 1119-20.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See 8 C.F.R. 103.3(a)(1)(iv); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *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) (recognizing the AAO's *de novo* authority).

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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).

## II. Continuing to work in the area of expertise in the United States

The statute and regulations require that the petitioner seeks to continue work in his area of expertise in the United States. *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). It is important to note that on the Form I-140, Immigrant Petition for Alien Worker (Form I-140), under Part 6, “Basic information about the proposed employment,” the petitioner states the beneficiary’s job title will be “Race Car Driver/Team Manager” and it provides the following nontechnical job description:

Continue to develop and manage the race car division within [the petitioner’s company.] Duties will include developing and managing the race car team and its race cars and perform required duties incidental to car racing which include maintaining and repairing of company race cars and performing the necessary tests on the same. Will represent and promote company and provide publicity of our products to sponsors, potential sponsors and clients. As the team manager, he will be the owner’s right hand man. He oversees the day-to-day administrative duties that keep our team running. He is required to work closely with the crew chief, who oversees all of the hands-on activities related to building and tweaking the car that will race on the track. These activities include designing the body, adjusting the suspension, turning the engine and more.

It is apparent that a conflict exists between the job title and the job description, as the job description contains no reference to the beneficiary’s proposed employment in the United States relating to driving a race car. The beneficiary’s Form G-325A, Biographic Information indicates the beneficiary’s occupation from March 2005 until the date he signed the form, December 18, 2008, was a race car driver. The vast majority of the beneficiary’s recognition through awards, membership, and published material initially filed with the petition relates to his achievements as a driver. However, the evidence related to the alien’s contributions of major significance primarily relates to his work as a shock and suspension specialist. Based on the information provided in the job description portion of the Form I-140, the record is clear that the petitioner intends for the beneficiary to continue to work as a team manager of a race car team in the United States.

Aside from documentation establishing the petitioner’s intention to employ the beneficiary as a race car team manager and for the beneficiary to continue to work in the United States as such, the petitioner submitted evidence of the beneficiary’s athletic accomplishments as a race car driver. It is not apparent when the beneficiary’s primary profession as a race car driver ended; however, it is clear that the petitioner now intends for the beneficiary to serve the organization as a manager of the race car team. While a race car driver and a race car team manager may share knowledge of the sport, the two rely on very different sets of basic skills. Thus, competitive athletics and managing are not the same area of expertise. This interpretation has been upheld in Federal Court. In *Lee v. Ziglar*, 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. A more recent Federal Court provides a similar interpretation. In *Hristov v. Roark*, 09-CV-2731, 2011 WL 4711885 (E.D.N.Y. Sept. 30, 2011), the court stated:

[T]he AAO accurately noted that the second requirement of 8 U.S.C. § 1153(b)(1)(A) [section 203(b)(1)(A) of the Act] necessitates that the plaintiff "continue [to] work in the area of extraordinary ability." It was reasonable for the USCIS to interpret continuing to work in one's "area" as actually working in the same profession and not merely the same field.

While the record demonstrates that the petitioner intends to continue working as a race car team manager, there is no evidence indicating that he intends to compete as a race car driver in the United States. The AAO acknowledges the possibility of an alien's extraordinary claim in more than one field, such as a race car team manager and a race car driver, but the petitioner must demonstrate "by clear evidence that the alien is coming to the United States to continue work in the area of expertise." See 8 C.F.R. § 204.5(h)(5). In the present matter, there is no evidence establishing that the beneficiary has achieved acclaim as a race car team manager. The record also lacks evidence that petitioner intends to continue employing the beneficiary in the United States as a race car driver. Accordingly, the petitioner must satisfy the statutory requirement at section 203(b)(1)(A)(i) of the Act as well as the regulations at 8 C.F.R. §§ 204.5(h)(2) and (3).

USCIS recognizes that a nexus exists between competing and managing in a given sport. To assume that every extraordinary race car driver's area of expertise includes managing, however, would be overly speculative. To resolve this issue, a balanced approach is appropriate when reviewing the evidence on record. Specifically, in a case where an alien has achieved *recent* national or international acclaim as a competitive athlete and has sustained that acclaim in the field of managing at a national level, the AAO can consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability such that the AAO can conclude that management of the sports entity is within the alien's area of expertise. However, as the petitioner in the present matter has attempted to classify the beneficiary as a race car team manager, the petitioner must demonstrate the beneficiary's extraordinary ability as a manager.

On the Form I-290B, counsel presents an additional function for the beneficiary within the petitioner's organization. The beneficiary's duties within this new function revolve around the beneficiary leading a consultation division whereby the beneficiary provides off-site expertise for the petitioner's customers and distributors. The petitioner's statement accompanying the appeal states:

The company has now created an entire department devoted to [the beneficiary]. [The beneficiary], as their master suspension consultant, works with all users of their products...[the petitioner] created a division where they will provide consultation to their customer; this means that [the beneficiary] will go customer sites within the U.S. as well as international locations. [The beneficiary] is the Master Consultant and his knowledge in all technology aspects is sought after by race car drivers. Together with his mechanic, [the beneficiary] meets with customers and distributors. He is the one who instructs the individual on how to assemble and disassemble the suspension to work with their vehicles. He fine tunes the suspension for the vehicle to perform at its best potential. Once the suspension has been fine tuned, he will test drive the vehicle to show the customer what can be done with the product. Race Car Drivers who have purchased [the petitioner's] suspensions for the race cars will have [the beneficiary] go to where they are racing prior to the race. [The beneficiary] will then re-adjust the suspension depending on the terrain. [The beneficiary], as the company's consultant advises the customers in the different styles of suspension. At times he will video tape the vehicle's performance and then review and analyze the video in order to provide accurate consultation to the user on how to make the vehicle perform to it's [sic] highest potential. As well, he recommends strategies to companies and provides information on how to increase efficiency, productivity, etc. He will then have his mechanic make the needed adjustments. [The beneficiary] is known internationally for his original ability and experience in his field. There are few individuals of his caliber who provide this type of expertise.

The "field" in which the petitioner claims the beneficiary is an expert is vastly different and is unrelated to the occupation the petitioner presents on appeal, as a business consultant. The present case contains three occupations in the field of racing in which the beneficiary has worked within the petitioning organization; as a driver, a team manager, and the head of a business consultation division. These occupations within the field of racing are distinct from one another. The AAO recognizes that a nexus may exist between competing and managing in the beneficiary's sport; however, this nexus is absent between the occupations of managing a race team and serving as the head of a business division as the petitioner describes in the above quote. Due to the job description the petitioner presents at the time of filing the Form I-140, the AAO will consider the beneficiary's intended occupation to be as a race car team manager.

### III. 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.*

This criterion contains three evidentiary requirements the petitioner must establish. The first derives from the clear regulatory language that the alien be the recipient of the prizes or the awards (in the plural). The next requirement is that the evidence establishes that the prizes or the awards have received national or international recognition. The final requirement relates to the criteria required to receive the award, which would indicate if the issuing entity bases their award selection on excellence in the alien's field of endeavor. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner asserts the beneficiary finished in first place in [REDACTED] vehicle class at the 2004 [REDACTED], the beneficiary's [REDACTED] racer of the year award, four contingency awards from [REDACTED], all in 2005, and a first place finish in [REDACTED] vehicle class at the 2006 [REDACTED]. The director determined that the petitioner failed to establish the beneficiary meets this criterion.

The petitioner also provides a website printout from terribleherbst.com. This printout appears to indicate the beneficiary is a two-time winner in 1996 and 2001. However, this printout fails to indicate which events the beneficiary allegedly won. As a result, this document will not be considered as evidence that establishes the beneficiary's eligibility under this criterion.

Regarding the first place finish at the 2004 [REDACTED] the petitioner submits conflicting evidence. One form of evidence indicates the beneficiary was the first place finisher in the form of an undated press release, and one form indicates the petitioner's father was the first place finisher in the form of a letter from [REDACTED]. The evidence relating to the beneficiary's father bears no relevance to the present petition and it will not be considered in this decision. In reference to the press release, the petitioner, however, provides no evidence to establish the popularity of the website such that event coverage on the site is indicative of the national or international recognition of the event.

The petitioner submits a photocopy of the beneficiary's 2005 [REDACTED] of the year award. The petitioner also submits an unsigned letter, purportedly from [REDACTED] confirming the beneficiary's 2005 award. As the letter is unsigned, it has no evidentiary value. The petitioner provides no documentary evidence demonstrating that the petitioner's [REDACTED] of

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<sup>2</sup> The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

the year award is recognized beyond the FAIR organization. As it stands, this award will not be considered as evidence here, nor in the final merits determination.

The beneficiary is also the recipient of four contingency awards from [REDACTED] all in 2005. The petitioner fails to provide any evidence demonstrating that the petitioner's contingency awards are recognized beyond the [REDACTED] organization. As a result, these awards are not commensurate with nationally or internationally recognized prizes or awards for excellence in the field.

Regarding the beneficiary's first place finish in [REDACTED] vehicle class at the 2006 [REDACTED] the petitioner offers evidence in the form of an Internet-based press release from terribleherbst.com. This coverage appears on a website. The petitioner, however, provides no evidence to establish the popularity of the website such that event coverage on the site is indicative of the national or international recognition of the event. The record lacks evidence that terribleherbst.com is an online version of media with a national reach, e.g., the Cable News Network (CNN) is nationally and internationally broadcast, and as a result, the CNN website is significant and content posted on the CNN web site can be considered to garner national recognition. The petitioner has not presented any evidence to establish that the content from terribleherbst.com can be considered to receive national or international recognition. The petitioner bears the burden to establish eligibility, and in this instance it failed to provide any evidence regarding the reputation of the website. National or international accessibility by itself is not a realistic indicator of a given website's reputation. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the beneficiary's awards be nationally or internationally recognized in the field of endeavor and it is the petitioner's burden to establish the beneficiary meets every element of this criterion. In this instance, there is no documentary evidence demonstrating that this first place finish is recognized beyond the presenting organization and terribleherbst.com, and is therefore commensurate with a nationally or internationally recognized prize or award for excellence in the field.

The petitioner provides a foreign language document, which appears to be an award, naming the beneficiary as the recipient. However, the petitioner failed to provide a translation of this document, which does not comply with the terms of 8 C.F.R. § 103.2(b)(3):

*Translations.* Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

As a result, this award will not be considered in this decision.

It is important to note that the petitioner indicates that the beneficiary's proposed employment is as a race car team manager rather than as a race car driver. Even if the petitioner filed the petition on behalf of the beneficiary as a race car driver, the documentation submitted by the petitioner fails to

meet the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(i). In light of the above, the petitioner has not established the beneficiary meets the plain language requirements of 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.*

This criterion contains several evidentiary elements the petitioner must establish. First, the petitioner must demonstrate that the beneficiary is a member of more than one association in his field. Second, the petitioner must demonstrate that the associations require outstanding achievements (in the plural) of its members. The final requirement is that admittance is judged, or adjudicated, by nationally or internationally recognized experts in their field. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

In response to the director's request for evidence (RFE), the petitioner submitted an unsigned letter purportedly from [REDACTED] confirming the beneficiary's 2005 award, which also mentions the beneficiary's membership [REDACTED]. As the letter is unsigned, it has no evidentiary value. Nevertheless, the petitioner submitted a list of members from FAIR's website confirming the beneficiary's membership. The AAO notes that in response to the director's RFE pursuant to 8 C.F.R. § 103.2(b)(8), the petitioner failed to specifically identify under which criteria at 8 C.F.R. § 204.5(h)(3) it wished the additional evidence to be considered. The burden is on the petitioner to establish eligibility; it is not the director's responsibility to infer or second-guess the criteria under which the petitioner intended the evidence to apply. The director determined that the petitioner failed to establish the beneficiary meets this criterion. On appeal, the petitioner notes this membership in FAIR should be considered under the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii).

The beneficiary is a member of this association. The membership handbook in the record indicates the criteria to become a FAIR member are that the applicant attend at least three association meetings and work in the FAIR "pits" at two races during a probationary period. The mere acts of attending meetings and working in the pit area are not outstanding achievements. Thus, the petitioner has not established that the beneficiary meets this criterion.

Additionally, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires evidence of membership in "associations" in the plural, which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. 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 \*1, \*12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at \*1, \*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(1)(2) requires a single degree rather than a combination of academic credentials).

It is important to note that the petitioner indicates the beneficiary’s proposed employment is as a race car team manager rather than as a race car driver. Even if the petitioner filed the petition on behalf of the beneficiary as a race car driver, the documentation submitted by the petitioner fails to meet the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(ii). Consequently, the petitioner has failed to establish that the beneficiary meets plain language requirements of 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.*

In order to meet the requirements of this criterion, the published material must primarily be about the alien and the contents must relate to the alien’s work in the field under which he seeks classification as an immigrant. The published material must also appear in professional or major trade publications or other major media (in the plural). Professional or major trade publications are intended for experts in the field or in the industry. To qualify as major media, the publication should have significant national distribution and be published in a predominant national language. The final requirement is that the petitioner provide each published item’s title, date, author, and if the published item is in a foreign language, the petitioner must provide a translation that complies with the requirements found at 8 C.F.R. § 103.2(b)(3). The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

Initially the petitioner submitted several articles that refer to the beneficiary, but that are not about the beneficiary and his work in the field. The director noted this shortcoming in his RFE, specifically naming two of the publications submitted with the initial petition filing. In response to the RFE, the petitioner provided information relating to [REDACTED] monthly newspaper rather than addressing the shortcoming that the articles were not about the beneficiary. Under this criterion, the petitioner must demonstrate that each of these constitute a professional publication, a *major* trade publication, or *major* media. 8 C.F.R. § 204.5(h)(3)(iii). Regarding dirtnewz.com, the petitioner submitted one article titled, [REDACTED] [REDACTED] dated May 30 – June 1, 2008. The submitted article is about the upcoming race and discusses the beneficiary among eight other race teams. This article is not about the beneficiary and his work in the field. As a result, the petitioner failed to demonstrate that this evidence meets the plain language requirements of this criterion. In response to the RFE, the petitioner also affirms the longevity of the *Dusty Times* newspaper. The petitioner submits a letter from [REDACTED] Editor/Publisher of *Dusty Times* and five printouts from dustytimes.com. The petitioner must demonstrate that the *Dusty Times* newspaper is either a professional or major trade publication or other major media. The submitted evidence indicates that *Dusty Times* has been in business for 27

years and dustytime.com asserts that it distributes the *Dusty Times* newspaper internationally. The petitioner failed to provide corroborating evidence of the claimed distribution data. The petitioner has also failed to establish the circulation data of the *Dusty Times* newspaper to compare with the circulation statistics of other similar monthly off-road newspapers. Consequently, the petitioner has failed to establish the *Dusty Times* newspaper is a professional or major trade publication, or a form of major media. Additionally, the articles from the *Dusty Times* newspaper consists of five photocopied pages, none of which bear the title, date, or author of the material. None of these articles are about the beneficiary as he is only mentioned in passing among numerous other racers. Therefore, the petitioner failed to demonstrate that this evidence meets the plain language requirements of this criterion.

The petitioner also submits several other forms of evidence related to the published materials criterion in response to the RFE. Two of the published articles are in a foreign language and are not accompanied by an English translation in accordance with 8 C.F.R. § 103.2(b)(3). Numerous other articles submitted in response to the RFE bear the same flaw noted by the director's RFE in that the article may be about the beneficiary's field, but it is not about the beneficiary and his work in the field. The director determined that the petitioner failed to establish that the beneficiary meets this criterion.

On appeal, the petitioner submits several new articles and a blog posting, which it had not previously submitted under the published material criterion. The petitioner submitted four articles reporting on itself or on the beneficiary. The preceding information from the petitioner's website is insufficient to demonstrate that their own website constitutes major media. Additionally, USCIS need not rely on the self-promotional material of the petitioner. *See Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9<sup>th</sup> 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).

The petitioner submits a blog posting from race-dezert.com. The printout fails to display all of the blog's text as the wording is cut off and incomplete. As the printout is incomplete, it has no evidentiary value. Additionally, the petitioner failed to demonstrate that this blog constitutes major media, it is undated and the petitioner failed to identify the author of the material. The petitioner also submits a printout from [REDACTED] "Class 5," authored by [REDACTED]. Although the beneficiary is mentioned in this material, it is not about the alien and his work in the field. Additionally, the material bears no date. As such, it does not meet the plain language requirements of this criterion. The off-road.com article titled, [REDACTED] is not about the alien; it is about the petitioner's company and products. In fact the article does not even mention the beneficiary. Of additional importance, the petitioner provides no evidence to establish the popularity of off-road.com, such that it may constitute major media. The petitioner provides two additional articles from off-road.com that are about the alien and his work in the field, however, as previously noted, the petitioner has failed to provide any evidence to demonstrate that off-road.com constitutes major media. As such, this evidence fails to meet the plain language requirements of this criterion. The petitioner also submits two forms of advertisement from downsouthmotorsports.com and jpmagazine.com, neither of which mentions the

beneficiary. None of the evidence submitted on appeal meets the plain language requirements of this criterion.

Consequently, the petitioner has failed to submit evidence that meets the plain language requirements of this criterion.

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

The petitioner provides several letters from members of the off-road racing community as evidence under this criterion in addition to the beneficiary promoting the petitioning entity through his expertise and technical knowledge. The director determined that the petitioner failed to establish the beneficiary meets this criterion. It is important to note that the beneficiary's contributions must be to the field as a whole rather than to the beneficiary's employer or its customers.

Regarding the letter from [REDACTED] the [REDACTED], he indicates that he [REDACTED] has won numerous races and championships, all with the petitioner's shocks, and all with the assistance of the beneficiary. [REDACTED] failed to provide any evidence to corroborate his claims of winning races or championships. He also does not explain how or to what extent the beneficiary contributed to his successful performances. He merely states that the beneficiary set up and tested the shocks on all of the cars in which he won the race. Additionally, [REDACTED] indicates that he and the beneficiary are personal friends.

The letter from [REDACTED] states the beneficiary's "help and knowledge has improved the off-road industry immensely. His value to his employer is irreplaceable. His expertise has increased my business and his employers [sic] business greatly." Mr. [REDACTED] does not explain how the beneficiary's knowledge contributed to a success of his own business, nor does he indicate what improvements the beneficiary has brought to the off-road industry.

The letter from [REDACTED] owner of [REDACTED] Motorsports thanks the beneficiary for his support he provided to Team Dakar USA at the 2007 Dakar Rally. However, [REDACTED] does not attribute any contributions the beneficiary may have made to the team other than the fact that he provided support. The remaining letters either avow the beneficiary's personal attributes or put forth claims of the beneficiary's excellent work ethic.

[REDACTED] and [REDACTED] failed to sign their letters, even though the closing of the letter provides a space for each individual's signature. Thus, these letters have no evidentiary value. Each author makes general assertions of the beneficiary's part in their own or their anticipated future success. Neither provides examples of original contributions the beneficiary has made to his field in general rather than to individual race cars or to individual race teams.

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).

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 (9<sup>th</sup> 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 “letters from physics professors attesting to [the alien’s] contributions in the field” was insufficient was “consistent with the relevant regulatory language.” 596 F.3d at 1122. The opinions of experts in the industry are not without weight and have been considered above. While such letters can provide important details about the beneficiary’s skills, they cannot form the cornerstone of a successful extraordinary ability claim. In its discretion, USCIS may use statements submitted as expert testimony as advisory opinions. *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 from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien’s eligibility, as this decision has done above. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to “fact”). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

The beneficiary’s contributions to his field do not appear to be original. While, his contributions may be notable, they are not of *major* significance. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the contributions be “of major significance in the field” rather than limited to one’s immediate employer and a few of its customers. Aside from the petitioner’s customers, there is no documentary evidence showing the widespread commercial or industrial implementation of the petitioner’s work or that it otherwise equates to an *original* contribution of major significance in the field. The beneficiary’s achievements and accomplishments, as of the priority date, fail to be sufficiently broad to rise to the level of “major” significance.

As a result, the petitioner has not submitted qualifying evidence relating to the beneficiary that meets the plain language requirements of this criterion.

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

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role’s matching duties. A critical role

should be apparent from the petitioner's impact on the organization's or establishment's activities. The petitioner's performance in this role should establish whether the role was critical.

Initially the petitioner discusses the fact that several publications have recognized the beneficiary as a renowned race car driver, but fails to identify any organizations or establishments in which the beneficiary has performed in a leading or critical role. The director's RFE notified the petitioner that the record contained insufficient evidence to meet the requirements of this criterion. The petitioner's response to the RFE includes a second brief detailing the additional evidence submitted; however, this brief fails to indicate what evidence the petitioner was submitting relating to this criterion. The brief does not even mention the phrase "leading or critical role." As previously noted, in response to the director's RFE, the petitioner failed to specifically identify the criteria under the regulation at 8 C.F.R. § 204.5(h)(3) under which it wished the additional evidence to be considered. The burden is on the petitioner to establish eligibility; it is not the director's responsibility to infer or second-guess the criteria under which the petitioner intended the evidence to apply. The director determined that the petitioner failed to establish the beneficiary meets this criterion.

On appeal, the petitioner only lists itself as an organization or establishment in which the beneficiary has performed in a leading or critical role. However, much like the response to the RFE, the petitioner failed to specify what evidence should apply to this criterion. As such, it is not the AAO's responsibility to infer or second-guess the criteria under which the petitioner intends the evidence to apply. The petitioner does not provide the organizational hierarchy for the AAO to analyze how the beneficiary fits into the organizational structure if it were claiming the beneficiary performed in a leading role for the organization. The petitioner does identify the impact the beneficiary has had on its organization; however, this impact is not associated with the beneficiary's area of expertise listed on the Form I-140 as a race car driver or as a race car team manager. In its appellate statement on the Form I-290B, the petitioner states:

[The beneficiary's] contribution to the success of [the petitioner's organization] is unparalleled [sic]. In fact, the company now offers a new division which is run by [the beneficiary]. The company now offers personal consultation to their distributors and customers who purchase and or sell their products. [The beneficiary] personally consults with these individuals at their own sites, be it in the U.S. or outside of the U.S. [The beneficiary] has made considerable contributions to [the petitioner] in the application.

To assert that USCIS be compelled to determine an alien meets the plain language of this criterion, ignoring the fact that the alien's achievements submitted are not in the field for which classification is sought would result in an absurd outcome inapposite to the administrative intent of the regulation. While 8 C.F.R. § 204.5(h)(3)(viii) does not specify that the leading or critical role must be performed in the field of expertise, 8 C.F.R. §§ 204.5(h)(2) and (3) provides an overarching structure requiring that the "achievements have been recognized in the field of expertise." As such, all of the regulatory criteria from (i) – (x) have to be in the field of expertise. According to the Form

I-140, the beneficiary's field of expertise in the present petition is a race car team manager. As such, the critical role the beneficiary has performed for the petitioner, as a business consultant, cannot serve to qualify under this criterion.

It is important to note that the petitioner indicated on the petition that the beneficiary's field, under which it seeks classification, is as a race car team manager rather than as a business consultant. The only evidence the petitioner presents under this criterion is as a business consultant. Even if the AAO were to recognize the petitioner's above claim of the beneficiary's critical role as qualifying, which it does not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence that the alien has performed in a leading or critical role for "organizations or establishments" in the plural. This is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act; 8 U.S.C. § 1153(b)(1)(A)(i). As previously noted, the AAO can infer that the plural language in the regulatory criteria has meaning and that federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya*, Civ. Act. No. 06-2158 (RCL) at \*12; *Snapnames.com Inc.*, 2006 WL 3491005 at \*10.

Additionally, while it is unclear when the beneficiary's work as a consultant began, if his performance in these duties post-dates the petition filing, this represents an additional shortcoming as a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998).

Consequently, the petitioner has failed to submit evidence that meets plain language requirements of this criterion.

#### *Summary*

The extraordinary ability immigrant classification requires the petitioner to submit the requisite evidence relating to the beneficiary under at least three of the evidentiary categories. In light of the above, the petitioner is unable to establish the beneficiary meets any of the initial evidentiary requirements related to this classification. Several of the criteria at 8 C.F.R. § 204.5(h)(3) were promulgated in a broad manner enabling the regulation to apply to as many professions or occupations as possible encompassed within the sciences, arts, education, business, or athletics. The agency took the additional steps to include an alternative means to qualify for this classification utilizing comparable evidence in the event the other broadly crafted categories do not directly apply to an alien's occupation. *See 56 Fed. Reg. 60897, 60898-99* (Nov. 29, 1991). The petitioner has failed to establish the beneficiary's eligibility for this restrictive classification and the present petition is not approvable. Notwithstanding this fundamental defect, the AAO will review the evidence in the aggregate as part of the final merits determination.

***B. Final Merits Determination***

In accordance with the *Kazarian* opinion, the next step is a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor,” 8 C.F.R. § 204.5(h)(2); and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. § 204.5(h)(3). *See Kazarian*, 596 F.3d at 1119-20.

Due to a lack of national or international recognition regarding the beneficiary’s first place finishes in 2004 and 2006, these awards are insufficient to attribute him with any acclaim. The beneficiary’s 2005 racer of the year award received no national or international recognition, nor did four contingency awards, also from 2005. Two prizes or awards lacking a sufficient level of recognition, coupled with six other awards unsupported by evidence of recognition at the national or international level, are not demonstrative of sustained acclaim or that the beneficiary is among that small percentage who have risen to the very top of the field of endeavor.

This decision already addressed why the petitioner’s membership in a single association does not rise to the level of associations requiring outstanding achievements of their members. The fact that an association merely requires that its members attend three meetings and help in the pits during two races is insufficient to establish that the organization qualifies under the regulations as an entity that requires outstanding achievements of its members. Such a membership is not representative of one who is among that small percentage who have risen to the very top of his field of endeavor.

The petitioner submits inadequate evidence to establish the beneficiary meets the requirements relating to published material about the alien and related to his work in the field under 8 C.F.R. § 204.5(h)(3)(iii). The petitioner provides numerous articles, however most only refer to the beneficiary. Brief references to the beneficiary, often in the context of reporting race results, do not demonstrate that the beneficiary has garnered a sufficient level of acclaim to warrant articles that focus on the beneficiary, relating to his work. This evidence is insufficient to establish sustained acclaim. The petitioner also makes assertions related to two of the publications in which the articles appear, but failed to provide corroborating evidence relating to the publications’ reputation. Because the petitioner failed to establish the articles appeared in a professional or major trade publication or another form of major media, the evidence is not characteristic of sustained national or international acclaim.

The letters from industry experts credit the beneficiary with the author’s success in motorsports. However, each author fails to provide evidence to corroborate their claims, and each letter fails to identify the beneficiary’s original contributions to his field that have impacted his field to such an extent that the contributions are considered to be of major significance. Having satisfied customers does not demonstrate national or international acclaim. The personal accomplishments of the beneficiary fall far short of establishing that he is one of that small percentage who have risen to the very top of the field of endeavor and that he has sustained national or international acclaim.

The petitioner was unable to provide evidence that the beneficiary has performed in a leading or critical role for organizations or establishments in the beneficiary's area of extraordinary ability and intended profession rather than in another profession running a business division, which is not related to his field. Additionally, the petitioner provided insufficient evidence to demonstrate if the beneficiary's performance in this unrelated field occurred prior to or after the petition was filed. The petitioner also only put forth one organization or establishment in which the beneficiary might qualify. This level of accomplishment is not representative of one who has attained sustained national or international acclaim or status as one of that small percentage who have risen to the very top of their field of endeavor related to this criterion.

Ultimately, the evidence in the aggregate does not distinguish the beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. The beneficiary, through the petitioner, relies on nominal awards, membership in a nonexclusive association, published material that, with two exceptions, only mentions the beneficiary in passing, vague letters from industry experts, and no examples of performing a leading or critical role for an organization in the beneficiary's area of extraordinary ability. Thus, it appears that the highest level of the petitioner's field is far above the level he has attained.

Finally, it is not clear that the outcome of this decision would have been any different if the petition listed the beneficiary as a race car driver rather than a manager of a race car team. The evidence related to prizes or awards at 8 C.F.R. § 204.5(h)(3)(i) is either insufficient to qualify as primary evidence, or the petitioner failed to establish the remaining awards are recognized beyond the issuing entity. The sole association of which the beneficiary possesses a membership to meet the requirements at 8 C.F.R. § 204.5(h)(3)(ii) does not require outstanding achievements of its members. Additionally, the regulation requires membership in more than one association. The considered evidence related to published material at 8 C.F.R. § 204.5(h)(3)(iii) is not about the beneficiary and his work as a driver in his field, and therefore does not qualify under the regulation. Lastly, the evidence submitted under 8 C.F.R. §§ 204.5(h)(3)(v) and (viii) relates to the beneficiary performing duties commensurate with the head of the petitioner's business division instead of as a race car driver. The petitioner also failed to demonstrate at what point the beneficiary began performing these duties. As a result, the petitioner would remain unsuccessful in establishing the beneficiary would meet at least three of the regulatory criterion enumerated at 8 C.F.R. §§ 204.5(h)(3)(i) – (x).

#### **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.

Review of the record, however, does not establish that the beneficiary is distinguished as a race car team manager to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the beneficiary shows talent as a race car driver and suspension specialist, but is not persuasive that the

beneficiary's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.