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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090



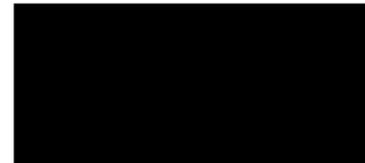
**U.S. Citizenship  
and Immigration  
Services**



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DATE: JUL 12 2012

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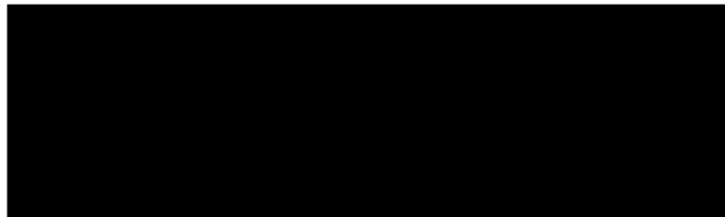


IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability as a fine art photographer and art educator.<sup>1</sup> The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of her sustained national or international acclaim. The director also determined that the petitioner had not submitted clear evidence that she would continue to work in her area of expertise in the United States.

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). 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, counsel asserts that the petitioner meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(ii) – (iv) and (vi) – (viii). For the reasons discussed below, the AAO will uphold the director's decision.

## 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,

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<sup>1</sup> The petitioner was initially represented by attorney [REDACTED]. In this decision, the term "previous counsel" shall refer to [REDACTED].

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101<sup>st</sup> Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.<sup>2</sup> With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

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<sup>2</sup> Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

## II. ANALYSIS

### A. Evidentiary Criteria<sup>3</sup>

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

In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner did not initially claim eligibility for this regulatory criterion or submit specific documentation and arguments addressing this criterion in response to the director's notice of intent to deny (NOID). The AAO notes that the director's December 13, 2010 NOID informed the petitioner that the record lacked evidence of her 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.

On appeal, counsel asserts for the first time in these proceedings that the petitioner meets this criterion as a member [REDACTED] and [REDACTED].

The petitioner's appellate submission includes letters from [REDACTED]

[REDACTED] and [REDACTED]. With regard to the preceding evidence submitted for this regulatory criterion for the first time on appeal, where a service center has requested specific evidence in a NOID, and the petitioner failed to comply with the request, that particular evidence will not be considered on appeal. As the petitioner was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner seeks evidence to be considered, she must submit the documents in response to the director's request for evidence. *Id.* Regardless, none of the preceding letters specifically state that the petitioner holds "membership" in the aforementioned museums. A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R.

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<sup>3</sup> On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

§ 103.2(b)(2)(i). The petitioner has not established that her relationship with the aforementioned museums as an exhibitor, workshop instructor, project partner, and educator constitutes her “*membership in associations in the field*” (emphasis added) as mandated by the unambiguous language in the regulation at 8 C.F.R. § 204.5(h)(3)(ii). Moreover, there is no documentary evidence (such as bylaws or rules of admission) showing that the MOMA, MDB, and the QMA require outstanding achievements of their members, as judged by recognized national or international experts in the petitioner’s field.

In light of the above, the petitioner has not established that she meets this regulatory 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 general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.<sup>4</sup>

The petitioner submitted a photograph of herself and four others seated on a couch in a television studio. A caption below the photograph states: “Univision dedicated a one hour program ‘En tu comunidad’ In you [sic] community to Project Luz, featuring [the petitioner] and students.” The petitioner also submitted a photograph of herself and three others seated on a couch in what appears to be the same television studio. A caption below the second photograph states: “[The petitioner] [REDACTED]” The petitioner failed to submit video footage of her appearances on the shows or other evidence (such as a television broadcast transcript) demonstrating that the shows were about her. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). In addition, previous counsel’s April 16, 2010 letter states: “NY1, Time Warner Cable’s 24-hour news channel in New York City, featured [the petitioner] at her exhibition’s opening at QMA.” Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility.

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<sup>4</sup> Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual’s reputation outside of that county.

8 C.F.R. § 103.2(b)(2)(i). Finally, regarding the preceding television programs said to have included the petitioner, the plain language of this regulatory criterion requires “published material about the alien” including “the title, date and author of the material.” A television show featuring the petitioner does not meet these requirements. Further, the petitioner did not submit documentary evidence indicating the dates of the television broadcasts.

The petitioner submitted a January 12, 2010 article in the *New York Post* entitled “Mayor’s State of the City pledge: We’ll do more for little guy.” The petitioner appears in the background of a photograph showing Mayor Bloomberg that accompanies the article, but none of the submitted material is about the petitioner. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii), however, requires that the published material be “about the alien.” See, e.g., *Accord Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*1,\*7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor).

The petitioner submitted a March 2009 article about her [REDACTED] “[The petitioner] lives life as art” and an April 2010 article about her in *Long Island City Courier Magazine* entitled [REDACTED] but there is no circulation evidence showing that these magazines qualify as “major” media.

The petitioner submitted a March 23, 2006 article [REDACTED] [REDACTED] but the article is not about the petitioner and only mentions her in passing.

The petitioner submitted a February 10, 2010 article in *Rio de la Plata* bilingual newspaper (New York) [REDACTED] but the article is not about the petitioner and the author was not identified as required by the plain language of this regulatory criterion.

The petitioner submitted an article entitled “Latinas display artwork” in *Vida en el Valle*, but the date of the article was not provided as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The petitioner also submitted a January 23, 2009 article in the *Fresno Bee* entitled “Latina artists showcase their gifts in ‘Espada de Dos Filos.’” The preceding articles in *Vida en el Valle* and the *Fresno Bee* do not even mention the petitioner.

The petitioner [REDACTED]

author identified), a 2007 article in *Slobodna Dalmacija* entitled “[The petitioner], Argentine Modern Artist and American Immigrant,” an undated article in *Hoy* entitled “Photo Workshops in Castilian” (no author identified), an undated article in *El Diario La Prensa* entitled “Creative Photography Workshop” (no author identified), a March 12, 2006 article in *El Diario La Prensa* entitled “Cultural Outlook” (no author identified), a March 2006 article in *El Correo de Queens* entitled “Agenda: Cultural Events: Palabras Locales” (no author identified), and a September 20, 2010 article in *El Diario La Prensa* entitled “Photography Techniques in Project Luz.” The latter article was published subsequent to the petition’s May 6, 2010 filing date. The petitioner, however, must demonstrate her eligibility 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). Accordingly, the AAO will not consider the September 20, 2010 article in *El Diario La Prensa* in this proceeding. Further, the English language translations accompanying the preceding articles were incomplete and they were not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that 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. *Id.*

The petitioner submitted a March 1, 2005 article in *New York Daily News* promoting her exhibition at the Exit Art Gallery entitled “Latitas: A Recycled Life,” but the author of the article was not identified as required by the plain language of this regulatory criterion. The petitioner also submitted an article in *New York Daily News* entitled “Photography Workshop at Local Project” announcing a class taught by the petitioner, but the material is not about the petitioner. Instead, the article provides general information promoting her upcoming creative workshop on photography scheduled at Local Project in Queens. As previously discussed, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be “about the alien” relating to her work rather than simply about the petitioner’s work. *Compare* 8 C.F.R. § 204.5(i)(3)(i)(C) relating to outstanding researchers or professors pursuant to section 203(b)(1)(B) of the Act. It cannot be credibly asserted that the preceding article is “about” the petitioner. Further, the date and author of the article were not identified as required by the plain language of the regulation this regulatory criterion. The petitioner also submitted a November 26, 2008 article about her in *New York Daily News* entitled “I wanted to share my passion.” On appeal, the petitioner submits a January 30, 2011 article about her in *New York Daily News* entitled “View of the city thru rose-colored lens,” but the article was published subsequent to the petition’s May 6, 2010 filing date. As previously discussed, the petitioner must demonstrate her eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider the January 30, 2011 article in *New York Daily News* in this proceeding.

In response to the director’s NOID, the petitioner submitted information about *New York Daily News*, the *New York Post*, *El Diario La Prensa*, *La Nacion*, *Queens Chronicle*, the *Fresno Bee*, and *Slobodna Dalmacija* from *Wikipedia*, an online encyclopedia. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-

edited internet site.<sup>5</sup> See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8<sup>th</sup> Cir. 2008). Accordingly, the AAO will not assign weight to information for which *Wikipedia* is the source. The petitioner also submitted information about *Vida en el Valle*, *Hoy*, *El Correo de Queens*, and *Defining Trends Magazine* from the publications' own websites. USCIS need not rely on self-promotional material. 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). Thus, the petitioner has failed to submit documentary evidence establishing that the preceding publications qualify as major media.

The petitioner's appellate submission includes a May 15, 2011 article posted on WNYC radio's website entitled "Museums Reach Out to Artists With Special Needs," but the article was published subsequent to the petition's May 6, 2010 filing date. As previously discussed, the petitioner must demonstrate her eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider the May 15, 2011 WNYC article in this proceeding. The petitioner's evidence included additional online material from Art Slant, New York Foundation of the Arts, and the QMA discussing projects involving the petitioner, but none of these articles meet all of the requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). For example, the articles were deficient in that they did not include an author, they were not about the petitioner, or they lacked evidence that they were published in major media.

Even if the AAO were to conclude that the November 26, 2008 article about the petitioner in *New York Daily News* entitled "I wanted to share my passion" meets all of the elements of this regulatory criterion, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires material about the alien in "professional or major trade publications or other major media" in the plural. 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. Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal

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<sup>5</sup> Online content from *Wikipedia* is subject to the following general disclaimer:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . **Wikipedia cannot guarantee the validity of the information found here.** The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

See [http://en.wikipedia.org/wiki/Wikipedia:General\\_disclaimer](http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer), accessed on June 21, 2012, copy incorporated into the record of proceeding.

courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. See *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at \*10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(1)(2) requires a single degree rather than a combination of academic credentials). Therefore, a single qualifying article about the petitioner limited to only one major publication does not meet the plain language requirements of this regulatory criterion.

In light of the above, the petitioner has not established that she meets this regulatory criterion.

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

On appeal, counsel states:

The alien has been invited to be a Panelist at several occasions. Her participation has been evidenced through the recommendation letters . . . . She was a panelist

The petitioner's appellate submission includes recommendation letters from an Associate Educator for Teen and Community Programs at the MOMA, the Director of Education and Public Programs at MDB, a Curator at MDB, the Executive Director of the QMA, the Director of Education at the Nassau County Museum of Art, the Senior Coordinator for Art Access Library Programs and Autism Initiatives at the QMA, a producer for FLUID (a new media laboratory in Queens), and the manager of Praxis International Art Gallery in New York. None of the preceding letters state that the petitioner participated as a judge on any panels or identify the specific work that she evaluated. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires evidence of the petitioner's "participation, either individually or on a panel, as a judge of the work of others" (emphasis added) in the field. There is no documentary evidence demonstrating that the petitioner's participation on the panels identified by counsel involved judging the work of other photographers or art educators. As previously discussed, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 158. A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Merely submitting letters claiming that the petitioner served on various panels without specifying the work she actually judged is insufficient to establish eligibility for this regulatory criterion. The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified at 8 C.F.R. § 204.5(h)(3)(iv). The regulation cannot be read to include every informal instance of lecturing or speaking at an educational forum or art

conference. Accordingly, the petitioner has not established that she meets this regulatory criterion.

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

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish her eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not established that she meets this regulatory criterion.

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

The petitioner submitted a copy of her book *Seeing in English: An introduction to photography for and with adult students* and copies of her broadsheet *Project Luz* which presents the work of her students, but there is no documentary evidence showing that the preceding book and broadsheet equate to "professional or major trade publications or other major media." Further, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires evidence of the "alien's authorship of *scholarly articles* in the field." [Emphasis added.] Generally, scholarly articles are written by and for experts in a particular field of study, are peer-reviewed, and contain references to sources used in the articles. There is no evidence demonstrating that the materials for novice photographers authored by the petitioner were peer-reviewed, contain any references to sources, or were otherwise considered "scholarly articles." Accordingly, the petitioner has not established that she meets the plain language requirements of this regulatory criterion.

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

The petitioner submitted documentary evidence demonstrating that she has displayed her work at artistic exhibitions and showcases. Accordingly, the petitioner has established that she meets the plain language requirements of this regulatory criterion.

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

On appeal, counsel states:

The alien has played a pivotal role in venturing partnerships between and with organizations of distinguished reputation. One of which is QMA . . . . The alien exhibited her Artistic Photography at QMA, and incorporated a workshop with Museum setting for the underserved. QMA partnered with the Queens Library and Public Schools

in Queens as a result of these recognized workshops. As a result these institutions were accorded grants from [REDACTED] and Library Services. A letter of recommendation provided by [REDACTED] – Executive Director clearly identifies the alien’s leading role in this partnership.

Further, the Alien is a founder of “Project Luz” and has successfully partnered with El Museo Del Barrio and MOMA leading the venture and coordinating all the exhibits and workshops between these institutes.

While the petitioner has submitted documentation indicating that she displayed her photography at the QMA and worked with the MOMA, MDB, and the QMA to coordinate exhibits and educational workshops, there is no documentary evidence demonstrating that her role was leading or critical for the museums. For instance, the petitioner failed to submit an organizational chart or other evidence documenting where her positions fell within the museums’ general hierarchies. In determining whether the petitioner’s roles were leading or critical, the AAO looks at her performance in those roles and how they contributed to the overall success or standing of the museums. The petitioner’s evidence does not demonstrate how her positions differentiated her from the other educators and museum staff at the QMA, the MOMA, and MDB, let alone their directors and curators. The evidence submitted by the petitioner does not establish that she was responsible for the preceding museums’ success or standing to a degree consistent with the meaning of “leading or critical role.” Moreover, the record lacks documentary evidence showing that the QMA and MDB have earned a distinguished reputation relative to other successful museums. Accordingly, the petitioner has not established that she meets this regulatory criterion.

### B. Summary

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

### C. Prior O-1 Nonimmigrant Visa Status

The record reflects that the petitioner was the beneficiary of three approved O-1 nonimmigrant visa petitions for an alien of extraordinary ability in the arts. Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, “The term ‘extraordinary ability’ means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(o)(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines extraordinary ability as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory

and regulatory distinction between these two classifications, the petitioner's receipt of O-1 nonimmigrant classification is not evidence of her eligibility for immigrant classification as an alien with extraordinary ability. Further, the AAO does not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each petition must be decided on a case-by-case basis upon review of the evidence of record.

It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of the alien's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of the alien, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, \*1, \*3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

### III. CONTINUING WORK IN THE AREA OF EXPERTISE IN THE UNITED STATES

The statute and regulations require that the petitioner seeks to continue work in her 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). Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the petitioner detailing plans on how she intends to continue his work in the United States. The director found that the petitioner failed to submit "clear evidence" that she would continue to work in her area of expertise in the United States as required by the regulation at 8 C.F.R. § 204.5(h)(5). On appeal, the petitioner submits a letter from Praxis International Art Gallery discussing her work in the United States. The petitioner also submits letters from the Nassau County Museum of Art and the QMA discussing ongoing projects and upcoming workshops involving the petitioner. Accordingly, the AAO finds that the petitioner has submitted clear evidence that she will continue to work in her area of expertise in the United States.

#### IV. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.<sup>6</sup> Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.

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<sup>6</sup> The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).