

Identifying data deleted to
prevent disclosure of sensitive information 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: JUN 18 2012 Office: TEXAS SERVICE CENTER



IN RE: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

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

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien’s “sustained national or international acclaim” and present “extensive documentation” of the alien’s achievements. See section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). 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 submits a brief and additional evidence and asserts that the petitioner meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3). Further, counsel asserts that the director made a material error that the petitioner relied upon when the director stated in the notice of intent to deny that the critical role criterion had been met, but stated that no evidence had been submitted under that criterion in the denial. Counsel also asserts that the director failed to separate the two-part approach stating that “this constitutes harmful error.” The remedy for counsel’s first concern is for the AAO to consider all the evidence on appeal. Regarding counsel’s second concern, upon review of the entire record, the AAO finds the errors to be harmless, as the petitioner does not meet three of the ten regulatory categories of evidence. For the reasons discussed below, the AAO upholds the director’s ultimate conclusion that the petitioner has not established his eligibility for the exclusive classification sought. The AAO conducts appellate review on a *de novo* basis. AAO’s *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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)).

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).

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 antecedent regulatory requirement of three types of evidence. *Id.*

II. INTENT TO CONTINUE TO WORK IN THE AREA OF EXPERTISE

The AAO notes here that in Part 5 of Form I-140, Immigrant Petition for Alien Worker, the petitioner listed his occupation as a “Fencing Instructor.” In addition, in Part 6, the petitioner listed his proposed job title as “Fencing Coach.” Further, the petitioner submitted an employment agreement between the petitioner and Woodlands Fencing Foundation, LLC which references the petitioner as “Coach” and a letter of support from Woodlands Fencing Foundation, LLC which refers to the petitioner as both a “Fencing Instructor” and a “Coach.” Thus, the record reflects that the petitioner is seeking classification as an alien of extraordinary ability as an instructor or coach rather than as a competitor. Even though the petitioner submitted documentation regarding his involvement in earlier tournaments as a competitor, the record reflects the petitioner’s intent to work in the United States as a coach.

The statute and regulations require the petitioner’s national or international acclaim to be *sustained* and that he seeks to continue work in his area of expertise in the United States. *See* sections 203(b)(1)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1153(b)(1)(A)(i) and (ii), and 8 C.F.R. §§ 204.5(h)(3) and (5). While a fencing coach and a fencer share knowledge of the sport, the two rely on very different sets of basic skills. Thus, instruction and competition are not the same area of expertise. This interpretation has been upheld in federal court. In *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

It is reasonable to interpret continuing to work in one’s “area of extraordinary ability” as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee’s extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

Id. at 918. The court noted a consistent history in this area. While the record demonstrates that the petitioner intends to work as a coach, there is no evidence indicating that he intends to compete as an athlete in the United States. While the AAO acknowledges the possibility of an alien’s extraordinary claim in more than one field, such as fencing coach and fencer, the petitioner, however, must demonstrate “by clear evidence that the alien is coming to the United States to continue work in the area of expertise.” *See* 8 C.F.R. § 204.5(h)(5).

Based on the petitioner’s answers to the questions on Form I-140 and the submitted documentation, the record reflects that the petitioner intends to continue to work in the area of coaching rather than

competition. It should also be noted that, according to the record, the petitioner has been coaching since 1988 and, thus, has had plenty of opportunity to earn acclaim as a coach. Ultimately, the petitioner must satisfy the regulation at 8 C.F.R. § 204.5(h)(3) through his achievements as a fencing coach. As such, the evidence submitted by the petitioner regarding his achievements as a competitor will not be considered here.

III. ANALYSIS

A. Prior O-1

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, classification. 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).

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).

B. Comparable Evidence Under 8 C.F.R. § 204.5(h)(4)

On appeal, counsel asserts that letters from renowned fencing coaches "demonstrate comparable evidence of [the petitioner]'s satisfying the criterion that he has participated as a 'judge of the work of others' (other coaches) as well as evidence of his significant, original contributions to the sport of fencing." The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten categories of evidence "do not readily apply to the beneficiary's occupation." Thus, it is the petitioner's burden to demonstrate why the regulatory criteria at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the alien's occupation and how the evidence submitted is "comparable" to the specific objective evidence required at 8 C.F.R. §§ 204.5(h)(3)(i) – (x).

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that a sufficient number of the ten criteria specified by the regulation at 8 C.F.R.

§ 204.5(h)(3) are not readily applicable to the occupation of fencing coach. In fact, the petitioner submitted evidence with the original Form I-140 that specifically addresses five of the ten categories of evidence set forth in the regulation at 8 C.F.R. § 204.5(h)(3) and on appeal, counsel asserts that the petitioner “qualifies under 8 C.F.R. § 204.5(h)(3)(i), (ii), (iii), (iv), (v), (viii) as well as 8 C.F.R. § 204.5(h)(4).” Where an alien is simply unable to satisfy the plain language requirements of at least three categories of evidence at 8 C.F.R. § 204.5(h)(3), the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. Nevertheless, the AAO will not ignore the letters and will consider them later in this decision.

Counsel further asserts that the letters “must be given substantial weight” because “they are corroborated by other evidence.” Much of the other evidence of record, however, is printed from *Wikipedia*. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.² See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008).

C. Evidentiary Criteria³

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

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires “[d]ocumentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the *field of endeavor* [emphasis added].” USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian*, 596 F.3d at 1221, citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). Therefore, any prizes or awards that may have been garnered by the petitioner as a competitor cannot be considered here, as they are not

² 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, accessed on June 15, 2012, a copy of which is incorporated into the record of proceeding.

³ The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

within the petitioner's field of endeavor as a fencing coach. *See Lee v. I.N.S.*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise).

Regarding the awards of the petitioner's students, they do not meet the plain language of this criterion, which requires the petitioner's receipt of qualifying awards or prizes. They also cannot be considered comparable evidence. It is the petitioner's burden to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the petitioner's occupation. 8 C.F.R. § 204.5(h)(4). The AAO notes that the submitted documentation shows that qualifying awards may exist for fencing coaches. For instance, the petitioner submitted a reference letter from [REDACTED] stating that he "was inducted into the United States Fencing Hall of Fame" in 2010 based on his achievements as a coach. Similarly, [REDACTED] states that he "received the USSR Medal of Merit for [his] performance as a Coach at the Olympic Games in Seoul." While the AAO need not and does not decide whether these honors might be qualifying nationally or internationally recognized prizes or awards, they suggest, especially in the absence of evidence to the contrary, that this criterion may well be readily applicable to the petitioner's occupation. The record does not contain evidence that the petitioner has received nationally or internationally recognized prizes or awards for excellence in coaching.

In light of the above, the petitioner has not established that he meets the plain language requirements of this regulatory 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.

The plain language of this regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires evidence of the "alien's membership in associations in the field for which classification is sought." As previously stated, the field for which the petitioner seeks classification in this matter is coaching. As such, the petitioner's membership on the Soviet National Fencing Team from 1982-1991 cannot be considered under this regulatory criterion for purposes of establishing his extraordinary ability as a coach.

Furthermore, as acknowledged by counsel on appeal, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires the petitioner's 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(i)(2) requires a single degree rather than a combination of academic credentials). Although counsel asserts that because the petitioner “was a member of the most select association possible” that “memberships in other associations, even if they existed, would be superfluous.” there is nothing in the regulations to allow for the waiver of the plural requirement.

In light of the above, the petitioner has not established that he meets the plain language requirements of 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.

On appeal, counsel asserts that the director erred in rejecting articles that are not primarily about the petitioner. 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.” Articles about competitions are not “about” each athlete referenced in the articles. *See generally Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). Regardless, for the reasons discussed above, the AAO will only consider the submitted articles which refer to the petitioner’s achievements as a coach.

Further, in order for published material to meet this criterion, it must 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.⁴

In addition, the plain language of the regulation requires that “[s]uch evidence shall include the title, date, and author of the material, and any necessary translation.”

The only article submitted which definitively relates to the petitioner as a coach, and not a competitor, is the July 3, 2009 article in *The Courier of Montgomery County*. However, the article is primarily about the petitioner’s student and not the petitioner. Furthermore, there is no evidence that the paper qualifies as major media.

The AAO notes that there was another article entitled “The Last of the Mohicans” which may have relied on the petitioner’s coaching experience. However, a complete translation was not provided, contrary to counsel’s claim, and therefore cannot be considered here. 8 C.F.R. § 103.2(b)(3).

⁴ 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.

In light of the above, the petitioner has not established that he 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.

It should be noted that counsel had not previously asserted a claim under 8 C.F.R. § 204.5(h)(3)(iv). On appeal, counsel asserts that letters from renowned fencing coaches “demonstrate comparable evidence of the [the petitioner]’s satisfying the criterion that he has participated as a ‘judge of the work of others’ (other coaches)” and that the petitioner “fulfills the requirement of judge of the work of others (athletes coached)” based upon the success of his students. With regard to the letters serving as comparable evidence, as previously stated above, where an alien is simply unable to satisfy the plain language requirements of at least three categories of evidence at 8 C.F.R. § 204.5(h)(3), the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. Furthermore, it should be noted that the authors of the letters do not claim that the petitioner meets this criterion. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The term “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). Serving as a coach as part of one’s job does not equate to participation as a judge of the work of others. Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence of the alien’s participation...as a judge.” The absence of evidence of the petitioner’s participation (such as judging slips, event programs identifying the petitioner as a judge, or a judge’s credential from events) is a significant omission from the record. The benefit sought in the present matter is not the type for which documentation is typically unavailable and the statute specifically requires “extensive documentation” to establish eligibility. See section 203(b)(1)(A)(i) of the Act.

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 light of the above, the petitioner has not established that he 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 concluded that the petitioner did not meet this criterion under 8 C.F.R. § 204.5(h)(3)(v). While the AAO agrees with the director that “[l]etters of support alone are not sufficient to meet this criterion,” the AAO finds that the director erred in his conclusion. In addition to the letters from experts and colleagues, the record contains evidence of the awards, competitive results, and rankings

of fencers coached the petitioner coached. The AAO finds that the preceding documentation is sufficient to demonstrate that the petitioner meets this regulatory criterion as a coach.

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

In the original filing, counsel asserts that the petitioner “performed a critical role for Estonia as Head Coach of the National Women’s team and the USSR as an individual and team champion as well as a coach for other Estonian fencers” and that the petitioner “performed a critical role for Alliance Fencing Academy” and “is currently performing a critical role at “Woodlands Fencing Academy.” Again, the AAO will only address the petitioner’s roles as a coach. *See Lee v. I.N.S.*, 237 F. Supp. 2d at 918. While the record contains sufficient evidence that the petitioner performs in a leading or critical role for his current employer, there is no documentary evidence that the petitioner’s employer has a distinguished reputation.

Furthermore, as noted by counsel on appeal, the regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence of experience “shall” consist of letters from employers. The petitioner failed to provide letters from any former employers. As a result, the AAO cannot determine whether the petitioner performed in a leading or critical role for any previous employer with a distinguished reputation, including the Estonian National Women’s team.

As previously discussed, the use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence that the petitioner has performed in a leading or critical role for distinguished “organizations or establishments” in the plural. Therefore, even if the petitioner were to submit documentary evidence showing that his current employer is distinguished, which the petitioner has not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence of a leading or critical role for more than one distinguished organization or establishment.

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

D. Summary

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

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.

Had the petitioner 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.⁵ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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

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

ORDER: The appeal is dismissed.

⁵ 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); *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).