

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services



B2

DATE: JUL 31 2012 OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on August 3, 2011, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary 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 master hair designer. The director determined that the petitioner had not established the beneficiary's requisite extraordinary ability and failed to submit extensive documentation of sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the beneficiary's "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 beneficiary 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.*; 8 C.F.R. § 204.5(h)(2).

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

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

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

II. TRANSLATIONS

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).

The regulation at 8 C.F.R. § 103.2(b) provides in pertinent part:

(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.

At the initial filing of the petition and 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 a single certified translation. However, it is unclear which documents, if any, to which the translation certification pertains. The submission of a single translation certification that does not specifically identify the document or documents it purportedly accompanies does not meet the requirements of the regulation at 8 C.F.R. § 103.2(b)(3), which requires that 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. Without a single translator's certification for each foreign language form of evidence, or a translator's certification specifically listing the documents it is validating, the certification cannot be regarded to be certifying any specific form of evidence. The final determination of whether evidence meets the plain language requirements of a regulation lies with USCIS. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988) (finding that the appropriate entity to determine eligibility is USCIS in a scenario whereby an advisory opinion or statement is not consistent with other information that is part of the record).

Moreover, the petitioner submitted foreign language documents without any English language translations, as well as handwritten snippets purportedly translating captions accompanying photographs in magazines and brochures. However, as the regulation at 8 C.F.R. § 103.2(b)(3) specifically requires a "full English language translation [emphasis added]," partial translations and snippets do not comply with the regulation. Because the petitioner failed to comply with the regulation at 8 C.F.R. § 103.2(b)(3), the AAO cannot determine whether the evidence supports the petitioner's claims. Accordingly, the documentary evidence identified below that does not comply with the regulation at 8 C.F.R. § 103.2(b)(3) is not probative and will not be accorded any weight in this proceeding.

III. ANALYSIS

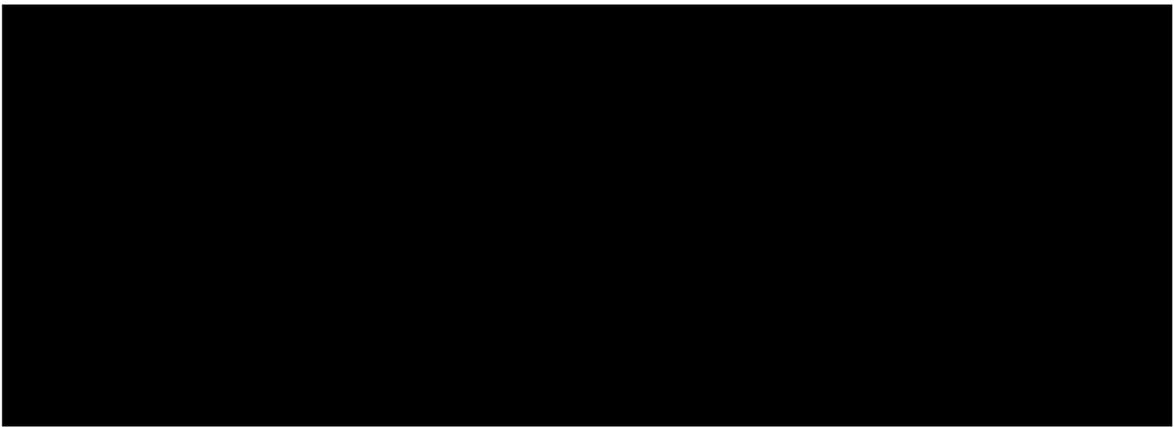
A. Evidentiary Criteria²

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

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

The director determined that the petitioner failed to establish the beneficiary's eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor." Moreover, it is the petitioner's burden to establish eligibility for every element of this criterion. Not only must the petitioner demonstrate the beneficiary's receipt of prizes and awards, it 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 the beneficiary's prizes and awards are recognized nationally or internationally for excellence in the field beyond the awarding entities.

On appeal, counsel claims that the beneficiary is eligible for this criterion based on her receipt of the following awards:



However, the petitioner failed to submit certified translations of the foreign language documents as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(3). Therefore, the petitioner failed to establish the beneficiary's "receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor" pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i).

Moreover, the petitioner submitted a letter from [REDACTED] who claimed that the beneficiary is "a three (3) time winner [REDACTED] presented by our foundation from 2007 through 2009." However, the regulation at 8 C.F.R. § 103.2(b)(2) provides in pertinent part:

- (i) The non-existence or other unavailability or required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the fact at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who

have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. While the letter from [REDACTED] claims that the beneficiary won [REDACTED] the petitioner must submit primary evidence of the beneficiary's awards unless it can establish that primary evidence does not exist or cannot be obtained. Here, primary evidence may exist in the form of certificates, but the petitioner failed to submit certified translations. As [REDACTED] letter is not primary evidence, as well as secondary evidence, of the beneficiary's awards, the letter is insufficient to demonstrate the beneficiary's receipt of nationally or internationally recognized awards for excellence in the field. Regardless, the letter that has been provided is not an affidavit, as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(2), as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (9th Ed., West 2009). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Even if [REDACTED] letter was an affidavit, which it clearly is not, and the petitioner demonstrated that primary and secondary evidence does not exist or cannot be obtained, which it clearly did not, the petitioner only submitted one letter in which the plain language of the regulation at 8 C.F.R. § 103.2(b)(2) requires more than one affidavit. It is noted that [REDACTED] made no mention of the beneficiary receiving the purported [REDACTED]

The petitioner also failed to establish that the beneficiary's purported awards are nationally or internationally recognized for excellence in her field of endeavor. On appeal, counsel claims that the beneficiary's awards "were published by [REDACTED] one of Japan's major professional journal[s]." However, while the petitioner submitted uncertified English language translations, there is no indication that the awards were, in fact, published by [REDACTED] nor did counsel submit any documentary evidence to support his assertions that that [REDACTED] is a major professional journal. In fact, a review of the original documents simply contains headings, photographs, and captions without any indication or characteristics of being published in a professional journal, let alone published in [REDACTED]. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). The AAO must look to the plain language of the documents executed by the petitioner and not to subsequent statements of counsel. *Matter of Izummi*, 22 I&N Dec. 169, 185 (Comm'r 1998). Further, while Mitsumasa Taniguchi provided background information regarding the history and selection process of the contest, the petitioner failed to submit independent, objective evidence demonstrating that the awards are nationally or internationally

recognized for excellence in the field.

promotional material).

As discussed, the plain language of this regulatory criterion specifically requires that the petitioner demonstrates the beneficiary's receipt of nationally or internationally recognized prizes or awards for excellence in her field. In this case, the petitioner failed to demonstrate that the beneficiary has received any prizes or awards, let alone nationally or internationally recognized prizes or awards for excellence in the field. The truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) citing *Matter of E-M*- 20 I&N Dec. 77, 80 (Comm'r 1989).

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

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

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

On appeal, counsel claims that the beneficiary's membership with the Japan Hair Design Foundation (JHDF) meets the requirements of this criterion. A review of the record of proceeding reflects that the petitioner submitted an uncertified translation of a certificate claiming that the beneficiary "has been accepted as a life-time member of the [JHDF] after the board members' careful review and consideration on her contribution to the industry." As the petitioner failed to submit a certified translation as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), the petitioner failed to establish that the beneficiary is a member of JHDF. It is noted that while [REDACTED] indicated that the beneficiary received lifetime membership with JHDF, the letter is insufficient to demonstrate the beneficiary's membership with JHDF as primary evidence may exist, but the petitioner failed to submit a certified translation, and the letter does not meet the regulatory requirements set for under 8 C.F.R. § 103.2(b)(2) for the similar reasons discussed under the awards criterion.

Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) states that the membership in associations “require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.” The petitioner submitted a letter from [REDACTED], and a portion of JHDF’s by-laws that was accompanied by an uncertified translation. It is noted that Takao Honda stated that “[f]or the fact that I have studied English during my college and lived in English-speaking country, Australia, for three years, I can vouch for the accuracy of my translation of the original into English.” Again, the plain language of the regulation at 8 C.F.R. § 103.2(b)(3) specifically requires 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.” As [REDACTED] did not certify that that his translation was “complete and accurate,” his translation fails to comply with the regulation at 8 C.F.R. § 103.2(b)(3) and cannot be accorded any weight to determine the beneficiary’s eligibility for this criterion.

It is noted that the uncertified translation claims that “[n]ominations must be made with recommendations from at least five (5) active members of the JHDF to the Lifetime Membership Committee followed by the approval of the Lifetime Membership Committee.” However, the petitioner failed to establish that Lifetime Membership Committee is comprised of “recognized national or international experts in their disciplines or fields.” As the petitioner only submitted a portion of JHDF’s by-laws, there is insufficient documentary evidence to establish that membership with JHDF is judged by recognized national or international experts pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

Notwithstanding the above, even if the petitioner were to establish that the beneficiary’s purported membership with JHDF meets the elements of this criterion, which it clearly has not, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires membership in more than one association. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of “letter(s).” Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS’ ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for “a” bachelor’s degree or “a” foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials). In the case here, the petitioner claimed the beneficiary’s eligibility for this criterion based on her membership with only one association.

For the reasons discussed above, the petitioner failed to demonstrate that the beneficiary is a member of associations that require outstanding achievements, as judged by recognized national or

international experts in their disciplines or field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii). It is the petitioner's burden to establish every element of this regulatory criterion.

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

At the outset, the petitioner submitted numerous magazine articles and covers without any English language translations as required pursuant to the regulation at 8 C.F.R. §§ 103.2(b)(3) and 204.5(h)(3)(iii). Moreover, the petitioner submitted magazine articles and covers with handwritten annotations that simply indicated the beneficiary's name. Furthermore, the handwritten annotations are not full and certified translations of the foreign documents and do not equate to published material about the beneficiary relating to her work in the field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

In addition, the petitioner submitted the following documentation:

1. An uncertified translation of an article entitled, [REDACTED] unidentified author, *Ocapa*;
2. An uncertified translation of an article entitled, [REDACTED] unidentified date, self-authored, unidentified publication;

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

3. An uncertified translation of an article entitled, [REDACTED] [REDACTED]” unidentified date, self-authored, unidentified publication;
4. An uncertified translation of an article entitled, [REDACTED] [REDACTED] August 2008, self-authored, [REDACTED]
5. An uncertified translation of an article entitled, [REDACTED] [REDACTED] unidentified date, self-authored, unidentified source;
6. An uncertified translation of an article entitled, [REDACTED] [REDACTED] unidentified author, [REDACTED]
7. An uncertified translation of an article entitled, [REDACTED] [REDACTED] September 2008, unidentified author, [REDACTED]
8. An uncertified translation of an article entitled, [REDACTED] [REDACTED] unidentified date, unidentified author, [REDACTED]
9. An uncertified translation of an article entitled, [REDACTED] [REDACTED] January [REDACTED], unidentified author, [REDACTED]
10. An uncertified translation of an article entitled, [REDACTED] [REDACTED] unidentified date, unidentified author, unidentified source;
11. An uncertified translation of an article entitled, [REDACTED] [REDACTED] unidentified date, unidentified author, unidentified source; and
12. An uncertified translation of an article entitled, [REDACTED] [REDACTED] Award,” December 2008, unidentified author, [REDACTED]

The petitioner failed to submit certified English language translations for any of the items listed above as required pursuant to the regulation at 8 C.F.R. §§ 103.2(b)(3) and 204.5(h)(3)(iii). Moreover, besides the petitioner’s self-authored articles listed in items 2 – 5, the petitioner failed to include the author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Furthermore, the petitioner failed to include the date of the material listed in items 2 – 3, 5, 8, and 10 – 11 as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

Notwithstanding the above, it appears from the uncertified translations submitted by the petitioner that only item 1 reflects published material about the beneficiary relating to her work. Regarding

items 2 – 5, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be “about” the beneficiary relating to her work in the field for which classification is sought. Articles authored by the beneficiary are not articles about her relating to her work consistent with the plain language of this regulatory criterion as they are not independent, journalistic coverage of the beneficiary. Similarly, regarding items 6 – 12, the articles reflect interviews with the beneficiary in which her answers are simply recorded in the submitted material. The unidentified authors do not discuss the beneficiary, and the material does not qualify as published material about the beneficiary relating to her work.

In addition, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires the published material to be in “professional or major trade publications or other major media.” However, the petitioner failed to submit any documentary evidence establishing that [REDACTED] or major trade publications or other major media. Further, regarding items 2 – 3, 5, and 10 – 11, the petitioner failed to identify where the material was published.

It is noted that the petitioner submitted a letter from [REDACTED] who stated that the beneficiary’s [REDACTED] top-billing actresses, signers [sic] and other celebrities and appeared in the nation’s top-ranking magazines including, but not limited to, [REDACTED]. The petitioner also submitted several magazine covers from [REDACTED] with uncertified English language translations. While [REDACTED] listed numerous publications in which “celebrities” have adorned the beneficiary’s hairdos and the uncertified translations of the covers list the beneficiary as the hairstylist, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires published material about the beneficiary relating to her work rather than published material and photographs of other people who have worn the beneficiary’s hairstyles. It is noted that [REDACTED] did not indicate that [REDACTED] are professional or major trade publications or other major media. Similarly, the petitioner submitted an uncertified translation of an unidentified document that listed the circulation statistics of various magazines including [REDACTED]. Again, the petitioner failed to submit any documentary evidence reflecting that the beneficiary has had published material about her relating to her work in magazines listed on the unidentified and uncertified translated document.

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.” The burden is on the petitioner to establish that the beneficiary meets every element of this criterion. In this case, the petitioner submitted one article that appeared to be published material about the beneficiary relating to her work but failed to submit a certified English language translation, failed to include the author of the material, and failed to demonstrate that [REDACTED] is a professional or major trade publication or other major media. Even if the petitioner established that the article meets every element of this criterion, which it clearly has not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires published material in more than one publication. As such, the AAO withdraws the decision of the director for this criterion.

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

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

In the director's decision, she determined that the petitioner failed to establish the beneficiary's eligibility for this criterion. Specifically, the director determined that the petitioner's claim that the beneficiary participated as a judge at [REDACTED] was insufficient to meet the eligibility requirements of this criterion. On appeal, counsel claims:

The Petitioner has *never* made a claim whatsoever that the Beneficiary served as a judge at [REDACTED]. In fact, the Petitioner submitted the evidence with its initial petition and in response to the [request for additional evidence] demonstrating that the Beneficiary served as the judge in **2008**.

(Emphasis in original.)

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.” A review of the record of proceeding reflects that at the initial filing of the petition, the petitioner submitted screenshots from [REDACTED] reflecting photographs of the [REDACTED]. In addition, the petitioner submitted a screenshot from [REDACTED] regarding event information for the [REDACTED]. Moreover, the petitioner submitted a program for the [REDACTED] without an English language translation, let alone a certified English language translation. If the petitioner was only claiming the beneficiary’s eligibility for this criterion based on the [REDACTED], it is unclear why the petitioner would submit documentary evidence regarding the [REDACTED]. On appeal, counsel makes no argument why the [REDACTED] documentary evidence was submitted at the initial filing of the petition.

The petitioner also submitted an uncertified translation of a course schedule from [REDACTED] ([REDACTED]) that reflected a short profile of the beneficiary but did not indicate that she participated as a judge of the work of others pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). On appeal, counsel does not claim that the beneficiary’s work with [REDACTED] demonstrates eligibility for this criterion. The AAO, therefore, considers this previous claim to be abandoned. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal to the AAO).

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 an uncertified translation of a purported invitation requesting the beneficiary to participate as a judge at [REDACTED] in the wig design department. The petitioner also submitted a copy of the cover of the program for the [REDACTED] with an uncertified translation claiming that the beneficiary was a judge in wig design. As the petitioner failed to

submit certified English language translations as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), the petitioner failed to establish that the beneficiary participated as a judge of the work of other at [REDACTED] consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

The petitioner also submitted a letter from [REDACTED] who stated that the beneficiary was a judge in the area of wig design [REDACTED]. However, [REDACTED] letter is not primary evidence of the beneficiary's participation as a judge at [REDACTED]. Again, the regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. In this case, it appears that primary evidence does exist in the form of [REDACTED] and invitation, but the petitioner failed to submit certified translations of the documents as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(3). Even if primary and secondary evidence do not exist, which it appears that they do, the petitioner only submitted one letter in which the plain language of the regulation at 8 C.F.R. § 103.2(b)(3) requires more than one affidavit.

For the reasons discussed above, the petitioner failed to demonstrate that the beneficiary served as a judge of the work of others in the same or an allied field of specification for which classification is sought at the time of the filing of the petition consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

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

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

The director determined that the petitioner failed to establish the beneficiary's 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 artistic-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).

A review of the record of proceeding reflects that the petitioner submitted a letter from [REDACTED] who stated:

[The petitioner] is one of the most respected hair designers in Japan because she is credited for creating the signature hairdo for Japan's top-billing supermodel [REDACTED] which has become the country's most popular hairdo known as [REDACTED]

chan Style,” the Japanese equivalent of [REDACTED]” in the United States. . . . This hairdo was created by [the petitioner] as inspired by one of Japanese traditional hairstyles. As demonstrated by her published portfolio which I understand has been submitted by her in connection with her immigration visa petition, her original [REDACTED] has been prominently featured in Japan’s best-selling fashion magazines, on top-rated television programs, and in advertisements by [REDACTED] and other global corporations. Her original hairdo has become immensely popular among girls and women all over Japan and its neighboring Asian counties [sic] and inspired professional hair designers and hair salons all over Asia to emulate it. In fact, this hairdo has been, still is, requested so often at hair salons, it has become [sic] the most popular hairstyle of all times in Asia.

While [REDACTED] claimed that [REDACTED] was created by the beneficiary and has been widely influential in Japan and neighboring countries, the record of proceeding does not support these claims. Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). In the case here, the beneficiary’s “Ebi-chan style” is not even mentioned in any the documentary evidence submitted in support of the other criteria. For example, a review of the uncertified translations discussed under the published material criterion, makes no mention of the hairstyle. Again the petitioner submitted several interviews with the beneficiary, yet the beneficiary was never asked about the [REDACTED]. Moreover, regarding the awards criterion, the uncertified translations do not indicate that any of the beneficiary’s purported awards were based on the [REDACTED]. The AAO notes that the petitioner submitted two additional recommendation letters for this criterion, which will be discussed further below, but the hairstyle is never referenced or mentioned. Regarding [REDACTED] reference to the beneficiary’s portfolio, the AAO already discussed the petitioner’s submission of uncertified translations of magazine covers of [REDACTED] and *non-no* under the published material criterion. Again, the uncertified translations simply credit the beneficiary as being the hairstylist for the individuals on the cover but make no reference to the [REDACTED]. As the documentary evidence submitted by the petitioner fails to support the claims made by [REDACTED] the petitioner failed to demonstrate that [REDACTED] can be considered an original contribution of major significance in the field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

Further, the petitioner submitted a letter from [REDACTED] of [REDACTED], who stated that the business has “long engaged [the petitioner] since 2006 as our creative consultant advising the management in terms of creating hairdos for fashion models in the company’s catalogues, commercials and other marketing and promotional campaigns.”

However, [REDACTED] failed to indicate any original contributions of major significance in the field as a whole. Instead, [REDACTED] briefly referenced the beneficiary's role at [REDACTED]

The petitioner also submitted a letter from [REDACTED] Asia Pacific, who indicated the beneficiary's skills and "remarkable talent." However, [REDACTED] did not indicate how the beneficiary's skills or talents are original contributions of major significance to the field. Merely having a diverse skill set is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the beneficiary has already used those unique skills to impact the field at a significant level in an original way. Furthermore, assuming the beneficiary's skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment labor certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm'r 1998).

While those familiar with the beneficiary's work generally describe it as "extraordinary," there is insufficient documentary evidence demonstrating that the beneficiary's work is of major significance. This regulatory criterion not only requires the beneficiary 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 beneficiary's contributions have already influenced the field. 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 (9th 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 the "letters from physics professors attesting to [the petitioner's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. Moreover, the letters considered above primarily contain bare assertions of the beneficiary's status in the field without providing specific examples of how those contributions rise to a level consistent with major significance in the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The lack of supporting evidence gives the AAO no basis to gauge the significance of the beneficiary'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. at 795. 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 beneficiary'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 beneficiary'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 beneficiary’s work has been unusually influential, widely applied throughout her field, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that she meets this criterion. The AAO notes even if the petitioner established that the [REDACTED] meets every element of this criterion, which it clearly has not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires more than one original contribution of major significance in the field.

Accordingly, the petitioner failed to establish that the beneficiary 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.

In the director’s decision, she determined that the “article published in Art-in-facts magazine in 2010” did not meet this criterion. On appeal, counsel states that the petitioner has never claimed the beneficiary’s eligibility for this criterion, and the petitioner never submitted an article that was “published in [REDACTED].” Further, counsel states that this criterion “is more pertinent to the determination of ‘an alien of extraordinary ability in the science or education,’ not in the artistic field. As counsel does not claim the beneficiary’s eligibility for this criterion on appeal, the AAO, therefore, considers this issue to be abandoned. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d at 1228 n. 2; *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *9, (the court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal to the AAO).

Accordingly, the petitioner failed to establish that the beneficiary 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 discussed the petitioner’s submission of a letter from [REDACTED] [REDACTED], who indicated that the beneficiary’s work has been selected for exhibition at [REDACTED] in July 2011. The director then indicated:

It should be noted that a petition cannot be filed under this classification based on the expectation of the beneficiary’s future eligibility. *See Matter of Katigbak*, 14 I & N Dec. 45, 49 (Regl. Commr. 1971). The instant petition was field [sic] on November 23, 2010, and the exhibition is scheduled for July 2011.

However, in the director's conclusion for this criterion, the director stated that "the evidence submitted does meet this criterion." On appeal, counsel states that "the Petitioner assumes that the USCIS intended to write 'As such, the evidence submitted does 'not' meet this criterion.'" A review of the record of proceeding reflects that the petition, as correctly indicated by the director, was filed on November 23, 2010. Moreover, [REDACTED] did, in fact, indicate that the beneficiary's work was selected to be exhibited at the TMAM in July 2011. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (2). Whether referencing an immigrant or a nonimmigrant classification, case law requires that an alien applying for a benefit, or a petitioner seeking an immigration status for a beneficiary, must demonstrate eligibility for the benefit or the status at the time the petition is filed. See *Matter of Pazandeh*, 19 I&N Dec. 884, 886 (BIA 1989) (citing *Matter of Atembe*, 19 I&N Dec. 427, 429 (BIA 1986); *Matter of Drigo*, 18 I&N Dec. 223, 224-225 (BIA 1982); *Matter of Bardouille*, 18 I&N Dec. 114, 116 (BIA 1981)). A petition may not be approved if the beneficiary or the self-petitioner was not qualified at the priority date. See *Matter of Katigbak*, 14 I&N Dec. at 49; see also *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978) regarding nonimmigrant petitions. The Regional Commissioner in *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977) emphasizes the importance of not obtaining a priority date prior to being eligible, based on future experience. This follows the policy of preventing affected parties from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. In fact, this principle has been extended beyond an alien's eligibility for the classification sought. For example, an employer must establish its ability to pay the proffered wage as of the date of filing. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Act. Reg'l Comm'r 1977), which provides that a petition should not become approvable under a new set of facts. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008). Therefore, the upcoming exhibition at the TMAM will not be considered to establish the beneficiary's eligibility for this criterion.

On appeal, counsel further states that the beneficiary is eligible for this criterion based on the exhibition of her work [REDACTED] and refers to [REDACTED] letter. Specifically, [REDACTED] stated that "from 2007 to 2009 . . . the photographs of her hair designs were selected for exhibition under the Fashion Division and prominently showcased at the [REDACTED]. However, the petitioner failed to submit primary evidence of the beneficiary's exhibition at the [REDACTED] as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(2). In fact, it appears that primary evidence may exist as indicated by [REDACTED]. In discussing the beneficiary's upcoming July 2011 exhibition, [REDACTED] stated that "[w]e will be more than happy to forward to your office under separate cover the catalogue of the [REDACTED] which will display her art work once it becomes available." As [REDACTED] indicated that [REDACTED] catalogue will be available, it is not unreasonable to conclude that catalogues for 2007 – 2009 may also exist. Thus, the petitioner's submission of a letter from [REDACTED] is insufficient to comply with the regulation at 8 C.F.R. § 103.2(b)(2). Even if the petitioner demonstrated that primary and secondary evidence do not exist, which it clearly did not, the petitioner only submitted one letter in which the plain language of the regulation at 8 C.F.R. § 103.2(b)(2) requires more than one affidavit.

For the reasons discussed above, the petitioner failed to demonstrate that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) that requires “[e]vidence of the display of the alien’s work in the field at artistic exhibitions or showcases.”

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

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

In the director’s decision, she determined that the petitioner failed to establish the beneficiary’s eligibility for this criterion. On appeal, counsel claims that the beneficiary is eligible based on her role with [REDACTED], and referred to the previously discussed letter from [REDACTED]. In addition, counsel claims that the director unlawfully interjected requirements by stating the beneficiary’s position was not permanent and thus implying that “‘leading or critical role’ the alien has performed must be ‘permanent.’”

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a *leading or critical role* for organizations or establishments that have a distinguished reputation [emphasis added].” In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment. As indicated previously, [REDACTED] briefly stated that the beneficiary has been engaged as creative consultant advising the management since 2006. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) does not require the alien’s role to be permanent. However, the petitioner must establish that the beneficiary’s role is leading or critical. In the case here, [REDACTED] letter failed to provide specific information such as the beneficiary’s job responsibilities, specific reporting requirements, or frequency of her consulting services, so as to demonstrate that she performed in a leading or critical role. Simply submitting a general letter indicating that the beneficiary served as a creative consultant is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) without evidence demonstrating that the beneficiary’s roles were leading or critical to the distinguished organization. There is no evidence comparing the roles of the beneficiary from the other employees in a similar position at [REDACTED], for example, so as to demonstrate that the beneficiary performed in a leading or critical role. In fact, when compared to the position of [REDACTED] who is the Senior Vice President, it appears that the beneficiary was in a subordinate role. In general, the AAO is not persuaded that sporadic, occasional, or one-time employment is reflective of leading or critical roles for organizations or establishments as a whole unless the petitioner submits documentation reflecting that the beneficiary’s role is leading or critical. In the case here, the submission of a letter that simply indicates that beneficiary’s job title is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires that the leading or critical role be “for organizations or establishments that have a distinguished reputation.” Although [REDACTED] provided some background information regarding [REDACTED]

Ltd., the petitioner failed to submit any independent, objective evidence demonstrating that the company has a distinguished reputation. [REDACTED]

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.” The burden is on the petitioner to establish that the beneficiary meets every element of this criterion. Even if the petitioner established that the beneficiary’s role was leading or critical and [REDACTED] has a distinguished reputation, which it clearly did not, the plain language of the regulatory criterion requires a leading or critical role with more than one organization or establishment in which the petitioner claimed the beneficiary’s eligibility based on only one organization. Without documentary evidence demonstrating that the beneficiary has performed in a leading or critical role for organizations or establishments that have a distinguished reputation, the AAO cannot conclude that the beneficiary meets this criterion.

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

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

The director determined that the petitioner failed to establish the beneficiary’s eligibility for this criterion. Specifically, the director stated:

The employment agreement of record shows that the beneficiary[’s] is \$6,500.00 per month. In response to the UCIS Request for Evidence (RFE) the petitioner provided additional information. However, the petitioner failed to demonstrate that the beneficiary has been actually paid the amount stipulated in the contract. The petitioner could have submitted for example copies of the beneficiary’s W-2, or similar foreign tax documents which establish yearly wages earned outside the U.S. The evidence of record is deficient.

On appeal, counsel states that that “the petitioner, through its attorneys, concurs with the USCIS’s conclusion: As such, the evidence of record does not meet this criterion.” As counsel does not claim the beneficiary’s eligibility for this criterion on appeal, the AAO, therefore, considers this issue to be abandoned. See *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d at 1228 n. 2; *Hristov v. Roark*, 2011 WL 4711885 at *9, (the court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal to the AAO).

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

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

In the director’s decision, she determined that the petitioner failed to submit any evidence for this criterion. On appeal, counsel states that “the Petitioner, through its attorneys, represents that the

petitioner did not submit any evidence pertinent to this specific criterion as correctly noted by the USCIS in the Decision.” As counsel does not claim the beneficiary’s eligibility for this criterion on appeal, the AAO, therefore, considers this issue to be abandoned. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d at 1228 n. 2; *Hristov v. Roark*, 2011 WL 4711885 at *9, (the court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal to the AAO).

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

B. Summary

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

IV. O-1 NONIMMIGRANT ADMISSION

At the time of the filing of the petition, the beneficiary was last admitted to the United States on October 11, 2010, as an O-1 nonimmigrant visa petition for an alien of extraordinary ability in the arts. Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states that “[t]he term ‘extraordinary ability’ means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(o)(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines extraordinary ability as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the beneficiary’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 case must be decided on a case-by-case basis upon review of the evidence of record.

However, while USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed.

Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner'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*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *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).

V. CONCLUSION

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

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.⁴ Rather, the proper conclusion is that the

⁴ The AAO maintains *de novo* review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003);

petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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

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

ORDER: The appeal is dismissed.