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



U.S. Citizenship and Immigration Services

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DATE: **JAN 11 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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, on April 28, 2010, 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. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his 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 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.* and 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate his or her 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.¹ With respect to the criteria at 8 C.F.R. §§ 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.*

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.

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 *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

II. Analysis

A. Evidentiary Criteria

This petition, filed on February 26, 2010, seeks to classify the petitioner as an alien with extraordinary ability as an educator and activist in end of life choices. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).²

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

Although the petitioner did not claim eligibility for this criterion at the initial filing of the petition, in response to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) the petitioner submitted the following documentation:

1. A document from [REDACTED] congratulating the petitioner for being a "finalist" for the Australian of the Year Awards 2005;
2. A document from [REDACTED] congratulating the petitioner for being a "finalist" for the Australian of the Year Awards 2006;
3. A document from [REDACTED] congratulating the petitioner for his "nomination" for the Australian of the Year Awards 2008; and
4. A document from [REDACTED] congratulating the petitioner for his "nomination" for the Australian of the Year Awards 2009.

In the director's decision, she determined that "[w]hile nominations are commendable, the record contains no evidence that the alien has ever won the award." The AAO agrees with the findings of the director 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 [emphasis added]." Moreover, it is the petitioner's burden to establish eligibility for every element of this criterion. Not only must the petitioner demonstrate his receipt of prizes and awards, he must also demonstrate that those prizes and awards are nationally or internationally recognized for excellence in the field of endeavor. In other words, the petitioner must establish that his prizes and awards are recognized nationally or internationally for excellence in the field beyond the awarding entities. In the case here, the petitioner failed to submit any documentary evidence establishing that being nominated or being a finalist resulted in a nationally or internationally recognized prize or award for

² The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

excellence in the field. There is no evidence indicating that the petitioner won the Australian of the Year Award for 2005, 2006, 2008, or 2009.

On appeal, the petitioner submitted documentary evidence reflecting that he received:

- A. [REDACTED] from the Australian Humanists (AH);
- B. [REDACTED] from the New Zealand Association of Rationalists & Humanists (NZARH); and
- C. [REDACTED] from the Rainier Foundation (RF).

Regarding items A and B, although on appeal counsel referred to AH's website (<http://vic.humanist.org.au>) and NZARH's website (<http://www.nzarh.org.nz>), counsel failed to submit the actual screenshots. Regardless, the petitioner failed to submit any independent, objective evidence demonstrating that the awards are nationally or internationally recognized prize or award for excellence in the field of endeavor. *See Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). There is no indication that the awards are nationally or internationally recognized for excellence beyond the awarding entities.

Regarding item C, the petitioner submitted a screenshot entitled, [REDACTED]

[REDACTED] dated February 7, 1997, from *The Seattle Times*' website. While the screenshot provides some background information regarding the RF, including that it is a "home-grown" charitable foundation, there is no evidence indicating that its awards, along with the \$500 prizes, are nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

On appeal, the petitioner also submitted a document from the National Australia Day Council congratulating the petitioner for his "nomination" for the Australian of the Year Awards 2010. As the petition was filed on February 26, 2010, the petitioner failed to demonstrate that he received the nomination prior to the filing of the petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Nevertheless, as previously discussed, the petitioner failed to submit any documentary evidence establishing that his "nomination" resulted in a nationally or internationally recognized prize or award for excellence in the field of endeavor.

Moreover, on appeal, counsel claimed that the petitioner won "The Territory Day Award" and claimed that it "recognize[s] industry, innovation and personal achievement." Counsel submitted

a photograph of a plaque that is illegible and provides no evidentiary weight to reflect that the petitioner actually received the award. Nonetheless, counsel failed to submit any documentary evidence to support her assertions on appeal regarding The Territory Day Award. 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). Regardless, counsel's assertions do not provide any evidence that The Territory Day Award is nationally or internationally recognized for excellence in the field.

The AAO notes that the petitioner submitted screenshots from BE Brands and Belong reflecting that he was ranked twelfth as "[REDACTED]"

[REDACTED] The AAO is not persuaded that a ranking equates to a prize or award, let alone a nationally or internationally recognized prize or award for excellence. Notwithstanding, the petitioner failed to submit any documentary evidence beyond the screenshots to demonstrate that rankings for "[REDACTED]" are nationally or internationally recognized prizes or awards for excellence in the field of endeavor. See *Braga v. Poulos*, No. CV 06 5105 SJO (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).

Again, 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." The burden is on the petitioner to establish every element of this criterion. Simply submitting documentary evidence that the petitioner received prizes or awards is insufficient to meet the plain language of this regulatory criterion without documentary evidence demonstrating that the prizes or awards are nationally or internationally recognized for excellence in the field of endeavor.

Accordingly, the petitioner failed to establish that he 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." A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence establishing that he meets the plain language of this regulatory criterion. As such, the AAO withdraws the findings of the director for this criterion.

Accordingly, the petitioner established that he meets the plain language of the regulation for this criterion.

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

In the director's decision, she determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." Here, the evidence must be reviewed to see whether it rises to the level of original scientific or scholarly-related contributions "of major significance in the field." The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

On appeal, counsel claims that the petitioner made a scientific contribution based on the display of his euthanasia machine, "[REDACTED]". Moreover, counsel claims that the petitioner made artistic contributions based on the display of his "[REDACTED]" and two documentaries entitled, "[REDACTED]". Finally, counsel claims that the petitioner made scholarly contributions based on his authorship of two books entitled, "[REDACTED]" and an article entitled, "[REDACTED]".

The petitioner's field is not artistic in nature; rather the petitioner's documentary evidence will be evaluated for scientific and scholarly-related contributions. Regarding the display of petitioner's "[REDACTED]" the petitioner submitted screenshots from www.sciencemusuem.org.uk reflecting that the museum displayed the machine and provided background information regarding the history and controversy involved with it. However, the petitioner failed to submit any other documentary evidence reflecting that the display of the machine at the Science Museum in London resulted in an original contribution of major significance in the field. In other words, the petitioner failed to demonstrate that the display of the machine influenced or impacted the field, beyond it simply being displayed at the museum. Similarly, regarding the display of the machine at MONA, the petitioner submitted an email, dated June 12, 2010, to the petitioner from "[REDACTED]" who indicated that MONA intended to display the machine in January 2011. However, eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. at 75 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. at 114, that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Regardless, the record contains no evidence that it was ever displayed at MONA, let alone that it is an original contribution of major significance in the field.

Regarding the petitioner's two documentaries, the petitioner submitted documentary evidence reflecting that he was interviewed for the documentary, *Mademoiselle and the Doctor*, and is listed as a cast member for the documentary, *Where Angels Fear to Tread*. However, the petitioner failed to submit any documentary evidence reflecting that the petitioner's contributions to the documentaries, while original, have been of major significance in the field rather than limited to the films in which he appeared. Although the petitioner submitted a letter from [REDACTED] indicating that she was so impressed with his work on the film, *Mademoiselle and the Doctor*, that she requested the petitioner to write an article for her book, the significance of the contributions of the petitioner are limited to the work of [REDACTED] rather than to the field as whole.

As it relates to counsel's reference to the petitioner's published article as evidence to meet this criterion, the regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). The AAO will not presume that evidence relating to or even meeting the scholarly articles criterion is presumptive evidence that the petitioner also meets this criterion. To hold otherwise would render meaningless the regulatory requirement that a petitioner meet at least three separate criteria. Therefore, while the petitioner's scholarly article will not be considered under this criterion, it will be addressed under the next criterion. The scholarly article, as well as the books authored by the petitioner, is relevant to this criterion with regard to the impact they have had on the field which is demonstrated by citations.

Regarding the article, [REDACTED] the petitioner submitted documentary evidence reflecting that it was cited six times by others. Regarding [REDACTED] and [REDACTED] the petitioner submitted an article reflecting that the author cited each book. While the number of total citations is a factor, it is not the only factor to be considered in determining the petitioner's eligibility for this criterion. Generally, the number of citations is reflective of the petitioner's original findings and that the field has taken some interest to the petitioner's work. However, it is not an automatic indicator that the petitioner's work has been of *major significance in the field*. In this case, the AAO is not persuaded that the petitioner's single article that is cited only six times, as well as a single article that cites two of the petitioner's books, are reflective that the petitioner's work has been of major significance in the field. Furthermore, the petitioner failed to submit any documentary evidence demonstrating that his article or books have been unusually influential. In this case, the petitioner's documentary evidence is not reflective of having a significant impact on the field. Merely submitting documentation reflecting that the petitioner's work has been cited by others in their published material is insufficient to establish eligibility for this criterion without documentary evidence reflecting that the petitioner's work has been of a major significance in the field. The AAO is not persuaded that the minimal citations of the petitioner's work are reflective of the significance of his work in the field. The petitioner failed to establish how those findings or citations of his work by others have significantly contributed to his field as a whole.

A review of the record of proceeding also reflects that the petitioner submitted several recommendation letters. While the authors of the letters indicate the petitioner's dedication to his work, they fail to demonstrate that the petitioner has made original contributions of major significance in the field. For example, [REDACTED] stated that the petitioner "pioneered a new approach" and is "one of a select few internationally who has promoted a public-education agenda in contrast to the usual law-reform approach." However, [REDACTED] failed to explain how the petitioner's approach has affected the field in a significant manner. While the petitioner's approach might be unique, an original contribution does not necessarily equate to a contribution of major significance in the field. Moreover, [REDACTED] stated that the petitioner [REDACTED]

[REDACTED] However, [REDACTED] failed to provide specific details evidencing that the petitioner has made original contributions of major significance in the field. Without specific information, the submission of letters that provide only general statements is insufficient to reflect that the petitioner has made original contributions of major significance. In addition, [REDACTED] briefly described the petitioner's creation of a [REDACTED] and the controversy it garnered in New Zealand, as well as the controversy garnered from the petitioner's launch of a "Drug Test Kit" in the United Kingdom. Although [REDACTED] the AAO is not persuaded that such media attention is demonstrative that his devices have been of major significance in the field. For instance, according to [REDACTED] device was seized by custom officials in New Zealand but was later returned to the petitioner. [REDACTED] failed to indicate the significance of the [REDACTED] beyond the media attention is garnered from its seizure.

While those familiar with his work generally describe it as "unique" and "extraordinary," there is insufficient documentary evidence demonstrating that the petitioner's work is of major significance. This regulatory criterion not only requires the petitioner to make original contributions, the regulatory criterion also requires those contributions to be of major significance. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the petitioner's contributions have already influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The lack of supporting evidence gives the AAO no basis to gauge the significance of the petitioner's present contributions.

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

when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance.

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

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

Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The director determined that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner claims eligibility for this criterion based on his authorship of three books, [REDACTED]

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires “[e]vidence of the alien’s authorship of *scholarly articles* in the field, in professional or major trade publications or other major media [emphasis added].” As this regulatory criterion requires authorship of scholarly articles, the submission of the petitioner’s *books* do not equate to articles. An article is “a nonfictional prose composition usually forming an independent part of a publication (as a magazine).”³ On the other hand, a book is “a long written or printed literary composition.”⁴ Furthermore, the regulation requires that the articles be “in professional or major trade publications or other major media.” As books may be published independently or self-published, mere publication does not establish that a book is a professional or major trade publication or other major media. Moreover, scholarly articles are generally written by and for experts in a particular field of study, are peer-reviewed, and contain references to sources used in the articles. While the petitioner submitted the covers and prefaces of the books, the petitioner failed to establish that his books are “scholarly.” As there is no evidence demonstrating that the petitioner’s books were peer-reviewed, contain any references to sources, or were otherwise considered “scholarly,” the petitioner’s authorship of three books is insufficient to meet this criterion.

³ See <http://www.merriam-webster.com/dictionary/article>, accessed on December 13, 2011, and incorporated into the record of proceeding.

⁴ See <http://www.merriam-webster.com/dictionary/book?show=0&t=1311785044>, accessed on December 13, 2011, and incorporated into the record of proceeding.

Even if the petitioner's books equate to scholarly articles, which they do not, the petitioner failed to demonstrate that they are professional or major trade publications or other major media. On appeal counsel claims:

The sales of these books underwrite his non-profit's flagship activity, the [REDACTED] public meeting and workshop program.

His principal book – [REDACTED] (published in online format) – currently generates average monthly sales of US\$10,000.

The print cousin [REDACTED] Revenue from this separate source is secondary.

* * *

[The petitioner] is also the author of [REDACTED] This book is now sold out (and hence out of print).

Counsel failed to submit any documentary evidence to support her assertions. 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). Notwithstanding, the AAO is not persuaded that average monthly sales of \$10,000 is reflective of a professional or major trade publication or other major media. Furthermore, even if the petitioner's book was sold out, without sales figures and the number of books originally printed, counsel failed to demonstrate that a "sold out" book establishes a major trade publication or other major media.

Moreover, counsel claims:

Book proceeds constitute the only source of revenue for the currently existing U.S. nonprofit corporation, [REDACTED]. The company's 2008 federal tax return reflects gross receipts of \$84,674. Notably, these sales were generated in 2008, prior [emphasis in original] to any promotion or advocacy in the US by [the petitioner].

While counsel submitted the company's 2008 Form 1120, U.S. Corporation Income Tax Return, as well as an Employment Agreement between the petitioner and [REDACTED] the petitioner failed to demonstrate that \$84,674 in yearly sales, as well as the only source of revenue from [REDACTED] equate to a professional or major trade publication or other major media. As the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires *major* trade publications or other *major* media, merely submitting evidence that the petitioner's books have been sold does not necessarily constitute a major trade publication or other major media.

The AAO notes that at the initial filing of the petition, counsel further claimed the petitioner's eligibility for this criterion based on two documentaries entitled, *Mademoiselle and the Doctor 2004* and *Where Angels Fear to Tread*, that have already been addressed under the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v). However, as the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires "authorship of scholarly articles" "in professional or major trade publications or other major media," documentaries and films clearly do not meet the plain language of this regulatory criterion.

Finally, on appeal, counsel submitted documentary evidence reflecting that the petitioner authored a scholarly article entitled, [REDACTED]

[REDACTED] However, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires authorship of more than one scholarly article. Here, the petitioner only established his authorship of one scholarly article; therefore he fails to meet the plain language of this regulatory criterion.

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

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

In the director's decision, she determined that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner claimed eligibility for this criterion based on the display of his [REDACTED]

[REDACTED] On appeal, counsel further claims the petitioner's eligibility for this criterion based on the previously discussed documentaries.

As indicated in this decision, the AAO considered and addressed the display of the petitioner's [REDACTED] and the documentaries under the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v). In addition, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at *artistic* exhibitions or showcases [emphasis added]." The beneficiary's field, however, is in educating and social activism rather than the arts. The plain language of this regulatory criterion clearly indicates that it applies to artists. The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist, the petitioner is not eligible to meet the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

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

B. Comparable Evidence

At the initial filing of the petition, in response to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), and on appeal, counsel requested that the documentary evidence that has already been discussed above be also considered as comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). The regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. The AAO further acknowledges that the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish the [petitioner's] eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner met the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), and counsel mentions evidence at the initial filing of the petition, in response to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), and on appeal that specifically relates to three other criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Moreover, although counsel failed to claim these additional criteria, the AAO finds that an educator and social activist could participate as a judge of the work of others pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), could perform in a leading or critical role pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), and could command a high salary pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). Counsel provided no documentation as to why these provisions of the regulation would not be appropriate to the profession of an educator and social activist. Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

C. Final Merits Determination

In accordance with the *Kazarian* opinion, the AAO must next conduct 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.” See section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). See also *Kazarian*, 596 F.3d at 1115. The petitioner met the plain language of one of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in the AAO’s preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating the AAO’s final merits determination, the AAO must look at the totality of the evidence to determine the petitioner’s eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner has garnered published material about him relating to his work, has authored a scholarly article, and has been appeared in two documentaries. However, the personal accomplishments of the petitioner 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 and that his or her achievements have been recognized in the field of expertise.” See 8 C.F.R. § 204.5(h)(2), section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

The regulation at 8 C.F.R. § 204.5(h)(3) provides that “[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” The petitioner’s evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien’s field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2).

The AAO cannot ignore that the statute requires the petitioner to submit “extensive documentation” of the petitioner’s sustained national or international acclaim. See section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Although the petitioner has submitted documentary evidence reflecting that he was *nominated* for the Australian of the Year Awards, he failed to demonstrate that he has won any nationally or internationally recognized prizes or awards for excellence that is reflective that “his or her achievements have been recognized in the field of expertise.” See section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). While the petitioner has authored one scholarly article, such minimal authorship is not demonstrative of “a level of expertise indicating that he is among that small percentage who have risen to the very top of the field of endeavor.” See 8 C.F.R. § 204.5(h)(2). Furthermore, the AAO will evaluate a citation history or other evidence of the impact of the petitioner’s work to determine the impact and recognition his work has had on the field and whether such influence

has been sustained. For example, numerous independent citations for an article authored by the petitioner would provide solid evidence that his work has been recognized and that other researchers have been influenced by his work. Such an analysis at the final merits determination stage is appropriate pursuant to *Kazarian*, 596 F. 3d at 1122. On the other hand, few or no citations of an article authored by the petitioner may indicate that his work has gone largely unnoticed by his field. As previously discussed, the petitioner submitted documentary evidence reflecting that his work has been cited 8 times. While these citations demonstrate some interest in his published work, they are not sufficient to demonstrate that his articles have attracted a level of interest in his field commensurate with sustained national or international acclaim at the very top of his field.

The evidence of record falls short of demonstrating the petitioner's sustained national or international acclaim as an educator and [REDACTED]. The regulation at 8 C.F.R. § 204.5(h)(3) requires "[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and this his or her achievements have been recognized in the field of expertise." While the petitioner submitted documentation demonstrating that he has published material about him relating to his work, the documentary evidence is not consistent with or indicative of sustained national or international acclaim.

USCIS has long held that even athletes performing at the major league level do not automatically meet the statutory standards for immigrant classification as an alien of "extraordinary ability." *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994); 56 Fed. Reg. at 60899. In *Matter of Racine*, 1995 WL 153319 at *1, *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.

The court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable. Likewise, it does not follow that the petitioner who has not offered any evidence that distinguishes him from others in his field, should necessarily qualify for approval of an extraordinary ability employment-based visa petition. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor."

The conclusion the AAO reaches by considering the evidence to meet each category of evidence at 8 C.F.R. § 204.5(h)(3) separately is consistent with a review of the evidence in the aggregate. Ultimately, the evidence in the aggregate does not distinguish the petitioner as one of that small

percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The petitioner seeks a highly restrictive visa classification, intended for individuals at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. In this case, the petitioner has not established that his achievements at the time of filing the petition were commensurate with sustained national or international acclaim, or that he was among that small percentage at the very top of the field of endeavor.

III. Conclusion

Review of the record does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act, and the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.