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



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

**PUBLIC COPY**

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DATE: **MAR 12 2012**

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [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:

**INSTRUCTIONS:**

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

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

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of her sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserts that the petitioner meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3). For the reasons discussed below, the AAO will uphold the director's decision.

## I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

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

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

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

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

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

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

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

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

II. ANALYSIS

A. Evidentiary Criteria

This petition, filed on March 25, 2010, seeks to classify the petitioner as an alien with extraordinary ability as an actress. The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(h)(3).<sup>2</sup>

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

The petitioner submitted documentation indicating that the television show [redacted] won "Best Factual" program at the [redacted]. The two [redacted] listings submitted by the petitioner specifically identify [redacted] as the recipient. The petitioner also submitted a list of credits and a letter from producer [redacted] indicating that the petitioner served as narrator for the television program. The preceding [redacted] award was presented to the "[redacted] production company for its show [redacted] rather than to the petitioner for her excellence in the field of acting. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires documentation of "the alien's receipt" of nationally or internationally recognized prizes or awards, not her employer's receipt of the award.

The petitioner submitted a letter from [redacted] stating: [redacted] first sponsored [the petitioner] to come across to the USA and Canada in the lead role of [redacted] in the production of the same name. . . . The play received [redacted]. . . in Philadelphia, PA at the [redacted]. The petitioner also submitted a printout from the website of the [redacted] stating:

Each year, at the [redacted] awards an [redacted] to children's theatre companies who show excellence in their ability to interact with sponsors in a prompt, efficient and compatible manner, and who demonstrate a positive attitude toward their art.

Past recipients are:

Year:	Performance/Company:	Country:
2001	[redacted]	Scotland

\* \* \*

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

On appeal, the petitioner submits a September 13, 2010 letter from [REDACTED], stating:

I am [REDACTED] which is an annual performing arts festival that showcases the finest international work for young people.

\* \* \*

It is for artists to perform, exhibit, and develop their work for an audience of presenters who book shows specifically for young people and their families.

\* \* \*

The [REDACTED] was established in the late 1990s as a way of recognizing excellence in performing arts for young people. In the early years, the award was voted on by Showcase technicians and was a sort of “congeniality prize.” For the last four years, the award has been a “people’s choice” of favorite performances from the [REDACTED]

\* \* \*

I can gladly confirm that [the beneficiary] was the lead actress in the solo show, [REDACTED] when it was awarded the [REDACTED] in 2002, and she performed in Philadelphia.

Although the printout from the website of the [REDACTED] specifically indicates that [REDACTED] received a [REDACTED] in 2001, the letter from [REDACTED] states that the show received the award in 2002. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, according to the letter from [REDACTED] did not become a “people’s choice” award until 2006. [REDACTED] states that “[i]n the early years, the award was voted on by Showcase technicians and was a sort of ‘congeniality prize.’” Moreover, the printout from the website of the [REDACTED] states that the award was presented “to children’s theatre companies who show excellence in their ability to interact with sponsors in a prompt, efficient and compatible manner, and who demonstrate a positive attitude toward their art.” The AAO cannot conclude that an award presented to a theatre company or performance in general for excellence in its “ability to interact with sponsors in a prompt, efficient and compatible manner” and for demonstrating “a positive attitude toward their art” constitutes “the alien’s receipt” of a nationally or internationally recognized award for excellence in acting. In addition to the preceding deficiencies, the petitioner failed to demonstrate the national or international *recognition* of the [REDACTED] received by her show. The plain language of the regulation at

8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is her burden to establish every element of this criterion. In this case, the petitioner has not established that the [REDACTED] received by [REDACTED] was recognized beyond the presenting organization and therefore commensurate with a nationally or internationally recognized award for excellence in the field.

The petitioner submitted a December 15, 2009 letter from the [REDACTED] stating that [REDACTED] was commended in the In [REDACTED] it won the [REDACTED] for [REDACTED] and [REDACTED] was awarded the [REDACTED] in 1994." The petitioner also submitted a May 2007 letter from [REDACTED] stating: "I have known [the petitioner] for many years, having employed her as a presenter on various projects, including the *Rough Guide to Glasgow University* in 1992 . . . . Indeed, the programme won several Royal Television Society Awards for its excellence and innovative style . . . ." The petitioner's evidence also included three RTS Scottish Centre certificates stating that "University of Glasgow [REDACTED]" won the [REDACTED]" (emphasis added), that [REDACTED] won the [REDACTED]" and that that [REDACTED] was "Commended" in the [REDACTED]. As previously discussed, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires documentation of "the alien's receipt" of nationally or internationally recognized prizes or awards in the field of endeavor. There is no evidence showing that the petitioner herself received an award from the RTS for excellence in the field of acting.

The petitioner submitted an August 2008 certificate stating that [REDACTED] [REDACTED]" won the [REDACTED]" [REDACTED]" This award was presented to [REDACTED] and the plain language of this regulatory criterion requires documentation of "the alien's receipt" of nationally or internationally recognized prizes or awards, not her theatre company's receipt of the award. Further, there is no documentary evidence showing that the preceding award is a "nationally or internationally recognized" award for excellence in the field of acting.

The petitioner submitted a letter from [REDACTED] stating:

The [REDACTED] is the body with responsibility for supporting and developing the arts in [REDACTED] and receives funding from the [REDACTED] and the [REDACTED]. Amongst other responsibilities I am responsible for the allocation of grants to individual theatre artists. I am well aware of the work of [the petitioner] and have twice supported her applications for professional development and have seen her perform.

\* \* \*

[The petitioner] has secured two grants awards from the [REDACTED] which are under huge competition due to a healthy and vibrant arts scene.

Regarding the two [REDACTED] “professional development” grants for which the petitioner applied and received funding, there is no documentary evidence showing that they equate to nationally or internationally recognized prizes or awards for excellence in the field of endeavor. Such grants are principally designed to fund future art projects, and not to honor or recognize excellence in the field of endeavor.

The petitioner submitted documentation indicating that she performed in various roles in [REDACTED] and that the production garnered [REDACTED] “nominations” for “Best Male Performance,” “Best New Play,” “Best Technical Performance,” and “Best Production.” There is no evidence showing that the production ultimately received any of the preceding CATS awards. The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires evidence of “the alien’s receipt” of nationally or internationally recognized “prizes or awards” for excellence in the field of endeavor. Earning a nomination does not equate to receipt of a prize or an award. Further, there is no evidence showing that the petitioner herself received an award or nomination from CATS for her excellence in the field of acting.

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

*Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.*

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.<sup>3</sup>

The petitioner submitted a December 17, 2009 article in [REDACTED], but the author of the material were not identified as required by the plain language of this regulatory criterion. The petitioner also submitted information printed from *The Stage*’s website indicating that the newspaper has “18,611 Total Average Net Circulation Per Issue.” In response to the director’s request for evidence, the petitioner submitted information from *The Stage*’s media kit indicating that the magazine had “21,362 Average Net Circulation” from July 2007 to June 2008. The petitioner failed to submit documentary evidence showing the distribution of *The Stage* relative to other media to demonstrate that the newspaper equates to a “major” trade publication or some other form of “major” media.

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

The petitioner submitted an article in the Fall/Winter 2009 issue of [REDACTED] entitled [REDACTED] [The petitioner],” but the author of the material was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Further, there is no circulation evidence showing that *Cross Platform Arts Quarterly* qualifies as a “major” trade publication or some other form of “major” media.

The petitioner submitted additional articles in [REDACTED] and [REDACTED] but the articles are not about the petitioner. Instead, the articles are about productions in which the petitioner appeared and the material fails to identify her or only briefly mentions her in passing. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be “about the alien.” See, e.g., *Accord Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*1,\*7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor).

The petitioner submitted an article written by her in the June 2006 issue of [REDACTED] entitled “[REDACTED]” This article constitutes material written by the petitioner about her own work rather than published material about herself. Thus, the article does not meet the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Further, there is no circulation evidence showing that *Writernet Bulletin* qualifies as a “major” trade publication or some other form of “major” media.

In response to the director’s request for evidence, counsel asserts that the “entertainment magazine, *Time Out*, published an article about [the petitioner] entitled [REDACTED] for [REDACTED]” The record, however, does not include a copy of the article about the petitioner published in *Time Out* magazine. Counsel also asserts that an interview of the petitioner by [REDACTED] “was webcast on [REDACTED] website as part of a [REDACTED] series.” The petitioner submitted a typed transcript of the [REDACTED] interview, but there is no evidence demonstrating that the interview was webcasted on [REDACTED] internet site or evidence showing the number of downloads of the petitioner’s interview. Counsel also claims that the petitioner appeared on the reality television show [REDACTED] but the petitioner failed to submit video footage of her appearance on the show or other evidence indicating that the show was about her. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The petitioner submitted a June 10, 2010 e-mail from [REDACTED] of [REDACTED] England stating: “I can confirm that Spirit fm broadcasts *county-wide* (throughout West-Sussex). Our total Survey Area comprises 209,000 people, with current figures suggesting

that 89,000 listeners are tuned in at any time. Your interview was conducted by Spirit's the Programme Controller, [REDACTED] [Emphasis added.] The record does not include a transcript of the radio interview, evidence showing the date of the broadcast, or documentation showing that program in which the petitioner aired "county-wide" qualified as a form of major media.

The petitioner submitted a [REDACTED] cover for its [REDACTED] stating: [REDACTED] broadcast Sunday 21 November 2004 'Shakespeare for Beginners' *King Lear* in [REDACTED]. The petitioner also submitted what she identifies as a partial transcript of an interview (consisting of a half page) of her for a television documentary airing on [REDACTED]. The petitioner's evidence also included a [REDACTED] viewing summary indicating that BBC 2 (BBC Artworks) had an "Average Daily Reach" of over 13 million viewers. There is no evidence showing that the televised documentary or DVD was about the petitioner. Instead, it appears that the documentary was about the Tag Theater Company's "Shakespeare for Beginners" *King Lear* production with elementary school students in [REDACTED].

The petitioner submitted a letter from [REDACTED] on [REDACTED] 94.4 FM, stating that he broadcast an interview of the petitioner in October 2008 and that his radio station has a listenership of around "300,000 people in [REDACTED] and the wider North West of England." The petitioner also submitted a transcript of the interview which indicates that the petitioner was on the program to promote "the new CBBC series [REDACTED] in which she was replacing actress [REDACTED]. The petitioner's evidence also included advertising material printed from [REDACTED] internet site stating that the station has "a potential audience of 300,000 people." The self-serving nature of [REDACTED] assertion regarding his radio station's listenership and the promotional material printed from the station's website are not sufficient to demonstrate that his radio program is a form of major media in England. USCIS need not rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 317 Fed. Appx. 680 (9<sup>th</sup> Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). There is no documentary evidence showing the listenership of [REDACTED] radio show relative to other broadcast media to demonstrate that his regional radio show qualifies as a form of "major" media.

Finally, regarding the preceding television and radio programs that included the petitioner, the plain language of this regulatory criterion requires "published material about the alien" including "the title, date and author of the material." A radio or television interview featuring the petitioner does not meet these requirements.

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

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

In counsel's brief, she did not contest the findings of the director for this regulatory criterion or offer additional arguments. The AAO, therefore, considers this issue 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). Accordingly, the petitioner has not established that she meets this regulatory criterion.

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

In counsel's brief, she did not contest the findings of the director for this regulatory criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885 at \*9. Accordingly, the petitioner has not established that she meets this regulatory criterion.

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

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. The petitioner asserted that her theater, television, and film performances meet this criterion. The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*1, \*7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

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

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. The petitioner submitted evidence of her theatrical performances in [REDACTED]

[REDACTED] The petitioner also submitted documentation indicating that she narrated the television documentary *My Childhood*, and that she performed in supporting roles in the television drama series [REDACTED] and in the feature film [REDACTED]. However, 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.] The petitioner failed to demonstrate how a theatrical performance, television show, or feature film equates to an "organization" or "establishment." Regardless, there is no evidence demonstrating that the petitioner's roles in [REDACTED] and [REDACTED] were leading or critical, or that the productions of [REDACTED]

██████████ and ██████████ earned a distinguished reputation relative to other theatrical productions.

The petitioner submitted a January 2010 letter from ██████████, Los Angeles, stating:

[The petitioner] auditioned for the post of trainee radio announcer in November 2008, and we were impressed by her talent and took her on.

Since that time she has made extraordinary leaps in the institution of American Radio Network and now hosts the ██████████ show weekly for KCLA FM, which has a listenership of 587,000,000 and is broadcast in 99.3FM. She is a popular talk show and features presenter and her show has a cult following in LA at least, judging from the correspondence we receive.

The record lacks documentary evidence to support ██████████ self-serving assertion that KCLA FM has a listenership of 587,000,000. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Further, USCIS need not rely on self-promotional material. See *Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 317 Fed. Appx. 680 (9<sup>th</sup> Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). There is no documentary evidence showing that the American Radio Network has a distinguished reputation in the broadcast industry. Further, there is no evidence demonstrating that petitioner's role was leading or critical to the company as a whole. The petitioner's evidence fails to demonstrate how her role differentiated her from the other radio hosts and announcers who work for the network, let alone its prime time radio hosts and senior management. The documentation submitted by the petitioner does not establish that she was responsible for the American Radio Network's success or standing to a degree consistent with the meaning of "leading or critical role."

In light of the above, the petitioner has not established that she meets this regulatory 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 petitioner submitted a transaction statement from ██████████, reflecting nineteen payments to her from April 6, 2009 to January 19, 2010 totaling \$19,790 for her narration and voice over services for ██████████. The transaction statement does not specify the number of hours worked for each remittance. In response to the director's request for evidence, the petitioner submitted evidence of a £2,500 payment to her from ICS for a voice over for a 60 second television commercial (2006). The petitioner also submitted four June 14, 2004 remittances from the ██████████, reflecting payment of £12,000 for five days of work on "██████████" payment of £21,000 for one day of work on "██████████ Campaign," payment of £4,521.52 for two days work on "██████████" and a payment of £5,500 for one day of work on "There is no ██████████". The petitioner's response also included a 2006

remittance from [REDACTED] in the amount of £2,300, two [REDACTED] paystubs from 2001 reflecting one hour's pay at a rate of £680, a 2006 paystub from the [REDACTED] [REDACTED] reflecting one hour's pay at a rate of £393, and bank statements from the [REDACTED] dated 2001 through 2004.

As evidence that the petitioner earns "a high salary or other significantly high remuneration for services, in relation to others in the field," the petitioner submitted information from the Department of Labor's *Occupational Outlook Handbook* (OOH), 2010-11 Edition, stating:

Many of the most successful actors, producers, and directors have extraordinarily high earnings, but many more of these professionals, faced with erratic earnings, supplement their income by holding jobs in other fields.

Median hourly wages of actors were \$16.59 in May 2008. The middle 50 percent earned between \$9.81 and \$29.57. Median hourly wages were \$14.48 in performing arts companies and \$28.72 in the motion picture and video industry. Annual wage data for actors were not available because of the wide variation in the number of hours worked by actors and the short-term nature of many jobs, which may last for 1 day or 1 week; it is extremely rare for actors to have guaranteed employment that exceeds 3 to 6 months.

\* \* \*

Minimum salaries, hours of work, and other conditions of employment are often covered in collective bargaining agreements between the producers and the unions representing workers. While these unions generally determine minimum salaries, any actor or director may negotiate for a salary higher than the minimum.

A joint agreement between the [REDACTED] and the [REDACTED] of [REDACTED] guarantees all unionized motion picture and television actors with speaking parts a minimum daily rate of \$782 or \$2,713 for a 5-day week as of June 2009. Actors also receive contributions to their health and pension plans and additional compensation for reruns and foreign telecasts of the productions in which they appear.

Some well-known actors earn well above the minimum; their salaries are many times the figures cited here, creating the false impression that all actors are highly paid. For example, of the nearly 100,000 SAG members, only about 50 might fall into this category. The average income that SAG members earn from acting is low because employment is sporadic and most actors must supplement their incomes by holding jobs in other occupations.

Actors Equity Association (AEA), which represents stage actors, has negotiated minimum weekly salary requirements for their members. Salaries vary depending on the theater or venue the actor is employed in.

The petitioner's response also included contractual minimum compensation guidelines for British Equity and the SAG, but such minimum earnings standards do not establish that the petitioner earned "significantly high remuneration" for her acting or voice over services. The petitioner's reliance on minimum or median hourly wages is not an appropriate basis for comparison in demonstrating that her earnings constitute a "*significantly high* remuneration for services, in relation to others in the field." [Emphasis added.] The record is void of reliable earnings evidence showing that the petitioner has received a "high salary" or "significantly high remuneration" in comparison with those performing similar theatrical or voice over work. See *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994) (considering professional golfer's earnings versus other PGA Tour golfers); see also *Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). In the present matter, the documentary evidence submitted by the petitioner does not establish that she has received significantly high remuneration for services in relation to others in the field.

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

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

This regulatory criterion focuses on volume of sales and box office receipts as a measure of the petitioner's commercial success in the performing arts. Therefore, the mere fact that a petitioner has performed in theatrical, motion picture, or television productions would be insufficient, in and of itself, to meet this criterion. The evidence must show that the volume of sales and box office receipts reflect the petitioner's commercial success relative to other actresses involved in similar pursuits in the performing arts.

In response to the director's request for evidence, counsel asserts that the petitioner's voice over work for eHarmony's advertising campaign meets this regulatory criterion. The petitioner submitted eHarmony television ratings and "Radio Impacts & Ratings" for 2009 and 2010 showing the reach of the company's advertising. The petitioner also submitted material from the company's media kit. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires "evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales." Counsel does not explain how an advertising campaign for eHarmony equates to "the performing arts." Moreover, eHarmony's ability to reach a mass audience through purchasing radio and television airtime for its commercials does not translate to the petitioner's commercial success as an actress. Thus, the petitioner's participation in eHarmony's advertising campaign does not meet the plain language requirements of this regulatory criterion.

The petitioner asserts that she appeared on the reality television show [REDACTED] but she failed to submit documentary evidence of her appearance on the show. Regardless, there is no evidence demonstrating that the commercial success of [REDACTED]

██████████ is attributable to the petitioner, as opposed to the ██████████ and the show's producers.

The petitioner submitted a ██████████ indicating that from October 3, 2001 to June 8, 2002 the show ██████████ grossed a total of \$63,400 in Canadian revenue and a total of \$193,200 in United States revenue in performances at more than thirty different venues. There is no evidence demonstrating that these total gross revenue amounts for such a large number of venues are indicative of commercial success when compared to the gross revenues generated by other traveling theatrical productions.

The petitioner submitted a letter from ██████████ stating that ██████████ consistently attracted audiences of 60% capacity across the tour. ██████████ letter also lists three venues where the show performed, but there is no documentary evidence of sales or box office receipts demonstrating that the show was commercially successful.

The petitioner submitted a letter from ██████████ stating that the petitioner performed with his group "for a 6 month tour of ██████████ playing . . . the ██████████ in Autumn 2003 – Spring 2004." ██████████ further states: "Overall on [the petitioner's] tour, ██████████ filled 75% of available seats which is very unusual, and one of the many reasons why it has been sold on to other theatre companies and still tours today." There is no documentary evidence of sales or box office receipts demonstrating that the show was commercially successful. Further, there is no indication any such success was primarily attributable to the petitioner's role in the show.

The petitioner submitted a June 8, 2010 letter from ██████████, stating that the petitioner wrote and performed the stage adaptation of ██████████ as a solo show in 2000, but there is no documentary evidence of sales or box office receipts demonstrating that the show was commercially successful.

The petitioner submitted a letter from ██████████ stating:

The petitioner played the title role in ██████████ and the show was a great commercial success.

\* \* \*

The ██████████ playing to standing room only houses throughout its run at ██████████ our permanent theatre in ██████████ (over 15,000 attendees), and similarly on our neighbor island touring production (an additional 7000).

██████████ asserts that the petitioner's show was "a great commercial success," but 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

plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires “[e]vidence of *commercial successes* in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.” [Emphasis added.] According to *Merriam-Webster*, a commercial success is defined as “viewed with regard to profit” and “designed for a large market.”<sup>4</sup> Although the petitioner submitted documentation indicating that ██████ grossed a total of \$63,400 in Canadian revenue and a total of \$193,200 in United States revenue, that ██████ consistently attracted audiences of 60% capacity across the tour, that ██████ filled 75% of available seats, and that ██████ played to standing room only houses at ██████ with over 15,000 attendees during the 2007 – 2008 season, the documentary evidence fails to demonstrate evidence of the petitioner’s commercial successes consistent with the meaning of the regulation at 8 C.F.R. § 204.5(h)(3)(x). In this case, the petitioner has not established that the size and attendance of the venues where she performed in ██████ are indicative of commercial success relative to other productions in the theatrical and entertainment industry. For instance, the AAO is not persuaded that attracting a “standing room only” audience at the ██████ (attendance capacity of only 315 seats) equates to commercial success in the petitioner’s field.

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

#### B. Summary

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

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

The record reflects that the petitioner was the beneficiary of an approved 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, “The term ‘extraordinary ability’ means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(o)(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines extraordinary ability as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the petitioner’s receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Further, the AAO does not find that an approval of a nonimmigrant visa

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<sup>4</sup> See <http://www.merriam-webster.com/dictionary/commercial>, accessed on March 6, 2012, copy incorporated into the record of proceeding.

mandates the approval of a similar immigrant visa. Each petition must be decided on a case-by-case basis upon review of the evidence of record.

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

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

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

### III. CONCLUSION

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

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

final merits determination.<sup>5</sup> 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.

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<sup>5</sup> 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).