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



U.S. Citizenship
and Immigration
Services

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B₂

DATE: **MAR 16 2012** OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, on May 17, 2010, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

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

On appeal, counsel claims that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. Law

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

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

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

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

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

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

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

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

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

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

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

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

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

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at 1119.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

II. Analysis

A. Evidentiary Criteria

This petition, filed on September 28, 2009, seeks to classify the petitioner as an alien with extraordinary ability as an ice figure skater. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).²

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

In the director's decision, he determined that the petitioner established eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence demonstrating that he meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requiring "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor." As such, the AAO agrees with the findings of the director for this criterion.

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

The director determined that the petitioner failed to establish eligibility for this criterion. On appeal, in counsel's brief submitted on appeal, counsel claims the petitioner's eligibility for this criterion based on his membership with the "Israeli National Ice Skating team [INIST]," the International Skating Union Grand Prix (ISUGP), and the International Skating Union (ISU).

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.

² On appeal, the petitioner does not claim to meet any criteria not discussed in this decision.

Regarding INIST, the record contains no evidence reflecting that the petitioner was a member of “INIST.” In fact, there is no evidence that INIST even exists. However, the petitioner submitted a letter from [REDACTED] who stated that the petitioner and [REDACTED] “were the first ever pair figure skating team to represent the nation of Israel.” Nonetheless, counsel claims that “[m]embership on the national team (for any sport), by definition, requires outstanding achievements of its members as judged by experts – national and international – in that sport.” While the petitioner submitted sufficient documentation reflecting that he was a member of IISF from 2000 – 2008, an alien’s participation as a member of a national team that competes internationally may demonstrate eligibility for this criterion as such teams are limited in the number of members and have a rigorous selection process. It is the petitioner’s burden, however, to demonstrate that he meets every element of a given criterion, including that he is a member of a team that requires outstanding achievements of its members as judged by recognized national or international experts in their fields or disciplines. The AAO will not presume that every national “team” is sufficiently exclusive. In this case, the petitioner submitted screenshots from <http://iisf.org.il> that reflect the history and background of ISSF. However, the screenshots fail to demonstrate the membership requirements for ISSF, so as to reflect that outstanding achievements, as judged by recognized national or international experts, are required for membership with IISF. As such, the petitioner failed to establish that his membership with IISF meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

Regarding ISUGP, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires “the alien’s membership in *associations* [emphasis added].” However, according to the ISU’s “Communication No. 1023” regarding the ISUGP that was submitted by the petitioner, the Grand Prix is a series of international invitational *competitions* organized by the ISU. The AAO is not persuaded that competitions equate to associations. Hence, competing in the ISUGP does not qualify for eligibility pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

Regarding ISU, in counsel’s appellate brief, counsel claims:

[The petitioner] is a member of the [ISU] as a competitor in international figure skating events, including the [ISUGP], as well as World Championships. Such membership is available to only those skaters who are able to compete at the highest level. We submit as an exhibit, an email from the ISU referring [the petitioner’s] and our law firm to the [IISF] with regard to an attestation providing [the petitioner’s] membership. . . . To this date, the letter from the [IISF] has not yet arrived. We will forward it to you as soon as we receive it.

At the outset, the AAO notes that the letter referenced by counsel on appeal regarding the petitioner’s membership has not been submitted by counsel, nor is it reflected in the record of proceeding. Moreover, according to the email from [REDACTED] “it is not customary for the ISU to issue [confirmation of membership with ISU].” In addition, [REDACTED] stated that “[s]katers [of ISU] are Members of their National Federation and the National Federation is

Member of the ISU.” Thus, it appears that individuals are not members of the ISU. Instead, national figure skating teams are members of the ISU. In fact, according to the previously mentioned document regarding the ISUGP, there are references to “Member Federations” rather than to individuals. As the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires “the *alien’s membership* in associations [emphasis added]” and there is no evidence that the petitioner, as well as any individual, is a member of the ISU, the petitioner does not meet this regulatory criterion.

Notwithstanding the above, counsel failed to submit any supporting documentation to support his assertions that “[s]uch membership is available to only those skaters who are able to compete at the highest level.” 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 petitioner failed to submit the bylaws or other membership requirements of ISU, so as to reflect that membership requires outstanding achievements, as judged by recognized national or international experts in their disciplines or fields. In fact, as indicated above, the only evidence submitted about ISU was the documentation regarding’s ISU’s Grand Prix Series. The record contains no evidence of the eligibility requirements of an individual to be a member of ISU, let alone that membership requires outstanding achievements.

Again, the petitioner only established that he was a member of the IISF. However, the petitioner failed to demonstrate that his membership with the IISF meets all of the elements for this criterion. Nevertheless, 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). Even if the petitioner established that his membership with IISF meets the elements of this criterion, which he clearly did not, the petitioner would have only demonstrated eligibility with one association in which the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires more than one.

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

Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which

classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

In the director's decision, he determined that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted the following documentation:

1. An uncertified translation of a screenshot entitled, "[REDACTED]" and "[REDACTED]" October 25, 2004, unidentified author, <http://israelifr.com>;
2. An uncertified translation of a screenshot entitled, "Ice Skating World Championship: Israelis Will Be Present at Every Events," March 14, 2005, unidentified author, <http://fr.jpost.com>;
3. A screenshot entitled, "[REDACTED]" June 2, 2004, by "[REDACTED]" <http://medyamasama.com>;
4. A screenshot entitled, "Soul on Ice," October 19, 2003, unidentified author, <http://webisrael21c.net>;
5. Screenshots entitled, "[REDACTED]" unidentified date, by "[REDACTED]" <http://www.mountain-news.com>;
6. An article entitled, "[REDACTED]" January 11, 2007, by "[REDACTED]";
7. A document entitled, "[REDACTED]" November 23, 2004, by "[REDACTED]" www.wer-art.com;
8. Screenshots entitled, "China Wins Figure Skating GP Pairs Title," October 25, 2004, unidentified author, <http://english.peopledaily.com>;
9. Screenshots entitled, "[REDACTED]" unidentified date, by "[REDACTED]" www.iisf.org;
10. Screenshots entitled, "[REDACTED]" America," October 21, 2004, by "[REDACTED]" www.iisf.org;
11. A blog entitled, "2008 ISU World Championships in Gothenburg," unidentified date, unidentified author, www.iisf.org;
12. A blog entitled, "Re: Metulla Club," December 22, 2000, unidentified author, <http://p102.ezboard.com>;

13. Screenshots entitled, "[REDACTED]" March 14, 2005, by [REDACTED] <http://pqasb.pqarchiver.com/jpost>;
14. Screenshots entitled, "[REDACTED]" December 17, 2004, by [REDACTED] <http://jsoslaw.com>; and
15. Screenshots entitled, "Something Old, Something New..." August 24, 2007, unidentified author, www.iisf.org.

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 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.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."

With the exception of item 6, as indicated above, the petitioner submitted screenshots from postings on the Internet. However, the AAO is not persuaded that postings and blogs on the Internet from printed publications, organizations, or Internet-based media outlets are automatically considered major media. The petitioner failed to submit any documentary evidence establishing that the websites are considered major media. The AAO notes that the petitioner did not submit any documentary evidence demonstrating that *Mountain Living*, item 6, is a professional or major trade publication or other major media. In today's world, many newspapers, businesses, and other media outlets post stories and information on the Internet. To ignore this reality would be to render the "major media" requirement meaningless. However, the AAO is not persuaded that international accessibility by itself is a realistic indicator of whether a given website is "major media." Moreover, the petitioner failed to include the date and/or author for the majority of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, the regulation at 8 C.F.R. § 103.2(b)(3) specifically requires that any foreign language document that is submitted to USCIS must be accompanied by a full and certified English language translation. Regarding items 1 and 2, however, the petitioner failed to submit any certified English language translations.

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.

Notwithstanding the above, regarding items 1 – 14, a review of the documentation fails to reflect published material about the petitioner relating to his work. Instead, the material is about events and competitions in which the petitioner is simply mentioned as being a participant or competitor. For example, regarding item 3, the screenshot is about Israeli skaters competing at the European Figure Skating Championships in Budapest, Hungary. In fact, the petitioner is mentioned once as competing in the pair competition with [REDACTED]. Clearly, the screenshot is not about the petitioner relating to his work. Articles that are not about the petitioner do not meet this regulatory criterion. See, e.g., *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). It is insufficient to establish eligibility for this criterion based any material that simply lists, mentions, or indicates the petitioner’s name, such as the posting of a skater’s score from a tournament, without published material that is about the petitioner relating to his work.

Regarding item 15, 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). Nonetheless, the screenshot reflects an interview with the petitioner in which his answers are simply recorded in the submitted material. The author does not discuss the petitioner, and the material does not qualify as published material about the petitioner relating to his work. The AAO notes that the petitioner failed to submit any documentary evidence establishing that www.iisf.org is major media.

As discussed above, 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 this case, the petitioner’s documentary evidence fails to reflect published material about him relating to his work in professional or major trade publications or other major media.

Accordingly, the petitioner failed to establish 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 determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel claims:

This regulatory criterion must be approached with an accurate understanding of the context in which elite figure skaters are performing and competing. Thus, it is practically impossible for [the petitioner], or anyone, to impact figure skating by introducing a brand new technique or style outside of the parameters set by the judging system and the moves required by each program.

* * *

[The petitioner] and his partner [REDACTED] made history as the first ever pair figure skating team to represent Israel in top-level competition. . . . [The

petitioner's] groundbreaking entry into elite figure skating competition opened the door for other excellent Israeli pair skaters to compete on the world stage, including [REDACTED] and [REDACTED]

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 or athletic-related contributions “of major significance in the field.” The phrase “major significance” is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

On appeal, the petitioner submitted the previously discussed letter from [REDACTED] who also stated that “Israel is now recognized as a source of world-class pair figure skating in addition to our single skaters and ice dancing competitors.” However, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the petitioner’s original contributions be of major significance “in the field.” In the case here, [REDACTED] failed to establish the significance of the petitioner’s contribution in the field as a whole. In other words, there is no evidence demonstrating that the petitioner’s contributions have been of major significance in the field of figure skating rather than limited to Israel or IISF. There is no evidence reflecting the impact or influence of the petitioner’s contributions in figure skating, let alone that he has made original contributions of major significance.

Furthermore, a review of the record of proceeding reflects that the petitioner submitted a few recommendation letters. In this case, while the recommendation letters praise the petitioner for his talents and skills, they fail to indicate that he has made original contributions of *major significance* in the field. For example, [REDACTED] stated:

[The petitioner] has made important original contributions to the sport through combination of his artistic expression and athletic precision. He was known for receiving extremely high artistic marks in international competition and has always displayed a unique and extraordinary ability to express different choreographies and themes. He is recognized as one of the finest artistic figure skaters in the world.

However, [REDACTED] failed to specifically indicate how the petitioner’s “artistic expression and athletic precision” have been of major significance in the field. [REDACTED] failed to provide any evidence reflecting that petitioner’s influence or impact on the field, so as to demonstrate original contributions of major significance. Similarly, [REDACTED] stated that the petitioner “is an extremely gifted skater whose artistic abilities on the ice are nearly unparalleled for such a young competitor.” Again, 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 petitioner has already used those unique skills to impact the field at a significant level in an original way. Furthermore, assuming the petitioner’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).

In addition, the petitioner submitted reference letters from [REDACTED] and [REDACTED] who stated that the petitioner's "continued training in the United States for international competition *will* result in a lasting contribution to the growth and development of the sport in the U.S. and abroad [emphasis added]." A petitioner cannot file a petition under this classification based on the expectation of future eligibility. Given the descriptions in terms of future applicability and determinations that may occur at a later date, it appears that the petitioner's training has yet to reflect any original contributions of major significance in the field. The letters fail to reflect that the petitioner's training has influenced "growth and development" of figure skating. The actual present impact of the petitioner's work has not been established. Rather, the petitioner's references appear to speculate about how the petitioner's contributions may affect the field at some point in the future. Eligibility must be established at the time of filing. Therefore, the AAO will not consider these items as evidence to establish the petitioner's eligibility. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. at 114, that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. The assertion that the petitioner's training is likely to be influential is not adequate to establish that his training is already recognized as a major contribution in the field.

While those familiar with the petitioner generally describe him as "extraordinary," there is insufficient documentary evidence demonstrating that the petitioner has made original contributions of major significance in the field. This regulatory criterion not only requires the petitioner to make original contributions, the regulatory criterion also requires those contributions to be of major significance. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the petitioner's contributions have already influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *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 petitioner's present contributions.

Further, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988).

However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008). Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance.

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

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

B. Final Merits Determination

In accordance with the *Kazarian* opinion, the AAO must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2); and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). *See also Kazarian*, 596 F.3d at 1115. The petitioner met the plain language of one of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in the AAO's preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating the AAO's final merits determination, the AAO must look at the totality of the evidence to determine the petitioner's eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner has won some nationally recognized awards, has competed in figure skating tournaments, and has been mentioned on several websites. However, the personal accomplishments of the petitioner fall far short of establishing that he "is one of that small percentage who have risen to the very top of the field of endeavor" and that he "has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." *See* 8 C.F.R. § 204.5(h)(2), section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

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

The AAO found that the petitioner met the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) based on his three first place finishes in the senior pairs at the 2003, 2004, and 2005 Israeli Figure Skating Championships, as well as his two second place finishes in the senior pairs at the 2007 and 2008 Israeli Figure Skating Championships. Based on the documentation submitted by the petitioner, it appears that the petitioner did not face any competition when he won the gold medal in 2003 – 2005, and there was only one other pair that competed at the 2007 and 2008 events. Awards won by the petitioner in which he faced no competition do not indicate that he “is one of that small percentage who have risen to the very top of the field of endeavor.” See 8 C.F.R. § 204.5(h)(2). There is no indication that the petitioner faced significant competition from throughout his field. USCIS has long held that even athletes performing at the major league level do not automatically meet the statutory standards for immigrant classification as an alien of “extraordinary ability.” *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm’r 1994); 56 Fed. Reg. at 60899. The AAO notes that in *Matter of Racine*, 1995 WL 153319 at *1, *4 (N.D. Ill. Feb. 16, 1995), the court stated:

[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine’s ability with that of all the hockey players at all levels of play; but rather, Racine’s ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court’s reasoning indicates that USCIS’ interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable. Likewise, it does not follow that a figure skater like the petitioner who has had success in events facing no other or little competition should necessarily qualify for approval of an extraordinary ability employment-based visa petition. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for “that small percentage of individuals that have risen to the very top of their field of endeavor.”

The AAO cannot ignore that the statute requires the petitioner to submit “extensive documentation” of his sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). The petitioner failed to submit evidence demonstrating that he “is one of that small percentage who have risen to the very top of the field.” In addition, the petitioner has not demonstrated his “career of acclaimed work in the field” as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).

The evidence of record falls short of demonstrating the petitioner’s sustained national or international acclaim as a figure skater. The regulation at 8 C.F.R. § 204.5(h)(3) requires “[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and this his or her achievements have been recognized in the field of expertise.” While the petitioner submitted documentation demonstrating that he has won some awards, the documentary evidence is not consistent with or indicative of sustained national or international acclaim.

The conclusion the AAO reaches by considering the evidence to meet each category of evidence at 8 C.F.R. § 204.5(h)(3) separately is consistent with a review of the evidence in the aggregate. Ultimately, the evidence in the aggregate does not distinguish the petitioner as one of that small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The petitioner seeks a highly restrictive visa classification, intended for individuals at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. In this case, the petitioner has not established that his achievements at the time of filing the petition were commensurate with sustained national or international acclaim, or that he was among that small percentage at the very top of the field of endeavor.

III. O-1 Nonimmigrant Admission

The AAO notes that at the time of the filing of the petition, the petitioner was last admitted to the United States as an O-1 nonimmigrant on January 11, 2009. However, 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, 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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

IV. Conclusion

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

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

ORDER: The appeal is dismissed.