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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

DATE:

Office: TEXAS SERVICE CENTER FILE:

APR 09 2013

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,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

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

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

On appeal, counsel asserts that the petitioner meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(iii), (v), (vii), and (viii). For the reasons discussed below, the AAO will uphold the director’s decision.

I. LAW

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

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

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

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

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

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

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 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*, 580 F.3d 1030 (9th Cir. 2009) *aff’d in part* 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 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.

While the petitioner initially submitted letters stating that he was a member of various arts organizations, he did not assert a claim of eligibility under 8 C.F.R. § 204.5(h)(3)(ii) in response to the director's request for evidence. The director did not discuss the criterion in his decision and the petitioner made no further claim on appeal. 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 established that he meets this regulatory criterion.

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

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. In general, in order for published material to meet this criterion, it must be about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media.

The petitioner submitted a brief announcement in the "New Jersey Calendar" section of the *New York Times* [REDACTED] promoting an "exhibit from the [REDACTED] and including the petitioner's [REDACTED] painting. The author of the material was not identified and the material was not about the petitioner as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The first paragraph of the "New Jersey Calendar" section explains that placement of an announcement in that section is open to the public and not indicative of independent journalistic media coverage. Specifically, the "New Jersey Calendar" material states: "A guide to cultural and recreational goings-on around the state. Items may be submitted by mail to New Jersey Calendar . . . or by e-mail to njtowns@nytimes.com."

The petitioner submitted a [REDACTED] web video screenshot from the internet site of NY1, Time Warner Cable's 24-hour news channel in New York City. The web video is entitled [REDACTED] and includes footage of the petitioner purportedly being interviewed. The petitioner, however, failed to submit the complete video recording of the segment featuring him or a copy of the transcript from the interview. As such, the petitioner has

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

not established that the coverage is about himself rather than about the “ [redacted] annual Art, Poetry and Prose event.” Further, the plain language of this regulatory criterion requires “published material about the alien” including “the title, date and author of the material.” The web video screenshot from NY1 does not meet these requirements.

The petitioner submitted a [redacted] article about himself on pages [redacted] of *NY Arts* magazine entitled ‘ [redacted] ’ but there is no documentary evidence showing that *NY Arts* is a major trade publication or some other form of major media. In addition, the petitioner submitted six sentences written by him appearing on page [redacted] on the [redacted] edition of *NY Arts* and posted on the *NY Arts* website. The six sentences posted online and appearing on page [redacted] constitute material written by the petitioner about his own work rather than published material about himself.³ The petitioner also submitted a [redacted] advertisement” in *NY Arts* promoting an exhibition of his work at the [redacted]. The material written by the petitioner and the promotional material advertising his exhibition do not meet the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

The petitioner submitted articles about himself in *The Korea Times* (New York edition) entitled [redacted] but author of the articles was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The petitioner also submitted information from *The Korea Times*’ website stating that the “news corporation publishes five different newspapers on a daily basis, with over 4 million in circulation.” Rather than submitting circulation information specific to the New York edition of *The Korea Times*, the petitioner submitted *combined* circulation data for the company’s “five different newspapers.” Further, with regard to the information submitted from the *The Korea Times*’ own website, USCIS need not rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff’d* 317 Fed. Appx. 680 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine’s status as major media). There is no objective documentary evidence demonstrating that *The Korea Times* (New York edition) qualifies as a form of major media in the United States or in any other country.

The petitioner submitted articles about himself in *The Korea Daily* (New York edition) entitled [redacted] “[The petitioner’s] [redacted] and “[The petitioner] and [redacted] but author of the articles was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The petitioner also submitted articles in *The Korea Daily* (New York edition) entitled [redacted] but author of the articles again was not identified and they are not about the petitioner. Instead, the articles are about group

³ The regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). The petitioner does not claim to meet the authorship of scholarly articles criterion, nor does the material in *NY Arts* meet the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vi).

exhibitions in which he participated. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be “about the alien . . . relating to the alien’s work in the field.” Thus, an article that mentions the petitioner but is “about” someone or something else cannot qualify under the plain language of this regulation. See *Noroozi v. Napolitano*, 11 CV 8333 PAE, 2012 WL 5510934 at *1, *9 (S.D.N.Y. Nov. 14, 2012); also 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 or a character within a show are not about the performer). The petitioner also submitted information from *The Korea Daily’s* website stating that the newspaper is the “most read Korean language general daily newspaper in the states”; is “published in 8 metro areas: LA, NY, Washington DC, San Francisco, Chicago, Atlanta, Seattle, Hawaii”; and has a “258,000 estimated daily readership.” Rather than submitting readership information specific to the New York edition of *The Korea Daily*, the petitioner submitted *combined* readership data for its eight different U.S. editions. Further, with regard to the information submitted from *The Korea Daily’s* own website, as previously discussed, USCIS need not rely on self-serving assertions. There is no objective documentary evidence demonstrating that *The Korea Daily* (New York edition) is a form of major media.

The petitioner submitted a [redacted] article about himself in *The New York Ilbo* entitled “[redacted] [the petitioner],” but the author of the article was not identified as required by the plain language of this regulatory criterion. The petitioner also submitted a captioned photograph in the [redacted] issue of *The New York Ilbo*. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “published material about the alien” including “the title, date and author of the material.” The captioned photograph does not meet these requirements. Further, there is no evidence showing that *The New York Ilbo* qualifies as a form of major media.

The petitioner submitted [redacted] article about himself in *The Korean Bergen News* entitled “[The petitioner’s] [redacted]” but the author of the article was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The petitioner also submitted a [redacted] article in *The Korean Bergen News* entitled [redacted]. The author of the article again was not identified and the article is not about the petitioner. Instead, the article was about the exhibition. Further, there is no documentary evidence showing that *The Korean Bergen News* is a form of major media.

The petitioner submitted three articles in *Huntington Arts Cultural News* dated Fall-Winter 2010-2011, Summer 2011, and Fall-Winter 2011-2012. The author of the articles was not identified as required by the plain language of this regulatory criterion. Further, none of the articles are about the petitioner. In addition, there is no documentary evidence showing that *Huntington Arts Cultural News* qualifies as a major trade publication or some other form of major media.

The petitioner submitted a two-sentence posting on the *Long Beach Patch* website entitled “[The petitioner] and [redacted]” but there is no evidence indicating that the *Long Beach Patch* website is a form of major media.

The petitioner submitted a [REDACTED] article in *The Long Islander* entitled [REDACTED]. The author of the article was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, the article is not about the petitioner. Instead, the article is about the Huntington Art Council's benefit auction. The petitioner also submitted a three-sentence art show announcement in the "Community Calendar" section of *The Long Islander* entitled [REDACTED] but the author of the material again was not identified as required by the plain language of this regulatory criterion. Further, there is no documentary evidence showing that *The Long Islander* qualifies as a form of major media.

The petitioner submitted a [REDACTED] article posted at TheAlternativePress.com entitled [REDACTED] but the author of the article was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, the article is not about the petitioner. Instead, the article is about the [REDACTED] exhibition. Further, there is no documentary evidence showing that TheAlternativePress.com is a form of major media.

The petitioner submitted a [REDACTED] article in *SOKY happenings* entitled "[REDACTED]". The author of the article was not identified as required by the plain language of this regulatory criterion. Further, the article is not about the petitioner. Instead, the article is about the [REDACTED]. In addition, there is no documentary evidence showing that *SOKY happenings* qualifies as a form of major media.

The petitioner submitted an article about him in the [REDACTED] *Harborfields Public Library Newsletter*, but the author of the article was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Further, there is no documentary evidence showing that the *Harborfields Public Library Newsletter* is a form of major media.

The petitioner submitted a [REDACTED] article in *The Segye Times* entitled "[REDACTED] Group Exhibition" but the English language translation accompanying the article was not a full translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that 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. *Id.* Further, the author of the article was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, the article is not about the petitioner and only briefly mentions him. Instead, the article is about the [REDACTED] group exhibition. In addition, there is no documentary evidence showing that *The Segye Times* qualifies as a form of major media.

The petitioner submitted an [REDACTED] article about himself in *The Kukmin Daily* entitled [REDACTED] but the author of the article was not identified as required by the plain language of this regulatory criterion. Further, there is no evidence demonstrating that *The Kukmin Daily* is a form of major media.

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The petitioner submitted excerpts from the 387-page almanac *Korean Art 2001* including an article on pages [REDACTED]. The English language translation accompanying the article was not a full translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). The petitioner is briefly mentioned along with numerous other artists in the almanac and there is no indication that the petitioner was the focus of the article. In addition, there is no objective documentary evidence showing that *Korean Art 2001* is a major trade publication or some other form of major media.

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

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

In the director's decision, he determined that the petitioner failed to establish eligibility for this regulatory criterion. 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.] Here, the evidence must be reviewed to see whether it rises to the level of original scholarly or artistic 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, counsel asserts that the director failed to consider documentation submitted by the petitioner in response to the director's request for evidence.

The petitioner submitted a [REDACTED] article on pages [REDACTED] of *NY Arts* magazine entitled [REDACTED] that states:

[The petitioner's] paintings are a quiet but weighty mantra, legendary truths where the imaginary is viable. He records dream worlds that beckon to materialize.

* * *

His paintings display a definite mastery of material and medium.

[The petitioner] works on a thin but strong traditional Korean paper called *Hanji* made from the bark of the mulberry tree.

[The petitioner's] paintings silently, plaintively, express a drifting through a solitary fragmented existence.

[REDACTED] article describes the petitioner's art work, but she fails to provide specific examples demonstrating that his original work is majorly significant to the field. As previously discussed, there is no evidence showing that *NY Arts* is a major trade publication or some other form of

major media. As such, [redacted] article fails to demonstrate that the petitioner's art work has attracted substantial attention beyond the New York metropolitan area at a level indicative of a contribution of major significance in the field. There is no documentary evidence demonstrating that the petitioner has significantly influenced other artists in the field, that any of his specific works are widely renowned as masterpieces of modern contemporary art, or that his work otherwise equates to original artistic contributions of major significance in the field.

The petitioner also submitted excerpts from the 387-page almanac *Korean Art 2001* including an article on pages [redacted] entitled [redacted]. As previously discussed, the English language translation accompanying the article was not a full translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, there is no objective documentary evidence showing that *Korean Art 2001* had substantial readership in the petitioner's field or otherwise qualifies as a major trade publication or some other form of major media. While the petitioner is briefly mentioned along with numerous other artists in the almanac, there is no indication that the petitioner's work is the main focus of the article. The submitted article does not set the petitioner's original work apart from that of the numerous other artists mentioned in the article and the author of the article does not sufficiently explain how the petitioner's original work was majorly significant to the field. As such, the petitioner has failed to demonstrate that his inclusion in *Korean Art 2001* is indicative of an original contribution of major significance in the field.

Furthermore, with regard to the preceding articles in *NY Arts* and *Korean Art 2001*, the regulations contain a separate criterion regarding published material about the alien. 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. Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for published material about the alien 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.

The petitioner submitted a portfolio of his work entitled [redacted] by [the petitioner]" that includes an introduction by [redacted] Art Critic and Professor at [redacted]. The introduction, entitled [redacted] states:

The series of [the petitioner's] works can be said to be of the windows of mind on a serene voyage from his meditation on the clue of life he has cherished without cease, asking about the solitary existence of modern people.

Like the fate of whales that swim through the abysmal blue sea, yelling out something that cannot be figured out, his works of meditation series carry the simplified silence created by the contemplation about human beings on a consecutive lonely [sic] journey with the titles of twilight, the Milky Way, an evening glow, a morning glow, song of birds, deep and blue night, serene voyage, etc.

* * *

His works seem to be on the basis of virtual images of dreams or frustration from the limited space produced by the sense of extinction and the alienation of humans in urbanized society.

Professor [REDACTED] comments on the petitioner's work, but Professor [REDACTED] fails to provide specific examples of how the petitioner's original artwork has impacted the field at a level indicative of contributions or major significance in the visual arts. It is not enough to be a talented artist and to have others attest to that talent. An alien must have demonstrably impacted his field in order to meet this regulatory criterion.

The petitioner also submitted a letter of support from [REDACTED] Gallery Director and Associate Professor, Department of Art, [REDACTED], stating:

It was a pleasure and a delight to work with [the petitioner] and to have his work exhibited in our gallery. Our gallery is located within a heavily trafficked University building in the center of campus [The petitioner's] exhibition was easily one of the campus favorites, appreciated by artists for its conceptual blend of Eastern and Western influences, imagery and process, and appreciated by the "non arts folks" for its beauty, color, and technique.

In addition to exhibiting his paintings, [the petitioner] provided a lecture for our campus community and a workshop for our Art Education students in traditional Korean painting. [The petitioner's] discussion of his own work, including his early Korean and later Western influences, increased our students' knowledge both of his unique process, but more importantly gave them a greater understanding of and appreciation for the broad and varied cultural experiences [the petitioner] shared with the audience. His lecture was delivered to a packed house, and I received many compliments on the exhibition and lecture from students, who were universally charmed and appreciative for the way in which [the petitioner] generously shared his knowledge of a process and culture so unfamiliar to their own.

Finally, we were delighted and surprised by the gift to our College of a beautiful painting from [the petitioner] from his [REDACTED] exhibition. A Korean watercolor painting entitled [REDACTED] it was quickly requested by the Dean's office to be exhibited there permanently, on view for students, faculty and the administration to enjoy.

Based on [the petitioner's] unique and important contribution to the field of painting which has been developed through study of both traditional Korean and Western methods, and based upon his generous desire to share this acquired knowledge as a teacher, I believe that granting the status of Permanent Resident of the United States of America to [REDACTED] would greatly enrich our culture in general and the field of fine arts in particular.

discusses the petitioner's visit to and comments on his "unique and important contribution to the field of painting," but she fails to provide specific examples of how the petitioner's work has significantly impacted the field at large or otherwise equates to an original contribution of major significance in the field. also states that the petitioner increased students' knowledge of "his unique process" and gave them a greater understanding of his "cultural experiences." Assuming the petitioner's skills and experiences 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 Department of Transportation*, 22 I&N Dec. 215, 221 (Comm'r 1998).

The opinions of the petitioner's references are not without weight and have been considered by both the director and the AAO. 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 reference letters supporting the petition 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 795-796; *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"). Thus, the content of the references' 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 that one would expect of an artist who has made original contributions of major significance in the field. Without additional, specific evidence showing that the petitioner's work has been unusually influential, has substantially impacted his field, or has otherwise risen to the level of artistic contributions of major significance, the AAO cannot conclude that he meets this regulatory criterion.

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

The AAO affirms the director's finding that the petitioner's evidence meets this regulatory criterion.

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

The petitioner submitted documentation showing that he participated in solo exhibitions at the and the The petitioner also submitted general information about the preceding galleries printed from their own websites. Once again, USCIS need not rely on self-promotional material. There is no objective documentary evidence demonstrating that the aforementioned galleries have a distinguished

reputation. Accordingly, the AAO withdraws the director's finding that the [REDACTED] and the [REDACTED] have a distinguished reputation.

On appeal, counsel asserts that when an artist such as the petitioner "is invited to present a solo exhibition of his artworks, such an exhibition by the artist indisputably equates to having performed in a critical role for that particular gallery or art venue." The petitioner submits a December 7, 2012 letter from [REDACTED] Executive Director, Huntington Arts Council, stating:

This letter is submitted to unequivocally support the fine arts industry position that renowned artists, via solo exhibitions, play critical roles on behalf of galleries and other fine art venues.

In essence, the sole purpose of the existence of galleries and fine arts venues is to present exhibitions to the public of artworks that are deemed original, aesthetic and meaningful, though at times they may be controversial or provocative.

More importantly, galleries strive to present solo exhibitions where a single, noteworthy artist presents a collection of his/her artwork for the public to view and purchase. This also is meaningful for the audience as they can see a wide range of work from an artist.

[The petitioner] has presented his work in solo exhibitions . . . at fine arts galleries/venues including [REDACTED]

[REDACTED] asserts that "renowned artists, via solo exhibitions, play critical roles on behalf of galleries and other fine art venues," but 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). Further, 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*, No. 95 civ 10729, 1997 WL 188942 at *1, *5 (S.D.N.Y.).

In general, a leading role is evidenced by the nature of the role itself and a critical role is one in which the individual was responsible for the success and standing of the organization or establishment. While the petitioner's participation may have been leading or critical to the temporary exhibitions in which he was the solo artist, such participation does not automatically translate to a leading or critical role for any particular gallery as a whole. This criterion has not been met because the submitted evidence does not indicate that the role the petitioner performed for the above galleries was leading or critical. For instance, [REDACTED] states that she has "overseen over eighty exhibitions" and that the petitioner exhibited his work at a gallery "located within a heavily trafficked University building in the center of campus." [REDACTED] and the other references, however, fail to adequately explain how the petitioner's role as a temporary exhibitor was leading or critical to the ongoing operation of their galleries. Further, the references' letters lack specific information demonstrating the impact of the petitioner's exhibitions relative to that of the other solo exhibitions held at the galleries. While the petitioner's solo exhibitions lasted a few

weeks and were no doubt valued by the galleries that temporarily displayed his artwork, the documentation submitted by the petitioner does not differentiate him from the galleries' managers, directors or curators so as to demonstrate his leading role, and fails to establish that he was responsible for the galleries' success or standing to a degree consistent with the meaning of "critical role."

further states: "In the future we wish to present [the petitioner] in a solo exhibition at the , New York." There is no documentary evidence showing that the petitioner had exhibited his work at the at the time of filing. 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. 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. Therefore, the AAO will not consider the petitioner's future exhibition at the as evidence to establish his eligibility.

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

B. Summary

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

C. Prior O-1 Nonimmigrant Visa Status

The record reflects that the petitioner is the beneficiary of approved O-1 nonimmigrant visa petitions for an alien of extraordinary ability in the arts. Although the words "extraordinary ability" are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, "The term 'extraordinary ability' means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction." The O-1 regulation reiterates that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the petitioner's receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Further, the AAO does not find that an approval of a nonimmigrant visa

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

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

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

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

III. CONCLUSION

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

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.⁴ Rather, the proper conclusion is that the

⁴ 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

petitioner has failed to satisfy the antecedent regulatory requirement of three categories 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 AAO may deny an application or petition that fails to comply with the technical requirements of the law 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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.

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).