

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:

Office: TEXAS SERVICE CENTER

FILE:

NOV 03 2012

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you.

Perry Rhew  
Chief, Administrative Appeals Office

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

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

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

On appeal, counsel, on behalf of the petitioner, asserts that the petitioner submitted sufficient qualifying evidence under five of the ten regulatory categories. Considering the evidence in the aggregate, the petitioner has not established eligibility for the benefit sought by a preponderance of the evidence.

## 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. Contrary to counsel’s assertions on appeal, this decision is not inconsistent with prior district court case law cited by counsel, namely *Buletini v. INS*, 860 F. Supp. 1222, 1234 (E. D. Mich. S. D. 1994) and *Muni v. INS*, 891 F. Supp. 440, 443 (N.D. Ill. 1995). As counsel acknowledges, the *Buletini* court stated:

Once it is established that the alien’s evidence is sufficient to meet three of the criteria listed in 8 C.F.R. § 204.5(h)(3), the alien must be deemed to have extraordinary ability *unless the INS sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard.*

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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).

*Id.* (Emphasis added.) As is clear from the italicized language, the *Buletini* court considered the possibility that an alien can submit evidence satisfying three criteria and still not meet the extraordinary ability standard provided legacy Immigration and Naturalization Service explains its reasoning.

The following year, the *Muni* court included a final section entitled “Totality of the Evidence” in which it evaluated whether the evidence submitted established national or international acclaim. The court expressly stated: “While the satisfaction of the three-category production requirement does not mandate a finding that the petitioner has sustained national or international acclaim and recognition in his field, it is certainly a start.” *Muni*, 891 F. Supp. at 445-46. Moreover, counsel has not explained how *Kazarian* results in a “heightened level of scrutiny” rather than a reorganization of the analysis that USCIS was already performing. See *Rijal v. USCIS*, 772 F. Supp. 2d 1339, 1347 (W.D. Wash. 2011) *aff’d* 683 F.3d 1030 (9<sup>th</sup> Cir. 2012).

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. *Kazarian*, 596 F.3d at 1122.

## II. ANALYSIS

### A. Prior O-1 Visa

While U.S. Citizenship and Immigration Services (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. The regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts* are dramatically different. 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) as simply “distinction,” which is further defined as follows:

Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

The regulation relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field 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.” While the ten immigrant criteria set forth at 8 C.F.R. § 204.5(h)(3) appear in nonimmigrant regulations, 8 C.F.R. § 214.2(o)(3)(iii), they refer only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. Rather, separate criteria for nonimmigrant aliens of extraordinary ability in the arts are set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv). The distinction between these fields and the arts, which appears in 8 C.F.R. § 214(o) does not appear in 8 C.F.R. § 204.5(h). As such, the petitioner’s approval for a non-immigrant visa under the lesser standard of “distinction” is not evidence of his

eligibility for the similarly titled immigrant visa. Regardless, each petition must be adjudicated on its own merits under the regulations which apply to the benefit sought. Thus, the petitioner's eligibility will be evaluated under the ten regulatory criteria relating to the immigrant classification, discussed below.

Furthermore, 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 had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

## B. Translations

As noted by the director in the request for evidence, all foreign language documents must be accompanied by a full translation that the translator certifies pursuant to 8 C.F.R. § 103.2B(3). That provision states: "Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." The language utilized within the regulation implicitly precludes a single certification that validates several translated forms of evidence unless the certification specifically lists the translated documents. Without a single translator's certification for each foreign language form of evidence, or a translator's certification specifically listing the documents it is validating, the certification cannot be regarded to be certifying any specific form of evidence. The final determination of whether evidence meets the plain language requirements of a regulation lies with USCIS. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988) (finding that the appropriate entity to determine eligibility is USCIS).

While not addressed by the director in his decision, throughout the record of proceeding the petitioner submitted numerous translations that were not each accompanied by a certified translation in accordance with the regulation. Instead with the initial petition filed in 2011, the petitioner submitted a photocopy of a blanket certification for the “attached translations” from [REDACTED] dated November 28, 2008. The certification does not list the translations it purports to certify. Some of the translations are of email messages dated in 2010 and 2011, an August 2011 letter from [REDACTED] Ortiz, a February 15, 2011 exhibit promotion, a 2011 assignment of rights and a 2010 gift certificate from the petitioner, all of which postdate the 2008 date on the certification. In response to the request for evidence, the petitioner provided a single, blanket certification for all of the foreign language documents naming [REDACTED] as the translator. This document does not identify the specific translations to which it pertains.

While the foreign language documents have no probative value because they lack translations that meet the requirements set forth at 8 C.F.R. § 103.2(b)(3), the AAO will consider this evidence as the director did not raise this concern in the final decision.

#### C. Evidentiary Criteria<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.* 8 C.F.R. § 204.5(h)(3)(i).

The director found the petitioner did not establish this criterion. In making this determination, the director assessed evidence that the petitioner submitted with respect to three purportedly qualifying prizes or awards: the [REDACTED], the [REDACTED] and the [REDACTED] in the national Galeria Santafe del Planetario Disrital (Best Project Prize).

Upon reviewing the documentary evidence relating to the [REDACTED] the director found that while the petitioner was nominated for this award, she did not actually receive the award. The director found that the nomination for the [REDACTED] did not qualify as a prize or award under the regulation and counsel for the petitioner does not challenge this determination on appeal. Accordingly, the petitioner has abandoned that claim. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at \*9 (E.D. N.Y. Sept. 30, 2011).

As for the [REDACTED] on appeal counsel asserts that the director erred by finding that a competition that was limited to artists who had not yet “attained international consecration” does not indicate that the winner is one of that small percentage who have risen to the very top of the field of endeavor, as required by 8 C.F.R. § 204.5(h)(2). Counsel maintains in the appeal brief that “the top national and international competitions for visual artists” are “universally categorized by age as being the best of his

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

or her generation . . . .” Counsel further states that “the field does not want 25- to 35-year-old painters, violinists, and opera singers competing against older painters, violinists, and opera singers.”

First, the “award” certificate itself makes no mention of “first place” as alleged. Instead, it states that the petitioner was “selected to represent Colombia in the [REDACTED] for the creation of the Visual Arts.” Even assuming this certificate constitutes an “award” as claimed by [REDACTED] Area Advisor of Visual Arts for the Colombian Ministry of Culture, according to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i), the issue is whether the prize or award is nationally or internationally recognized. While the AAO does not discount that an age-restricted award could be nationally or internationally recognized, it is the petitioner’s burden to demonstrate this recognition. In the response to the director’s request for evidence, counsel asserts that the most prestigious prizes or awards in the visual and performing arts have restrictions and submitted a list of prizes or awards and identified those with age restrictions. However, there is nothing in the record to substantiate the claim that those prizes are the most prestigious in the field and even assuming they are, the existence of other age-restricted awards that are nationally or internationally recognized does not create a presumption that the Union Latina award, which is not only age-restricted but also restricted to those with no international exposure, is also nationally or internationally recognized. Therefore, the AAO agrees with the director that the petitioner has not established that the Union Latina is a prize that meets the plain meeting requirements of the regulation.

The director also did not find the [REDACTED] to be evidence that meets the requirements of the regulation. On appeal, counsel asserts that the director erroneously found that the Best Project Prize was not nationally recognized. Counsel points to various documents, including support letters and the 2004 competition guidelines that demonstrate that the competition is without age restrictions and is open to citizens of Colombia and foreign nationals residing in Colombia. The AAO agrees that the documentation regarding the Best Project Prize sufficiently establishes that it is national in scope. However, national scope is not equivalent to national recognition and 8 C.F.R. § 204.5(h)(3)(i) specifically requires that a prize or award be “nationally or internationally *recognized*.” (Emphasis added.) As such, the prize or award must be recognized at least nationally in the field beyond the organizing entity. The record contains no such evidence, such as independent media coverage of the award selections. Thus, the AAO agrees with the director that the petitioner has not established that the Best Project Prize qualifies as a lesser nationally or internationally recognized prize.

For all of the reasons discussed above, the AAO must conclude that the petitioner failed to satisfy this criterion and affirm the director’s findings.

*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. 8 C.F.R. § 204.5(h)(3)(iii).*

While not all of the evidence submitted to satisfy this criterion constitutes published material about the petitioner, the AAO affirms the director’s finding that the petitioner satisfied 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. 8 C.F.R. § 204.5(h)(3)(iv).*

The director determined that the petitioner failed to establish this criterion. To support her claim of meeting the requirements under 8 C.F.R. § 204.5(h)(3)(iv), the petitioner submitted a letter from [REDACTED]. In describing the work that the petitioner performed for the 2003 [REDACTED] art auction for Operation Smile, [REDACTED] writes:

The work included the selection of the artists, collection of information about the art samples, classification of information such as, resumes and origin of the samples. Due to the large amount of mandatory information, the job required strict order, and an absolute clarity of the task and accordance with an extremely exact time frame.

Critically, the letter from [REDACTED] is the only document the petitioner submitted to establish that she satisfactorily met the requirements of this criterion.<sup>3</sup> The only portion of the letter that potentially relates to the petitioner acting as a judge for the event is the phrase “[t]he work included the selection of the artists.” This limited description leaves room for the possibility that the selection criteria for the artists could be based solely on factors unrelated to judging the artists’ work, such as notoriety, general reputation, or availability. Such factors may be valid bases for selection of artists to the event, but they would not require the petitioner to have judged the work of the selected artists and the regulation clearly requires that an alien submit evidence of her participation as a judge of the work of others. The single document that the petitioner submitted regarding this criterion, because it is so vague in its description of what the criteria were for choosing the artists, is insufficient to satisfy the requirements of the regulation. The Board of Immigration Appeals has stated that where testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborating evidence. *See Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998). Moreover, 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.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

On appeal, counsel asserts that “[i]n deciding on inclusion of artists in the auction, [REDACTED] as an artist, clearly had to accept and reject artists after determining whose work would garner the most attention and would bring in the most funds for [REDACTED].” but there is no independent

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<sup>3</sup> Counsel in the appeal brief references other documentation that purportedly relate to whether or not the petitioner judged the works of others. However, those documents merely convey background information relating to [REDACTED] the event, and the venue and do not provide information on the function and duties that the petitioner performed for the event.

documentation in the record to substantiate this statement. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the AAO must conclude that the petitioner has failed to satisfy the plain language requirements of the regulation.

*Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.* 8 C.F.R. § 204.5(h)(3)(vii).

The AAO affirms the director's finding that the petitioner established this criterion.

*Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role's matching duties. A critical role should be apparent from the petitioner's impact on the organization or the establishment's activities. The petitioner's performance in this role should establish whether the role was critical for organizations or establishments as a whole. The petitioner must demonstrate that the organizations or establishments (in the plural) have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-Webster's online dictionary defines distinguished as, "marked by eminence, distinction, or excellence."<sup>4</sup> 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. at 306. Therefore, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or a similar reputation. The petitioner must submit evidence satisfying 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. On appeal, counsel maintains that the petitioner had a critical role in four organizations with distinguished reputations: [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. To substantiate the claim that [REDACTED] and [REDACTED] are organizations with distinguished reputations, the petitioner submitted printed content from [REDACTED] website and submitted a letter from the Manager of the [REDACTED] attesting to the gallery's importance in Latin America. USCIS need not rely on the self-promotional affirmations. *See Braga v. Poulos*, No. CV 06 5105 SJO (C.D. CA July 6, 2007) *aff'd* 2009 WL 604888 (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).

As for the [REDACTED] and the [REDACTED] counsel maintains that that they sell the works of top artists. Counsel further states that "there are two methods to determine

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<sup>4</sup> See <http://www.merriam-webster.com/dictionary/distinguished>, [accessed on October 19, 2012, a copy of which is incorporated into the record of proceeding.]

whether a gallery is excellent or eminent. The first is to determine which artists the gallery represents and the second is whether the gallery qualifies to be juried into top international art fairs.” The AAO reiterates that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N at 534; *Matter of Ramirez-Sanchez*, 17 I&N at 506. There is no independent documentation in the record to otherwise substantiate counsel’s claims.

Furthermore, counsel claims that because the [REDACTED] and the [REDACTED] either displayed or sold the petitioner’s work she has demonstrated a leading or critical role. The AAO finds that such an assertion is insufficient to establish the petitioner’s leading or critical role within those galleries. Notably, the regulations contain a separate criterion for the display of artistic work, 8 C.F.R. § 204.5(h)(3)(vii), a criterion the petitioner has satisfied. The AAO is not persuaded that being one of many artists whose works are either sold or displayed at a gallery amounts to a leading or critical role in addition to meeting 8 C.F.R. § 204.5(h)(3)(vii).

Moreover, the petitioner has submitted several letters from individuals who are associated with the above galleries, and while those letters praise the petitioner or her work, their content does not extend to discussing how the petitioner has performed a leading or critical role for any of the galleries.

Consequently, for all the above reasons, the AAO concludes that the petitioner has failed to demonstrate that she performed in a leading or critical role in a distinguished reputation pursuant to the requirements in 8 C.F.R. § 204.5(h)(3)(viii).

*Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix).

While the petitioner originally submitted evidence relating to this criterion with her Form I-140, the director found that she failed to satisfy the requirements of the regulation, and the petitioner does not challenge the finding on appeal. Consequently, the AAO concludes that the petitioner has abandoned her claim regarding this criterion. *See Sepulveda*, 401 F.3d at 1228 n. 2 citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11<sup>th</sup> Cir. 1998); *Hristov*, 2011 WL 4711885 at \*9.

#### D. Summary

The petitioner has submitted relevant, probative and credible evidence that qualifies under only two of the regulatory subparagraphs, 8 C.F.R. §§ 204.5(h)(3)(iii) and (vii).

### 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.<sup>5</sup> Rather, the proper conclusion is that the petitioner has failed to satisfy the 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 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).