



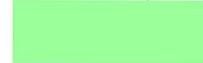
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **FEB 26 2013**

Office: TEXAS SERVICE CENTER FILE:



IN RE:

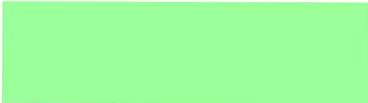
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the 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 is a soccer instructional school. It seeks to classify the beneficiary 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 an art illustrator. The director determined that the petitioner had not established the requisite extraordinary ability for the beneficiary 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 for the alien under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserts that the beneficiary meets all ten of the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i) – (x). Counsel requests that, if not approved, the petition be held in abeyance for further guidance and clarification in the extraordinary ability context. 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). Counsel argues that the ruling does not require a "two-part review" and "has resulted in an unclear adjudication." Counsel's arguments are not persuasive. 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)).

The court's multiple references to a final merits determination make clear that the court assumed an inquiry into the final merits would occur after the initial evidence stage. 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. As the court was interpreting the statute and regulations as they currently exist, any guidance would be purely procedural and would merely change when in the adjudication USCIS would review the evidence under the statutory standard.

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).

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.*

II. ANALYSIS

A. Evidentiary Criteria

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

The AAO withdraws the director's finding that the beneficiary meets this regulatory criterion.

The petitioner submitted a partially illegible color photocopy of a certificate from the "[REDACTED]" stating that the beneficiary received a "[REDACTED]" The English language translation accompanying the preceding certificate was not certified by the translator 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, there is no documentary evidence showing that this certificate is a nationally or internationally recognized prize or award for excellence in the field of endeavor.

The petitioner submitted a June 2, 2010 "[REDACTED]" presented to the beneficiary "for outstanding performance and lasting contribution as Speaker to the [REDACTED]" The petitioner also submitted a February 17, 2011 "Certificate of Appreciation" from the President of the [REDACTED] presented to the beneficiary "for outstanding performance and lasting contribution to the [REDACTED]"² The beneficiary's Certificates of Appreciation reflect local or regional recognition by the Brazilian business community in [REDACTED] rather than nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The petitioner submitted an "Excellence Award" (2010) from [REDACTED] (a [REDACTED] published in [REDACTED] focusing on the Brazilian Community) recognizing the beneficiary for his outstanding work as the newspaper's cartoonist. The petitioner also submitted a photograph of the beneficiary receiving his award from Mr.

² According to its website, "[REDACTED] is an independent, secular organization, founded in 2006 with the objective of uniting and strengthening the Brazilian business community in [REDACTED] especially [REDACTED] where a large part of the community is concentrated." [Emphasis added.] See [REDACTED] accessed on January 11, 2013, copy incorporated into the record of proceeding.

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[redacted] Publisher of [redacted]³ According to the beneficiary's resume that was submitted by the petitioner (initial exhibit 4), the beneficiary has worked as Art Director for [redacted] since June 2009. Therefore, the beneficiary's [redacted] "Excellence Award" reflects institutional recognition from the newspaper that he works for rather than a nationally or internationally recognized prize or award for excellence in the field of endeavor.

The petitioner submitted the following certificates:

1. Certificate stating: [redacted] [the beneficiary] For the Creation of the Winner Artwork in Design [redacted] Your outstanding contribution to the Brazilian Community in the U.S. was recognized by the [redacted]
2. Certificate stating: "[redacted] [the beneficiary] For the Creation of the Winner Artwork in Direct Marketing [redacted] Your outstanding contribution to the Brazilian Community in the U.S. was recognized by the [redacted]; and
3. Certificate stating: [redacted] [the beneficiary] For the Creation of the Winner Artwork in External Media [redacted] Your outstanding contribution to the Brazilian Community in the U.S. was recognized by the [redacted]

In response to the director's request for evidence, the petitioner submitted a November 28, 2011 letter from Mr. [redacted] in his capacity as "President of the [redacted]" Mr. [redacted] states:

[The beneficiary] has received from our institution the following awards:

[redacted]

The certificates numbered as items 2 and 3 above correspond to two of the awards listed by Mr. [redacted] However, the "[redacted] (Best Design - [redacted]

³ The petitioner's evidence includes copies of [redacted] listing the beneficiary among the newspaper's staff as the "Art Director" and Mr. [redacted] as the newspaper's "Publisher."

2008)" listed by Mr. [REDACTED] contradicts information on the certificate (item 1) recognizing the beneficiary "For the Creation of the Winner Artwork in Design [REDACTED] Specifically, Mr. [REDACTED] states the beneficiary won Best Design for [REDACTED] in 2008 at the [REDACTED] program while the beneficiary's certificate as winner of Artwork in Design for [REDACTED] (item 1) is from the [REDACTED] program. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, while the petitioner submitted the "Official Catalog" for the [REDACTED] event listing the beneficiary as [REDACTED] the catalogue does not identify the beneficiary as the winner of the [REDACTED] and [REDACTED] awards from 2011. Therefore, the second and third awards listed by Mr. [REDACTED] above are undocumented. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). Further, the regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. *Id.* In this instance, the petitioner has not demonstrated that primary evidence of the beneficiary's [REDACTED] and [REDACTED] awards from 2011 does not exist or cannot be obtained. Accordingly, the November 28, 2011 letter from Mr. [REDACTED] asserting that the beneficiary received those two awards does not comply with the preceding regulatory requirements.

Mr. [REDACTED] asserts that the [REDACTED] "has as its members more than 200 institutions, press, and broadcasting companies from around the world" and that the association's [REDACTED] "of 6 judges receives hundreds of submissions for consideration from individuals worldwide." Mr. [REDACTED] states that there are [REDACTED] [REDACTED] and four [REDACTED] Mr. [REDACTED] does not indicate how many individuals submitted entries in the specific categories won by the beneficiary. Mr. [REDACTED] also states that the [REDACTED] "has gained its place as a reputable and internationally recognized institution, due to its membership profile and its involvement in promoting a form where exchange of creativity can occur." In addition to Mr. [REDACTED] comments, the "Official Catalog" for the [REDACTED] [REDACTED] and copy of the DVD from the 2008 [REDACTED] [REDACTED] event, the petitioner submitted online material from the presenting association's website identifying the [REDACTED] listing the participating organizations, and posting videos from the award program. The self-serving nature of the information submitted from the [REDACTED] website, provided in the letter from Mr. [REDACTED] and contained in the other material from the event's organizers fails to demonstrate that the

beneficiary's particular awards are nationally or internationally recognized awards for excellence in the field of endeavor. 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). Moreover, a contest may be open to entries from throughout a particular country or countries, but this factor alone is not adequate to establish that a specific prize from the contest is "nationally or internationally recognized."

The petitioner submitted an article about the [REDACTED] posted at [REDACTED] a website that focuses on the Brazilian community in the United States. The petitioner also submitted an article entitled "[REDACTED]" posted at [REDACTED] a [REDACTED]. In addition, the petitioner submitted an article posted on the website of [REDACTED] stating that one of the university's faculty, Professor [REDACTED], was recognized "for her 'outstanding performance and contribution' in the [REDACTED]." None of the preceding online materials mention the beneficiary or his specific awards. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the beneficiary's awards be nationally or internationally recognized in the field of endeavor and it is the petitioner's burden to establish every element of this criterion. There is no documentary evidence showing that the beneficiary's specific [REDACTED] were recognized beyond the presenting association and therefore commensurate with nationally or internationally recognized prizes or awards for excellence in the field.

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

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

The petitioner submitted documentation of the beneficiary's membership in the Brazilian International Press Association and the [REDACTED]. There is no documentary evidence (such as bylaws or rules of admission) showing that the [REDACTED] require outstanding achievements of their members, as judged by recognized national or international experts in the field.

The petitioner submitted two December 6, 2011 letters from [REDACTED] President, [REDACTED]. The first letter from Ms. [REDACTED] states: "Among our fine caliber members we are happy to have [the beneficiary] as signature member and one of our fine visual artists." Ms. [REDACTED] second letter states:

[REDACTED] are working and professional fine artists whose artwork is of a high caliber and have been juried into the [REDACTED] Only Signature

Members may enter shows at the [redacted] at [redacted] with full benefits, enter the [redacted] at the [redacted] and participate in the [redacted] program. [redacted] members also may display their art on the [redacted] and on the large screen TV in the gallery.

The petitioner also submitted a blank [redacted] form from the [redacted]. In addition, the petitioner submitted an online biography for [redacted] and a December 24, 2010 article entitled "[redacted] at [redacted] show" stating that Ms. [redacted] "a former local museum curator, juried the submissions." The petitioner also submitted a [redacted] stating:

Associate Membership

[redacted] members automatically become Associate Members. Membership is open to all members of [redacted]

* * *

After being an Associate member for a minimum of 90 days, a member may submit their work to be juried to [redacted]

* * *

Once an Associate member has successfully been juried, they become [redacted]

* * *

For [redacted]:

New member are [sic] juried. Jurying requires a presentation of a body of four (4) pieces of artist work, completed within the past 2 years and professionally presented for display, and information about the candidate's artistic background. All jurying is done by outside [redacted]

* * *

[redacted] are chosen by their solid reputation in U.S. as professional artist, art instructors, gallery directors, or curators. [redacted] must represent a wide range of knowledge of fine arts and crafts.

The AAO cannot conclude that being a working and professional fine artist, fulfilling 90 days as an [redacted] submitting four pieces of artwork that have been completed within a two year period and professionally presented for display, providing information about one's artistic

background, and having been juried into the [REDACTED] by an outside juror equates to “outstanding achievements” in the arts. For instance, creating pieces of artwork that were displayed professionally is inherent to the visual arts rather than an indication of “outstanding achievements” relative to other working artists. Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires “membership in associations” in the plural. The use of the plural 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). Therefore, even if the petitioner were to establish that the beneficiary’s [REDACTED] in the [REDACTED] - [REDACTED] meets the elements of this regulatory criterion, which the petitioner has not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires evidence of the beneficiary’s qualifying membership in more than one association requiring outstanding achievements of its members, as judged by recognized national or international experts.

In light of the above, the petitioner has not established that the beneficiary 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 director concluded that the materials submitted by the petitioner were either not about the beneficiary or did not appear in professional or major trade publications or other major media. 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 beneficiary 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 generally *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 submitted pages of the newspaper [REDACTED] with cartoons created by the beneficiary. The plain language of this regulatory criterion requires the submission of

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“[p]ublished material about the alien in professional or major trade publications or other major media” including “the title, date, and author of the material.” The newspaper cartoons submitted by the petitioner do not meet the preceding requirements. For instance, they are not about the beneficiary and the petitioner has failed to demonstrate [REDACTED] qualifies as a form of major media in the United States or in any other country.

The petitioner submitted an article entitled “[REDACTED]” appearing in an unidentified publication “produced by the [REDACTED].” The article was unaccompanied by an English language translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). In addition, the date and author of the material were not identified as required by the plain language of the regulation at regulation at 8 C.F.R. § 204.5(h)(3)(iii). While the article includes a brief caption stating that the Academy’s logo was created by the beneficiary, the article is not about the beneficiary and there is no documentary evidence showing the material was in a professional or major trade publication or some other form of major media.

The petitioner submitted two articles in [REDACTED] entitled “[REDACTED]” (July 2007) and “[REDACTED]” (December 2005), but the articles were unaccompanied by a full English language translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). In addition, the author of the material was not identified as required by the plain language of the regulation at regulation at 8 C.F.R. § 204.5(h)(3)(iii). Although the two articles purportedly include one sentence thanking the beneficiary for his artistic contribution and participation, the articles are not about the beneficiary and there is no documentary evidence showing that [REDACTED] is a professional or major trade publication or some other form of major media.

The petitioner submitted a September 2006 article in A [REDACTED] newspaper entitled “[REDACTED]” but the article was unaccompanied by an English language translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). This article constitutes material written by the beneficiary rather than published material about himself. Moreover, there is no evidence showing that [REDACTED] newspaper qualifies as a form of major media in Brazil or in any other country. Thus, the article does not meet the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

In response to the director’s request for evidence, the petitioner submitted an October 20, 2011 article in [REDACTED] newspaper entitled “[REDACTED]” that includes five sentences specifically mentioning the beneficiary. This article was published subsequent to the petition’s May 12, 2011 filing date. Eligibility, however, 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. Accordingly, the AAO will not consider articles published after May 12, 2011 as evidence to establish the beneficiary’s eligibility.

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Regardless, the author of the material was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

The petitioner also submitted a December 24, 2010 article entitled “[REDACTED]” in Florida’s [REDACTED] newspaper, but the article is about the art show in general and does not even mention the beneficiary. As previously discussed, 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.”

The petitioner’s response included a December 2010 four-sentence article in [REDACTED] promoting the [REDACTED] exhibition. The article and an accompanying photograph identify the beneficiary and another individual as participants in the exhibition, but the author of the material was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, the petitioner submitted a November 2010 article in [REDACTED] entitled “[REDACTED]” but the article is not about the beneficiary. Instead, the article is about the [REDACTED] High School Soccer Team and only briefly mentions the beneficiary as having designed the team’s logo and mascot. Further, the author of the material was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The petitioner also submitted an August 2010 article in [REDACTED] entitled “[REDACTED]” discussing the beneficiary’s work for the newspaper, but the author of the material was not identified as required by the plain language of this regulatory criterion. The petitioner’s submission also included information from [REDACTED]’ media kit stating that the [REDACTED] based newspaper has “[REDACTED]” and reaches “[REDACTED]” As previously discussed, USCIS need not rely on self-promotional material. *See Braga v. Poulos*, at 680. There is no documentary evidence (such as objective circulation information from an independent source) showing the distribution of [REDACTED] relative to other newspapers to demonstrate that the submitted articles were published in a form of “major” media. For instance, the petitioner submitted information indicating that the [REDACTED] has a readership of [REDACTED] while [REDACTED] claims a readership of only [REDACTED]. Accordingly, the petitioner has not established that [REDACTED] is a form of “major” media in the United States or in any other country.

The petitioner’s response included additional material in [REDACTED], in conservation advertisements by [REDACTED], in public awareness campaigns and newsletters prepared by [REDACTED] promotional and technical documentation, and in Diagraphic Editoria’s anatomical diagrams and imagery. None of these additional items meets all of the requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). For example, the submitted materials were deficient in that they did not include a date or an author, they were not about the beneficiary, they lacked the necessary English language translation, or they lacked evidence that they were published in professional or major trade publications or other major media.

On appeal, the petitioner submits an October 2007 article in [REDACTED] entitled "[REDACTED]" This multi-page article is primarily about how good illustrations play a crucial role in product sales and only briefly mentions the beneficiary. Further, the author of the material was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The petitioner also submits information about [REDACTED] from the publisher stating that the magazine's circulation is 40,000 copies. As previously discussed, USCIS need not rely on self-promotional material. *See Braga v. Poulos*, at 680. There is no documentary evidence showing the distribution of *Marketing e Negocios* relative to other industry publications to demonstrate that the magazine qualifies as a "major" trade publication. Regardless, as the petitioner had the opportunity to submit the October 2007 article in [REDACTED] in response to the director's request for evidence, the AAO will not consider this evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

On pages 30 and 31 of the appellate brief, counsel asserts that the materials submitted for this criterion "must be considered as comparable evidence to corroborate his occupation because they illustrate that beneficiary's work is intrinsically connected to his employers or his affiliation with organizations." The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten categories of evidence "do not readily apply to the beneficiary's occupation." Thus, it is the petitioner's burden to demonstrate why the regulatory criteria at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the alien's occupation and how the evidence submitted is "comparable" to the specific objective evidence required at 8 C.F.R. §§ 204.5(h)(3)(i) – (x). The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the beneficiary's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner submitted evidence that specifically addresses all ten of the categories of evidence set forth in the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to satisfy the plain language requirements of at least three categories of evidence at 8 C.F.R. § 204.5(h)(3), the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

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

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

The AAO withdraws the director's finding that the beneficiary meets this regulatory criterion.

The aforementioned December 6, 2011 letter from [REDACTED], President of the [REDACTED] states:

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[The beneficiary] . . . has performed as [redacted] in other exhibitions sponsored in [redacted] located on [redacted] in [redacted]. A [redacted] works with the [redacted] as the artwork is selected: they cannot have work entered in the exhibition; they work from a roster of art work entered; they make sure the determined number of accepted artwork is correct; indicates which pieces of artwork are eligible for awards and notes the winners on the "award sheet" with titles and names.

The letter from Ms. [redacted] fails to establish that performing in the subordinate role of [redacted] equates to participating as "a judge" of the work of others in the field. There is no evidence demonstrating that a [redacted] actually judges the artwork and makes final selections for the exhibition, rather than merely assisting the [redacted] with general administrative functions of the exhibition. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires evidence demonstrating that the beneficiary has participated as "a judge of the work of others." The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified at 8 C.F.R. § 204.5(h)(3)(iv). The regulation cannot be read to include instances of providing only administrative support to an actual [redacted] (such as [redacted] who formally participates as a judge of the work of others. Moreover, there is no documentary evidence showing the specific exhibitions judged by the beneficiary at the [redacted] the dates of his participation, and the names of the artists whose work he specifically selected. Merely submitting documentary evidence reflecting that the beneficiary has served as a [redacted] without evidence demonstrating who he judged is insufficient to establish eligibility for this regulatory criterion.

The petitioner submitted a November 28, 2011 "Statement" from [redacted] stating:

I was the Resident Vice President for [redacted] in a period of 10 years

In the year 2000, [redacted] had sponsor [sic] an Art Contest in partnership with [redacted] a non-profit organization committed with education and industrial production. [The beneficiary] was invited to participate as a Judge in a panel composed of three to evaluates [sic] the candidate's work. The main idea was invites [sic] artists to present new ideas about the new millennium with a sort of innovative art resource.

The petitioner also submitted a December 5, 2011 "Statement" from [redacted] stating:

I hereby certify that [the beneficiary] served as judge in a promotional campaign developed by [redacted] in 2006. I was co-owner of [redacted] in the period 2002 to 2007.

In one of these actions we have developed contest of cartoons with sportive subject aimed on promoting the new site of [redacted] magazine, a magazine aimed to the Brazilian Soccer and sports in general. Basically the participant would access the customer's site and send

his cartoon; he could send a maximum of three images. The winner would receive 1 year subscription of the printed version of the magazine and a cash value.

The artistic reputation of [the beneficiary] in sports universe as cartoonist gave great importance to the project, where his decision determined the winner.

Merely submitting statements asserting that the beneficiary has served as a judge of the work of others without evidence showing who he judged and their field of specification is insufficient to establish eligibility for this criterion. Rather than submitting contemporaneous documentary evidence of the beneficiary's participation as a judge in the art contest co-sponsored by [redacted] and the [redacted] in 2005-2006 and in the [redacted] magazine cartoon contest in 2006, the petitioner instead submitted brief statements from Mr. [redacted] and Mr. [redacted] issued in 2012 attesting to the beneficiary's involvement. The AAO notes that neither statement bears the letterhead of the contests' company sponsors or the companies' contact information. Further, there is no documentary evidence showing the beneficiary's specific assessments and the names of the artists whose work he evaluated. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Moreover, 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). In this instance, the record does not include primary evidence demonstrating the beneficiary's participation as a judge for either contest. A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). When relying on secondary evidence, the petitioner must provide documentary evidence that the primary evidence is either unavailable or does not exist. *Id.* When relying on an affidavit, the petitioner must demonstrate that both primary and secondary evidence are unavailable. *Id.* In this instance, the petitioner has not demonstrated that primary evidence of the beneficiary's participation as a judge does not exist or cannot be obtained. Accordingly, the November 28, 2011 and December 5, 2011 statements from Mr. [redacted] and Mr. [redacted] do not comply with the preceding regulatory requirements.

In light of the above, the petitioner has not established that the beneficiary 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 the beneficiary's 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 artistic or business-related contributions "of major significance in the field." The phrase "major significance" is not

superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

The petitioner submitted letters of support discussing the beneficiary's work and documentary evidence of the beneficiary's artwork for various clients.

Dr. [REDACTED] Medical Department Manager, [REDACTED], states:

Since our mainstream is medicines manufacturing, our advertising campaigns demand state-of-the-art support in fields such as technical advisory (provided by myself), specialized marketing planning, computer graphics, and scientific artistic illustrations - remarkably provided by [the beneficiary]. In this latter case, [the beneficiary] was able to demonstrate a high capacity in comprehending the complexities of biopharmacology and expressing it in marvelous artistic illustrations. After [the beneficiary's] cooperation in our Marketing initiatives, we were able to notice a significant increase in our company's revenue along the next two years time span. Due to our clients' positive reaction to our advertising material - mainly physicians - we were able to link [the beneficiary's] works to this profitable economic response. We can surely state that his works did - and still do - contribute to our commercial performance in the field, and that a different graphic artist could hardly reproduce the same brilliant results.

* * *

I would recommend his professional services to any person or company demanding high quality and high complexity artistic illustrations.

Dr. [REDACTED] comments that the beneficiary's artistic illustrations helped increase [REDACTED] revenue, but Dr. [REDACTED] does not provide specific examples of how the original illustrations by the beneficiary have significantly impacted others in his field or otherwise constitute original artistic contributions of "major significance" in pharmaceutical marketing.

[REDACTED] Senior Art Director, [REDACTED] states:

As an Art Director I consider that [the beneficiary] is by far one of the greatest artists we ever worked. He has an elite-level technique that differs from all medical illustrators. His achievements by using a combination of styles and media, brings a rare beauty mixed with strong reality. [The beneficiary's] artwork can add significantly to any Organization, Advertising Agency, Art Gallery or Institution.

Mr. [REDACTED] comments on the beneficiary's skillful illustration technique, but he does not specify which of the beneficiary's illustrations equate to original scientific, artistic, or business-related contributions of major significance in the field. Assuming the beneficiary's skills are

unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm'r 1998). The petitioner's appellate submission includes an October 2007 article in [REDACTED] entitled "[REDACTED]" that quotes Mr. [REDACTED]. In the article, Mr. [REDACTED] states that the sales revenue of the campaign containing the beneficiary's illustrations for the product "[REDACTED]" represented "an increase of 45% over the initial revenue in a period of two years." While the beneficiary's illustrations helped increase [REDACTED] revenue, there is no evidence demonstrating that his original work for the company constitutes original contributions of major significance in the field. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the beneficiary's contributions be "of major significance in the field" rather than limited to a single client or company.

Dr. [REDACTED] Medical Editor, [REDACTED], a scientific editorial company specializing in medical education, states:

We are a publishing company engaged in three strategic pillars: Art and Design, Communication and Targeted Editorial Content.

* * *

[The beneficiary] is part of our team since 2001 He is an expert not only because he does biological art and is able to illustrate anatomical charts with singular beauty, but because he does in a [sic] extraordinary way. His illustrations comes [sic] with an exquisite technique that can be noted at the very moment of the briefing. . . . Normally a talented illustrator is more than enough to translate visually what I need. But in very rare cases, and really important ones, we need to illustrate an entire description of biomechanisms in articles with scientific precision; those articles are edited to highly qualified audience. This is not a regular task. This requires a deep understanding of science an [sic] art and [the beneficiary] can make this looks [sic] really easy.

In addition, [the beneficiary] has achieved the position of training our art professional team. . . . The off-set printing process is a crucial moment of any publication, representing a million dollars loss if something goes wrong and harm our reputation as well. By using his multidisciplinary knowledge of colors in different media [the beneficiary] had developed a technical list of steps and set ups witch [sic] are been [sic] used for all of our team since then in order to grant the best printing result.

Dr. [REDACTED] praises the beneficiary for his expertise in biological art, his anatomic illustrations, and training others in the company, but Dr. [REDACTED] fails to provide specific examples of how the beneficiary's original illustrations and training methodologies have significantly influenced the field at large or otherwise constitute original artistic contributions of major significance in the medical publishing industry. While the beneficiary's work helped ensure the quality of [REDACTED] illustrations and its off-set printing process, there is no evidence

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demonstrating that the beneficiary's original work for the company equates to original contributions of major significance in the field.

_____, President of the _____, states:

The _____ the highest power of guidance and supervision of the profession of Phonoaudiology in the state of _____ comes, through this letter, to attest the essential contribution of [the beneficiary], artist of incomparable creative ability, to the repercussion and success of campaign '_____'

The visual identity of the socio-educational actions, for nine years, has been growing rapidly and spreading throughout Brazil, through the character '_____' that was entirely designed and developed by this brilliant artist who is conquering children, youth, adults, pregnant women, mothers, professionals and managers at all levels with his creativity.

[The beneficiary] is undoubtedly the secret of the success of this beloved character . . . who is a "Trademark" of _____ which for two years, has rights of use granted also to all the other seven _____ - expanding at a range almost 180 million people in Brazil, equivalent to the current total population of this country.

We can say with certainty that the character "_____" has been changing health habits of a nation, improving the living conditions of Brazilian society, bringing health information, wellness, prevention and best practice in breastfeeding. This remarkable transformation was only possible due to the extraordinary ability that this artist has to give life to an idea and make dreams come true.

[The beneficiary] has an amazing talent and an amazing level of knowledge in various fields, through art, health, marketing, psychology and education. . . . All these qualities, combined no doubt resulted in the incredible impact the character "_____" with its popularity is becoming '_____' becoming a national icon, unanimity among families and institutions, young and old, businessmen and workers.

'_____' has appeared massively in the mainstream media across the country, newspapers, television, magazines, and panels on public transport stations. Also investments have been made by the _____ renowned public and private institutions to large-scale publications and nonprofit, the image of "_____" in flyers, brochures, promotional items, educational materials, among others.

In addition to Ms. _____ letter of support, the petitioner submitted campaign material and publications showing that the "_____" logo and a T-shirt design of the beneficiary were utilized by _____ for its campaign to promote breast feeding. Ms. _____ does not cite to

any specific national health studies to support her assertion that “the character ‘ [REDACTED] ’ has been changing health habits of a nation, improving the living conditions of Brazilian society, bringing health information, wellness, prevention and best practice in breastfeeding.” The mere fact that the beneficiary has designed a logo or T-shirt graphics that were utilized by [REDACTED] does not demonstrate that his work has had major significance in the field. In response to the director’s request for evidence, the petitioner submitted an October 20, 2011 article in [REDACTED] newspaper entitled ‘ [REDACTED] ’ that includes five sentences mentioning the beneficiary’s visual arts background and his graphic design work for [REDACTED] health campaigns. As previously discussed, this article was published subsequent to the petition’s May 12, 2011 filing date. Eligibility, however, must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49 (Reg’l Comm’r 1971). Accordingly, the AAO will not consider this article as evidence to establish the beneficiary’s eligibility. Regardless, the petitioner has not submitted evidence demonstrating that the beneficiary’s design of the ‘ [REDACTED] ’ logo or of T-shirt graphics equates to artistic contributions of major significance in the field.

[REDACTED] Senior Specialist/Customer Relationship Management, Office of Information Technology, [REDACTED] states:

[The beneficiary’s] work is a composition between two classical schools, Impressionism and Realism. The artistic composition between these different artistic styles provides a unique touch of personality and originality. The vivid colors when integrated into the central element of the work brings attention in anywhere they are displayed.

[The beneficiary’s] animal portraits are reminiscent of the works of [REDACTED] who chronicled the fauna of the Americas for future generations. [The beneficiary] has also a strong scientific basis in his artistic representations and his sense of observation and reproduction of nature, are extremely important concerning academic subject.

Mr. [REDACTED] does not explain how his working in the “ [REDACTED] ” translates to expertise in the beneficiary’s field. Regardless, Mr. [REDACTED] does not provide specific examples of how the beneficiary’s animal portraits have impacted the field in the same manner as Mr. [REDACTED], the individual to whom Mr. [REDACTED] compares the beneficiary, or were otherwise majorly significant to the field.

[REDACTED], an artist residing in Florida who exhibits his paintings internationally, states:

I have met Mr. [REDACTED] at one of my exhibits at the year of 2001 in [REDACTED] and I had the opportunity to look at his work. I’ve seen illustrations for book covers, magazines, advertising and all sort of material where an artist can lend his talent.

I could easily notice that [the beneficiary] can master pencil drawing, charcoal, watercolor, pointillism, color pencil, oil paint, acrylic paint and digital art and, he often combines them to reach his objectives. He has a strong presence of realism in his pieces

that allows achieving results that a photo cannot. A photographer can barely “stop” a humming bird wing when it is flying, or, a kit cat will never “poses” [sic] to a picture, holding something in its pawns [sic]. Illustration is a discipline that requires a very specific ability and I consider [the beneficiary] one of the greatest illustrators I ever met.

In addition, he is an outstanding Art Director, not only because he has what it takes for this discipline, but for he integrates a marketing knowledge that allows costumers [sic] and, costumers [sic] of his costumers [sic] to succeed.

Mr. [redacted] asserts that the beneficiary has mastered various artistic mediums, has a strong presence of realism in his work, and is an outstanding art director, but Mr. [redacted] does not provide specific examples of how the beneficiary’s original work has already significantly impacted the field or otherwise constitutes an original contribution of major significance in the visual arts or marketing.

[redacted] Chair of the Bachelor of [redacted] states:

I affirm that [the beneficiary] is an exceptional artist. His talent was easily identified thru the period, July 1995, I was teaching the workshop at [redacted] Which was an [sic] knowledge exchange between this school of visual arts in Brazil and the [redacted] in the USA.

The quality of [the beneficiary’s] work was beyond the expectation when compared with other classmates. It’s wonderful to see that not only does he creates fast, but he has the ability of producing the pieces in a very professional and organized manner.

Definitely, [the beneficiary] is professional of great value and his “[redacted],” piece made for the workshop, had huge prominence.

While the beneficiary’s “[redacted]” piece stood out when compared with the work of “other classmates” in Mr. [redacted] workshop, there is no documentary evidence showing that the beneficiary’s artwork had a majorly significant impact in the visual arts field, has significantly influenced the work of other artists, or otherwise equates to an original artistic contribution of major significance in the field.

[redacted], owner of [redacted] states:

I have been a graphic designer since 1989. In the search for perfection I participated in innumerable classes, workshops and events.

I met [the beneficiary] . . . at an exhibit in [redacted] organized by [redacted] and directed by [redacted] an Art and Illustration Professor and very prominent artist in the world of illustration. [The beneficiary] was still young in that time but with a very mature and exquisite treat in his art and between all present

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artists in that exhibit, [the beneficiary's] was considered with 1st appreciation certification, given by [redacted] personally, which was a great achievement.

* * *

[The beneficiary] was blessed with a rare talent and I believe that he brings to anywhere he is the gift of art.

Ms. [redacted] comments that the beneficiary received an appreciation certificate for his work in Mr. [redacted] workshop, but there is no documentary evidence showing that the beneficiary's artwork from that workshop has impacted the field at level indicative of an original artistic contribution of "major significance" in the visual arts.

[redacted], an artist, and a watercolor teacher at the [redacted] states:

[The beneficiary] asked me to make a review of his work and I was really impressed with the quality of the work he presented me. It is easy for me to recognize the professionalism and competency that [the beneficiary] shows. He is a natural artist with ability that stands out. He is so creative that he can use different mediums and techniques to achieve the results he desires. The characters he makes are really imaginative and professionally done well.

While Mr. [redacted] compliments the beneficiary on the quality of his work, Mr. [redacted] fails to provide specific examples of how the beneficiary's work is majorly significant to the field at large.

[redacted] Producer, [redacted], an entertainment company working out of [redacted], states:

This letter testifies [the beneficiary's] ongoing contribution to our Animation Project "[redacted]"

* * *

[The beneficiary] has been the main key to make this project real. We invited him to accept the challenge of developing all characters concerning their profiles according to our script.

* * *

I am the author of [redacted] and I been closely working with [the beneficiary]. I am truly impressed on how fast he can draw and his perception to details, despite his actives [sic] contribution with ideas about the characters' profile and story board. We are glad to have chosen [the beneficiary], his versatility on creating different

styles brought to ' [REDACTED] ' to reality and gave her the exact personality we expect, and our own visual style.

[The beneficiary] will be developing every single character on this movie, presenting the scenes to our team through story boards and participating as Creative Director of the [REDACTED] promotional material. He is an [sic] crucial asset to our project and we highly recommend his work. Due to the confidential aspect of this project I present attached a summarized booklet targeted to potential investors, studios and producers in the U.S., Canada, and Europe.

Mr. [REDACTED] comments that the beneficiary is currently developing characters for the ' [REDACTED] ' animation project, but there is no documentary evidence showing that the production has been successfully released in theaters or broadcast on television. As previously discussed, eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Therefore, the AAO will not consider the beneficiary's ongoing work for this unreleased animation project as evidence to establish his eligibility. There is no evidence showing that the beneficiary's work for the project had already attracted a substantial audience or otherwise qualified as an original artistic contribution of major significance in the field at the time of filing.

[REDACTED] an employee of [REDACTED] a non-profit entity created to promote Art, Culture, Sports and Social Work, states:

[The beneficiary's] work for the writer [REDACTED] one of the most important personalities of Brazilian Literature, brought to our service the excellent quality of his work. We've organized a commemorative exhibition about the author, bringing together his books, archive photos, historic facts and other documentation about his contribution to culture and Portuguese language.

[The beneficiary] has made the main illustration for the exhibit, used in our publications and material to promote the event. Also, this illustration, a monochrome [REDACTED] figure about [REDACTED] was hanged during the exhibit and represented the amount of \$5000 dollars in our art auction at the end of the event.

I affirm that [the beneficiary] is an exceptional artist, well known by the quality, creativity and expressiveness of his work. He is a singular talent of the art which he represents and it confirms itself by creation of his artwork.

Ms. [REDACTED] states that the beneficiary created an illustration for an exhibition honoring the work of Brazilian writer [REDACTED] but there is no documentary evidence showing that the beneficiary's artwork was majorly significant to the field of visual art. The mere fact that the beneficiary has secured projects as an illustrator does not demonstrate that his work has had major significance in the field.

Dr. [REDACTED] Assistant Professor of Biogeography in the Department of Geosciences and the Environmental Sciences Program at [REDACTED], states:

[The beneficiary's] work concerning endangered Brazilian wildlife is very realistic and anatomically/physiologically accurate in a manner that is useful for taxonomic illustration in scientific texts. In addition, his art evokes an immediate connection between the species and the general public. This connection through his art, the painstaking care of a human hand to reproduce the characteristics and personality of species on the edge of existence, touches an important cord in the hearts and minds of citizens in a manner that spurs their support for the often long-term, expensive, and difficult choices required to restore species' habitats and pull species back from the brink of extinction.

Dr. [REDACTED] asserts that the beneficiary has accurately depicted endangered Brazilian wildlife in illustrations for a conservation campaign sponsored by [REDACTED] but Dr. [REDACTED] does not provide specific examples of how the beneficiary wildlife illustrations have significantly impacted the field or otherwise constitute original artistic contributions of major significance in the field.

[REDACTED] Art Specialist, [REDACTED] states:

I believe [the beneficiary's] work is very special; he brings out a pictoric essence. His pencil drawings are precise, with an impressive use of the chiaroscuro technique (light and dark to create an impression of shade and, therefore, volume). The drawings concerning American culture are clever and very particular, due to the fact that only a few people have this profound knowledge of different cultures. This artistic expression would be achieved by acclaimed artists like Norman Rockwell (1894-1978) As [the beneficiary], Norman Rockwell had worked as cartoonist, illustrator and art director for several magazines.

[The beneficiary's] watercolors are rich, especially on the use of bright colors to depict the rich color palette of tropical scenery. This is not easy to obtain using this technique. The macaws, calls my attention The richness of the colors and the perfection of the lines are outstanding. [The beneficiary] had shown different kinds of techniques that exceed the ability of others.

The artistic versatility of [the beneficiary] is impressive; it is compared to great masters from the past like Goya (1746-1828); who painted cartoons (designs) for the royal tapestry factory in [REDACTED] As a tapestry designer, Goya did his first genre paintings or scenes from everyday life and was appointed first Spanish court painter in 1799.

Another acclaimed artist who had combined art and design was Andy Warhol, an American painter, printmaker, and filmmaker who was a leading figure in the visual art movement known as pop art. After a successful career as a commercial illustrator, Warhol became famous worldwide for his work as a painter and he removed the

difference between fine arts and commercial arts used in magazines and advertising campaigns.

Mr. [REDACTED] asserts that the beneficiary's "work is very special," but Mr. [REDACTED] does not provide specific examples of how the beneficiary's drawings, watercolors, cartoons and other works of art have impacted the field in the same manner as those of Norman Rockwell, Goya, or Andy Warhol, the influential artists to whom Mr. [REDACTED] specifically compares the beneficiary, or of how the beneficiary's works were otherwise majorly significant to the field. For example, there is no documentary evidence showing the extent of the beneficiary's influence on other artists in the field or that the field has somehow changed as a result of his original work.

[REDACTED], President of [REDACTED] states:

We've been hiring [the beneficiary] for every special job that needs more expertise than is available from our team. [The beneficiary] does have a special talent and his work was extremely necessary to the success of the jobs he was involved in.

[REDACTED] - March, 2008

[The beneficiary] was hired as Art director for 200 years of "[REDACTED] Special Exhibit of 200 years of the bank including, but not limited to the following:

- Design of the exhibition as a whole.
- Creation of 17 panels with all of the pictures and their history for exhibition.
- Artistic Restoration of all the pictures, including one of their first building.
- Artwork for the stage scenery - Conception, digital art for the mega prints and coordination of the Installation at the location. The stage was used for a concert of one of the most representative "[REDACTED]" musicians of all times: [REDACTED]
- Design and production of all the pieces, including CD and DVD covers, for the commemorative gift package for the VIP guests.

[REDACTED] September, 2008

- [REDACTED] The client was the [REDACTED] who hired [REDACTED] to develop artwork for the invitation. [The beneficiary] made a digital painting and the whole concept of this piece, bringing it to a completely different level of beauty and artistic sublimation.

Mr. [REDACTED] describes two of the beneficiary's projects for [REDACTED] and the [REDACTED] on behalf of [REDACTED] but Mr. [REDACTED] does not provide specific examples of how the beneficiary's original contributions to these projects were majorly significant to the field. The mere fact that the beneficiary has designed an exhibition and promotional material depicting the history of [REDACTED] and created the digital artwork for an invitation to a municipal celebratory event does not demonstrate that his work has had major significance in the field.

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[redacted] states that she was Marketing Manager of [redacted] from 2003 – 2006. Ms. [redacted] further states:

I had the pleasure of working with [the beneficiary] during the years 2004 to 2005, in the drafting work as creative consultant and I could see his high level of competence.

* * *

[The beneficiary] had performed as specialist on elaborating, newspapers to the consumer awareness, Visual Identity to our work projects, and so on. [The beneficiary] has developed several panels of illustrations, each aimed at specific subject of the project with great detail, efficiency and speed, but also toward the creation of all parts concerned and institutional advertising as well. As expected, our project was a great success at that time, being recognized and acclaimed by all branches of the [redacted] in the world.

We were very happy and grateful for the beautiful artistic work of [the beneficiary], that when targeted to a corporative language brings the unique approach needed. He is extraordinarily, competent and his illustrations have an incredible perspective. [The beneficiary] was an important asset to our Company and I would recommend his work to anyone.

While the beneficiary's illustrations helped promote the [redacted] brand image, there is no documentary evidence demonstrating that his specific work for the company equates to original contributions of major significance in the field. As previously discussed, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the beneficiary's contributions be "of major significance in the field" rather than limited to a single client or company.

[redacted], founder of [redacted] a company aimed to promotion and merchandising, states:

The [redacted] was the world's largest political summit; it was officially known as [redacted] or [redacted]. Held in [redacted] brought together 172 countries for 2 weeks discussing global issues were they signed a package of agreements concerning biodiversity, climate changes among others.

I met [the beneficiary] at the UNCED preparation

* * *

[The beneficiary] was the artist responsible for illustrating all perspective pictures of the convention park, creating and designing the publications and visual conceptions for all park stands. [The beneficiary's] art skills were extremely important; his speed on drawing and illustrating made possible get everything done in time. It is important considering that in 1992, computers for graphic art weren't useful as today, and art

department still manage its creations in old school style, using actual painting and drawing materials. Only a few artists would be able to work in an event as [REDACTED], and only [the beneficiary] could perform so brilliant.

Mr. [REDACTED] comments on the beneficiary's work for the [REDACTED] but he fails to provide specific examples of how the beneficiary's drawings and paintings from the event have significantly impacted the field at large or otherwise constitute original artistic contributions of major significance in the field.

The opinions of the beneficiary's references are not without weight and have been considered above. The preceding references discuss their collaborations with the beneficiary and his skills as an illustrator and artist, but they fail to provide specific examples of how the beneficiary's original work equates to original contributions of "major significance" in the field. Vague, solicited letters from one's colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian*, 580 F.3d 1030 at 1036. 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" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. Furthermore, 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 beneficiary'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 illustrator or artist who has made original contributions of major significance in the field. Without additional, specific evidence showing that the beneficiary's original work has been unusually influential, has substantially impacted his field, or has otherwise risen to the level of artistic or business-related contributions of major significance, the AAO cannot conclude that he meets this regulatory criterion.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The petitioner submitted an article by the beneficiary entitled "[REDACTED]" that was distributed to the audience at a "workshop" at [REDACTED]. The petitioner also submitted a monograph written by the beneficiary entitled "[REDACTED]" that was submitted as a partial requirement for the beneficiary's master's degree in Global Marketing at [REDACTED]. There is no documentary evidence showing that the preceding articles appeared "in professional or major trade publications or other major media." Accordingly, the petitioner has not established that the beneficiary meets this regulatory criterion.

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

The petitioner submitted evidence showing that the beneficiary attended “ [REDACTED] ” taught by [REDACTED] at the beneficiary's alma mater, [REDACTED] and that the beneficiary exhibited his work along with his classmates at [REDACTED] in [REDACTED]. The petitioner also submitted evidence showing that the beneficiary displayed his work at the [REDACTED] exhibition in 2010. Accordingly, the petitioner has established that the beneficiary meets the plain language requirements of 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 letters of support and artwork indicating that the beneficiary worked as an art director and designer for [REDACTED] and its [REDACTED] project, as a visual art developer for the [REDACTED] project of the [REDACTED] as an artist for the [REDACTED] as an illustrator for the [REDACTED] of the [REDACTED], as a biological illustrator for [REDACTED] as a medical illustrator for [REDACTED], as an illustrator for [REDACTED] s marketing campaigns, as a creator and speaker for the [REDACTED] program, and as a graphic designer and artist for [REDACTED]. The AAO acknowledges the petitioner's submission of letters of support and marketing material from the preceding organizations, but the self-serving nature of the submitted information is not sufficient to demonstrate that they have earned a distinguished reputation. As previously discussed, USCIS need not rely on self-promotional material. *See Braga v. Poulos*, at 680.

The next issue is whether the beneficiary has performed in a leading or critical role for [REDACTED] the [REDACTED] the [REDACTED] and [REDACTED]. Not every employee or capable service provider working for an organization meets the elements of this criterion. In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien is responsible for the success or standing of the organization. The petitioner submitted documentation showing that the beneficiary worked on various artistic projects and marketing campaigns for the preceding organizations, but the submitted evidence does not establish that the beneficiary's role was leading or critical to the organizations as a whole. For instance, the petitioner failed to submit organizational charts or similar documentary evidence to demonstrate where the beneficiary's artistic positions fit within the overall hierarchy of the preceding organizations. The AAO notes that while the beneficiary provided illustrations for advertising material that helped increase sales revenue for [REDACTED] product, there is no evidence showing that his role as an “illustrator” was leading or critical to the pharmaceutical company's overall operations. The documentation submitted by the petitioner indicates that [REDACTED] was the Senior Art Director and President of the Art Committee at [REDACTED]. Moreover, although the petitioner submitted documentation indicating that the beneficiary created the “[REDACTED]”

character and provided other graphic design services to [REDACTED] for its health awareness campaigns, the submitted evidence does not establish that the beneficiary was responsible for [REDACTED] success or standing to a degree consistent with the meaning of "critical role." The aforementioned letter from [REDACTED] submitted on appeal also fails to explain how the beneficiary's role was leading for [REDACTED] relative to that of the organization's numerous council members and board of directors (comprised of the president, vice-president, director-secretary and director-treasurer). While the beneficiary has performed admirably on the specific artistic projects to which he was assigned, the petitioner has failed to submit documentary evidence demonstrating that the beneficiary's roles were leading or critical for the preceding organizations as a whole.

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

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

The petitioner submitted the beneficiary's 2010 Form 1040, U.S. Individual Income Tax Return, reflecting "total income" of \$33,661. The beneficiary's tax return also included his 2010 Form 1040, Schedule C, Profit or Loss From Business (Sole Proprietorship), reflecting that his "Art Director" business generated \$73,175 in "Gross receipts or sales" and a "net profit" of \$33,661 (which appears as "business income" on the first page of his Form 1040). The petitioner must present evidence of objective earnings data showing that the beneficiary has earned a "high salary" or "significantly high remuneration" in comparison with those performing similar work. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding average salary information for those performing lesser duties is not a comparison to others in the field); *Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N.D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

While the petitioner indicated on the Form I-140 that the beneficiary's occupation is that of an art illustrator, the above U.S. income tax return specifically identifies the beneficiary as the sole proprietor of an "Art Director" business. Thus, the petitioner has submitted conflicting information regarding the beneficiary's specific occupation. As noted by the director, the petitioner failed to submit evidence showing that the beneficiary has earned a high salary or significantly high remuneration relative to that of other Art Directors or business owners in the art illustration field.

The petitioner submitted salary information from CareerOneStop.org indicating that the top ten percent of "Fine Artists, Including Painters, Sculptors, and Illustrators" in the United States earn more than \$89,700. The preceding top ten percent amount exceeds both the beneficiary's total income for 2010 of \$33,661 and the gross sales or receipts from his business amounting to \$73,175. In addition, the petitioner submitted information from www.simplyhired.com stating

(b)(6)

that the “average” salary for illustrator jobs is \$46,000 per year. The petitioner also submitted information from www.salary.com stating that the “median expected salary for a typical ‘Painter/Illustrator’ in the United States is \$37,558.”

Therefore, even if the AAO were to rely on the beneficiary’s occupation as claimed on the Form I-140, according to the information submitted by the petitioner, the beneficiary’s 2010 “total income” of \$33,661 is below average for an illustrator and below the median for a Painter/Illustrator. The plain language of this regulatory criterion requires the petitioner to submit evidence showing that the beneficiary has earned a “high salary” or other “significantly high remuneration” in relation to others in the field, not simply a salary that is above “average” or a salary that places the beneficiary in the top half of his field.

The petitioner also submitted various contracts and invoices from the beneficiary’s company, but there is no documentary evidence showing that the beneficiary’s remuneration was “significantly high” relative to others in his particular field.

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

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

On appeal, counsel asserts that the beneficiary meets this regulatory through his artistic illustrations that helped increase [REDACTED] revenue and through the public health campaign material that the beneficiary created for [REDACTED]. The beneficiary’s field, however, is not “in the performing arts.” The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) focuses on the volume of sales or box office receipts as a measure of the beneficiary’s “commercial successes in the performing arts.” The petitioner failed to submit “box office receipts or record, cassette, compact disk, or video sales” showing that the beneficiary has achieved commercial successes in the performing arts. Accordingly, the petitioner has not established that the beneficiary meets the plain language requirements of this regulatory criterion.

B. Summary

The petitioner has failed to submit evidence for the beneficiary satisfying the antecedent regulatory requirement of three categories of evidence.

C. Prior O-1 Nonimmigrant Visa Status

The record reflects that the alien is the beneficiary of an approved O-1 nonimmigrant visa petition for an alien of extraordinary ability in the arts. Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, “The term ‘extraordinary

ability' means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction." The O-1 regulation reiterates that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the beneficiary'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). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *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 for the beneficiary 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 beneficiary has failed to satisfy the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122.

The petitioner has not established the beneficiary’s 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.

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 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).