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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

B2

DATE: **MAR 30 2012**

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

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

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

On appeal, the petitioner submits a brief with additional documentary evidence. For the reasons discussed below, the AAO upholds the director's ultimate determination that the petitioner has not established his eligibility for the classification sought.

I. LAW

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

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

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

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

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

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

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

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

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

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

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

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 Criteria²

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

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

This criterion contains three evidentiary requirements the petitioner must satisfy. First, the published material must primarily be about the petitioner and the contents must relate to the petitioner's work in the field under which he seeks classification as an immigrant. The published material must also appear in professional or major trade publications or other major media (in the plural). Professional or major trade publications are intended for experts in the field or in the industry. To qualify as major media, the publication should have significant national or international distribution and be published in a predominant national language. The final requirement is that the petitioner provide each published item's title, date, and author and if the published item is in a foreign language, the petitioner must provide a translation that complies with the requirements found at 8 C.F.R. § 103.2(b)(3). The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner provided two articles titled: [REDACTED] for the Performing Arts. . ."; a segment on a Filipino news program; and four photographs appearing in magazines featuring models for whom the petitioner applied the make-up. The director determined that the petitioner failed to meet the requirements of this criterion.

Regarding the article titled, [REDACTED]" the article is primarily about a Filipino-nominee, [REDACTED]. While the petitioner is briefly mentioned within the article, the article is not about him relating to his work in the field. Consequently, this article will not serve to meet the plain language requirements of this criterion. Regarding the article titled, "Showcase

² The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

Academy for the Performing Arts. . .,” the article is primarily about a performing arts academy, Showcase Academy. The petitioner is in a photograph accompanying the article, but the article is not about him relating to his work in the field. Articles that are not about the petitioner do not meet this regulatory criterion. *See 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 is not even mentioned in the article itself. Instead, the article contains a photograph with a caption identifying the petitioner within the photograph. A caption accompanying a photograph that merely identifies the petitioner in the photograph is not published material about the petitioner relating to his work in the field.

The petitioner also provided a news segment from “Balitang America News,” a Filipino news program based in California. Much like the article titled, [REDACTED], the news clip is about [REDACTED] as she prepared for the Oscars. Although the petitioner’s image appears in the clip, the reporter fails to even mention his name. As such, the material is not about the petitioner and his work in the field. Within the response to the director’s request for evidence (RFE), counsel states, “the said video featured petitioner [sic] Maximo as a world class talent and a **well known Hollywood make-up artist.**” (Emphasis in original.) As the petitioner is not highlighted, or even mentioned in the news segment, the petitioner’s notoriety is not apparent in the video as counsel asserts. 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 (Assoc. Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

Regarding the four photographs appearing in magazines, the regulation at 8 C.F.R. § 204.5(h)(3)(iii), plainly states, “Such evidence *shall* include the title, date, and author of the material, and any necessary translation.” (Emphasis added.) The submitted evidence lacks all of the elements required by the last sentence of this criterion as these are not the type of titled, authored published material contemplated under this criterion. The plain language of the regulation requires an author, title, and date of the published material, which are present in written published works. The petitioner fails to provide documentary evidence of these required elements thereby disqualifying the submitted evidence. The petitioner did not submit any articles that are about him relating to his work in the field in one of the requisite publication types, including the title, date, and author of the material.

In response to the director’s RFE the petitioner also submitted two articles bearing the same text and title, “Maxi: Make Up Artist Extraordinaire.” These articles both postdate the petition’s filing date of August 27, 2009. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm’r 1998). At the time of filing, the petitioner had not submitted evidence demonstrating eligibility under this criterion.

Additionally, even if one form of evidence listed above satisfied the plain language requirements of this criterion, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires evidence of published material in “professional or major trade publications or other major media” in the plural, which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. 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 *1, *12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *1, *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).

Consequently, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

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

The director determined that the petitioner satisfied the plain language requirements of this criterion, of which the AAO concurs.

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

The plain language of this regulatory criterion contains multiple evidentiary elements that the petitioner must satisfy. The first is evidence of the petitioner’s contributions (in the plural) to his field. These contributions must have already been realized rather than being potential, future contributions. The petitioner must also demonstrate that his contributions are original. The evidence must establish that the contributions are scientific, scholarly, artistic, athletic, or business-related in nature. The final requirement is that the contributions rise to the level of major significance in the field as a whole, rather than to a project, to an organization, or to a person. 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). Contributions of major significance connotes that the petitioner’s work has significantly impacted the field. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner provides photos of and information relating to celebrities, the “published works in well-known magazines” that the petitioner also claims under the published material criterion, certificates and

letters of appreciation, and compact discs depicting some of the petitioner's work. Much of the evidence that the petitioner submitted relating to this criterion originates from *Wikipedia*. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.³ See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008). As such, the AAO will not accept the evidence originating from *Wikipedia* as probative. The director determined that the petitioner failed to meet the requirements of this criterion.

Regarding the evidence deriving from "published works in well-known magazines" that the petitioner also claims under the published material criterion, the regulations contain a separate criterion regarding published material. 8 C.F.R. § 204.5(h)(3)(iii). The AAO will not presume that evidence relating to or even meeting the published material criterion is presumptive evidence that the petitioner also meets this criterion. The regulatory criteria are separate and distinct from one another. Because separate criteria exist for published material and original contributions of major significance, USCIS clearly does not view the two as being interchangeable. To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria. Thus, there is no presumption that every published work in a well-known magazine is a contribution of major significance in the field.

Regarding the letter from [REDACTED] at Black Entertainment Television (BET), [REDACTED] indicates that the petitioner has provided his expert services on several shows and specials under the BET banner. She also indicates that BET's corporate communications department relies on the petitioner's experience. This reflects an impact on a single department, while the regulation requires contributions of major significance in the field as a whole.

The letter from [REDACTED] indicates that the petitioner is "the" make-up artist for her company. [REDACTED] lists celebrities for which and projects in which she claims that the petitioner performed his work. This work reflects an impact on projects or for her company, while the regulation requires contributions of major significance in the field as a whole. She asserts that the petitioner "is one of the very few make-up artists in America who has gain [sic] wide-spread recognition for perfecting the craft of high definition makeup [sic] application and airbrushing." [REDACTED] does not indicate that the petitioner developed this technique; therefore it is not considered an original contribution attributable to the petitioner. Additionally, the record lacks any evidence demonstrating that the petitioner's airbrushing technique is of major

³ Online content from *Wikipedia* is subject to the following general disclaimer, "WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . *Wikipedia* cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields. See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, [accessed on March 20, 2012, a copy of which is incorporated into the record of proceeding.]

significance in the field or that it has influenced the field as a whole. Furthermore, the petitioner failed to provide documentary evidence to corroborate [REDACTED] assertions of the petitioner's "wide-spread recognition for perfecting the craft of high definition makeup." 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.

The petitioner also submitted several additional reference letters praising his talents as a make-up artist and discussing his activities in the field. Talent and experience in one's field, however, are not necessarily indicative of original artistic contributions of major significance in the petitioner's field. Assuming the petitioner's make-up application 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 certification process. *See Matter of New York State Dep't. of Transp.*, 22 I. & N. Dec. 215, 221 (Assoc. Comm'r 1998). It is not enough to be skillful and knowledgeable and to have others attest to those talents. An alien must have demonstrably impacted his field in order to meet this regulatory criterion. The reference letters submitted by the petitioner briefly discuss his skills as a make-up artist, but they do not provide specific examples of how the petitioner's work has significantly impacted or influenced the field at large or otherwise constitutes original contributions of major significance in the field.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" was insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. The opinions of experts in the field are not without weight and have been considered above. While such letters can provide important details about the petitioner's skills, they cannot form the cornerstone of a successful extraordinary ability claim. USCIS may, in its discretion, use as advisory opinions 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 from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as this decision has done above, 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) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec.

at 190). 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.

None of the letters from those in the entertainment industry indicates that the petitioner is the exclusive make-up artist that each celebrity uses. As celebrities take part in numerous engagements using different make-up artists at each event, it serves that not every make-up artist who applies make-up to a celebrity has inherently made a contribution of major significance to the field. It remains the petitioner's burden to document the actual impact of his work. The remaining photos, information relating to celebrities, and compact discs depicting the petitioner's work fails to demonstrate the manner in which the petitioner has impacted his field.

In view of the foregoing, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

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

This criterion contains multiple evidentiary elements the petitioner must satisfy. The plain language of this criterion requires that the work in the field is directly attributable to the alien. Additionally, 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. See *Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at 7 (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). The alien's work also must have been displayed at an artistic exhibitions or showcases (in the plural). While neither the regulation nor existing precedent speak to what constitutes an exhibition or a showcase, Merriam-Webster's online dictionary defines exhibition as, "a public showing (as of works of art)."⁴ Merriam-Webster's online dictionary also defines showcase as, "a setting, occasion, or medium for exhibiting something or someone especially in an attractive or favorable aspect."⁵ Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U.S. 304, 306 (1893). Therefore, it is the petitioner's burden to demonstrate that the display of his work in the field claimed under this criterion occurred at artistic exhibitions or at artistic showcases. The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion. The director determined that the petitioner failed to meet the requirements of this criterion.

The record does not establish that the locations where artists have appeared wearing the petitioner's make-up, including television shows, parties and award ceremonies, are artistic exhibitions or showcases. As the petitioner is not one who has displayed his work at artistic exhibitions or showcases

⁴ <http://www.merriam-webster.com/dictionary/exhibition>, [accessed on March 20, 2012, a copy of which is incorporated into the record of proceeding.]

⁵ <http://www.merriam-webster.com/dictionary/showcase>, [accessed on March 20, 2012, a copy of which is incorporated into the record of proceeding.]

of make-up, he 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.

Counsel's appellate brief asserts for the first time that the totality of the petitioner's eligibility claims constitutes evidence that the petitioner has performed in a leading or critical role for organizations that have a distinguished reputation. Counsel references the petitioner's roles for individuals and their projects. The plain language of this criterion, however, requires that the role be leading or critical for organizations and establishments, not simply individuals or their projects. Counsel does not identify the organizations or establishments for which the petitioner has performed in a leading or critical role. A review of the record of proceeding fails to reflect that the petitioner claimed eligibility for this criterion when filing the petition or in response to the RFE. The burden is on the petitioner to establish his eligibility and not on the director to infer or second-guess the intended criteria. As such, the director did not err in his decision as it relates to this criterion. As the director lacked the opportunity to evaluate and address the petitioner's leading or critical role claims, the AAO will not consider an issue that the petitioner raises for the first time on appeal.

The purpose of the request for evidence is to elicit further information that clarifies whether the petitioner has established eligibility for the benefit sought as of the filing date of the petition. See 8 C.F.R. §§ 103.2(b)(8) and (12). The director's RFE stated, "You may submit any available additional documentary evidence of acclaim which meets the criteria listed under 8 CFR 204.5(h)(3) & (4)." In the present matter, the director put the petitioner on notice that he could submit additional evidence that meets the criterion listed in 8 C.F.R. § 204.5(h)(3)(viii). If the petitioner had wanted the director to consider the submitted evidence under this criterion, he should have made that request in response to the director's request for evidence. See generally *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Regardless, the AAO has already considered the evidence under the criteria to which the evidence directly relates. The AAO will not presume that evidence directly relating to one criterion is presumptive evidence that an alien meets a second criterion. Such a presumption would negate the statutory requirement for extensive evidence and the regulatory requirement that an alien meet at least three criteria.

B. Comparable Evidence

The regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish the [petitioner's] eligibility." The petitioner requested that the director and the AAO consider the recommendation letters as comparable evidence. In order to properly claim comparable evidence, a petitioner must demonstrate that he is unable to qualify for this highly restrictive immigrant classification due to the nature of his occupation. The petitioner must explain why he is unable to submit evidence that satisfies the minimum number of regulatory criteria at 8 C.F.R. § 204.5(h)(3), and he must explain how the criteria are not directly relevant to his occupation. The petitioner may not simply claim comparable evidence in

an attempt to garner a favorable determination on an additional regulatory criterion in an effort to bolster the number of criteria that he has satisfied. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation as a make-up artist cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, the petitioner has claimed that numerous criteria directly apply to his occupation as follows: (1) at the time of the initial filing, the petitioner claimed that at least four of the criteria directly applied to his occupation; (2) in response to the RFE the petitioner claimed at least five criteria directly applied to his occupation; and (3) on appeal he again claims five criteria directly apply to his occupation. As a result, the petitioner has not demonstrated that he may claim comparable evidence in the present petition.

Additionally, the petitioner must explain how the submitted evidence is comparable to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x) and he must specify under which criterion his evidence is comparable. Even if the petitioner was not precluded from claiming comparable evidence, he did not specify under which criterion the comparable evidence applies. Therefore, the AAO is unable to determine if the evidence is in fact comparable to the standards listed at 8 C.F.R. § 204.5(h)(3)(i)-(x). Where an alien is simply unable to meet or submit documentary evidence satisfying at least three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. The AAO notes that the petitioner's recommendation letters were considered under the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v).

C. Summary

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

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.

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

final merits determination.⁶ 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.

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