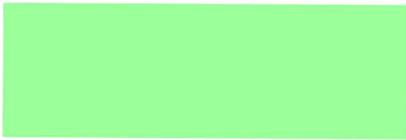




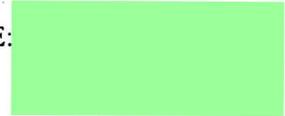
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 11 2013**

Office: NEBRASKA SERVICE CENTER FILE:



IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability as a circus performer. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of her 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, the petitioner submits a brief from counsel and additional evidence. At the outset, counsel states that the director's decision does not take into account the findings of a recent circuit court decision. The AAO will rely significantly on that decision in its analysis. Counsel also asserts that the petitioner meets the categories of evidence at 8 C.F.R. § 204.5(h)(3)(iii), (v), and (vii) – (ix). For the reasons discussed below, the AAO finds that the petitioner has submitted qualifying evidence under only one of the regulatory categories of evidence, 8 C.F.R. § 204.5(h)(3)(ix) relating to high salary, of which a petitioner must satisfy at least three to meet the basic eligibility requirements.

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.

On appeal, counsel asserts that the *Kazarian* court held that USCIS must "apply – not interpret – the regulations." The AAO is not persuaded by counsel's argument. An administrative agency is afforded deference in its interpretation of the statute and regulations it administers. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984). The *Kazarian* court did not eliminate USCIS' authority to interpret its own regulations, previously confirmed in *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Rather, it concluded that USCIS may not "unilaterally impose novel substantive or evidentiary requirements beyond those set forth" in the regulations. *Kazarian*, 596 F.3d 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

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).

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)).

In addition, counsel asserts in a footnote that the court’s two-part analysis itself violates the regulation, which states that a petitioner establishes acclaim through submission of evidence in three categories. As recognized by the *Kazarian* court, however, there is evidence that can satisfy the plain language of a regulatory criterion that may, in the context of the alien’s occupation, not be indicative of or consistent with national or international acclaim and USCIS is not precluded from taking the nature of the evidence into consideration. *Id.* at 1121-22. For example, the court expressly acknowledged that while the regulation at 8 C.F.R. § 204.5(h)(3)(iv) does not require anything other than judging the work of others, USCIS is not precluded from taking into account the significance of the judging experience in a final merits determination, such as noting that the review duties were internal and in the course of normal employment duties. *Id.* Under counsel’s view, USCIS would be precluded from evaluating the quality of the evidence at any stage. Such a view is untenable and undermines congressional intent in making section 203(b)(1)(A) of the Act an exclusive classification limited to those who can demonstrate either a one-time achievement such as a Nobel Prize or a career of acclaimed work. See H.R. Rep. No. 101-723, 59 (Sept. 19, 1990) as well as the regulatory definition at 8 C.F.R. § 204.5(h)(2).

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 in this matter did not submit qualifying evidence under at least three criteria, the proper conclusion is that she has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

The petitioner is a performer with the Las Vegas based [REDACTED] show [REDACTED] Human Resources for the [REDACTED] asserts that [REDACTED] is “an international renowned circus entertainment production company based out of [REDACTED] with a [REDACTED] Las Vegas.” [REDACTED] further asserts that [REDACTED] hires 100 to 150 of the 8,000 auditioners annually. The supplementary information at 56 Fed. Reg. 60899 (Nov. 29, 1991) states:

The Service disagrees that all athletes performing at the major league level should automatically meet the “extraordinary ability” standard. . . . A blanket rule for all major league athletes would contravene Congress’ intent to reserve this category to “that small percentage of individuals who have risen to the very top of their field of endeavor.”

Similarly, a blanket rule for all performers with a prestigious entertainment company would be equally problematic. The AAO will consider the specific evidence as it relates to the regulatory criteria at 8 C.F.R. § 204.5(h)(3) below.

A. Evidentiary Criteria²

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

The petitioner submitted a certificate confirming that she and her sister won second place in the floor category at the [REDACTED] in 2001. The petitioner also submitted material about the festival reflecting that [REDACTED] was the first year the festival was held. Since the first year, the festival “underwent deep transformations” to achieve its goals of increasing and forming new circus audiences and growing Brazilian circus production. The petitioner submits what purports to be information about the competitors in [REDACTED] but the original foreign language document indicates that the source is a document saved on someone’s computer under a “Green Card” subfolder within a “My documents” folder rather than from a reliable Internet site or official festival program. The petitioner also submitted a 2005 Canadian Report on the Performing Arts Market in Brazil listing the [REDACTED] as the most important circus festival in Brazil designed to exchange experiences, discuss cultural policies and present the main Brazilian circus groups. The evidence submitted by the petitioner, however, does not demonstrate the festival’s significance in [REDACTED].

On appeal, counsel does not challenge the director’s conclusion that the petitioner’s [REDACTED] award from [REDACTED] is not qualifying evidence under 8 C.F.R. § 204.5(h)(3)(i). As the petitioner does not contest the director’s findings for this criterion or offer additional arguments, the AAO 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).

Regardless, the AAO notes that the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires qualifying “prizes or awards” 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 must conclude 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 her

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

[REDACTED] award meets the elements of this criterion, which she has not, a single qualifying award does not meet the plain language requirements of this criterion.

In light of the above, the petitioner has not established that she 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 were either not primarily about the petitioner or did not appear in professional or major trade publications or other major media. In his analysis the director rejected articles about the petitioner and her sister and certain Internet material. On appeal, counsel asserts that the published material need not be “solely” about the petitioner and that the director erred in rejecting online 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 petitioner but is “about” someone or something else cannot qualify under the plain language of this regulation. *See Noroozi v. Napolitano*, 11-CV-8333, 2012 WL 5510934 *1, *9 (S.D.N.Y. Nov. 14, 2012); *also see Negro-Plumpe v. Okin*, :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). That said, the AAO accepts in this matter that articles about the petitioner and her sister who performs with her would qualify as being about the petitioner.

The director did not reject Internet coverage as a whole; rather, the director concluded that it is the petitioner’s burden to establish the significance of the website covering the petitioner. The AAO acknowledges that there are many websites that could qualify as major media, especially the sites of major print publications or national television cable networks. To ignore the reality that the Internet is accessible to anyone with a computer, however, would be to render the “major media” requirement in the regulation at 8 C.F.R. § 204.5(h)(3)(iii) meaningless. The AAO is not persuaded that international accessibility on the Internet by itself is a realistic indicator of whether a given website constitutes “major media” published material. For example, reliance on *Wikipedia* is not favored by federal courts. *See Badasa v. Mukasey*, 540 F. 3d 909 (8th Cir. 2008).

The petitioner submitted promotional materials for the Las Vegas show [REDACTED] in which the petitioner and her sister perform as well as the following reviews:

1. A review by [REDACTED] in the July 1, 2007 issue of [REDACTED]. The petitioner submitted promotional material from the magazine’s own website indicating that [REDACTED] “provides advertisers with the opportunity to reach an audience of more than 3 million visitors each month in America’s premiere tourist destination – Las Vegas.” USCIS need not rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO, *aff’d* 317 Fed. Appx. 680 (C.A.9) (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). The review, while mentioning the petitioner and her sister as the "amusing appetizers" to the show, is about the show generally rather than focusing on the petitioner and her sister.

2. A review by [REDACTED] posted on [REDACTED] an Internet weekly entertainment guide for Las Vegas. While the article itself is undated, it was printed from the Internet in 2005. Once again, the review is about the show in general and does not focus on the petitioner and her sister.
3. A 2005 review by [REDACTED] that purportedly was posted on vegas.com but is actually printed from a personal computer's "documents" folder on the computer's "C" drive. The review does not focus primarily on the petitioner and her sister.
4. A Friday, September 23, 2005 review by [REDACTED] in the [REDACTED] entitled [REDACTED] appealing -- but not to everyone." While the review praises the expansion of the roles for the petitioner and her sister in [REDACTED] the article is not about the petitioner and her sister. Instead, the review is about the show in general and its [REDACTED]. The petitioner submitted information from [REDACTED] stating that that the [REDACTED] and the [REDACTED] have a daily joint readership of 461,400 Clark County, Nevada adults. Rather than submitting readership data specific to the [REDACTED] the petitioner submitted *combined* readership data for both of the preceding local newspapers. There is no evidence showing the distribution of the [REDACTED] alone relative to other U.S. newspapers to demonstrate that the submitted review was published in a form of "major" media.
5. 2003 and 2004 reviews by [REDACTED] in [REDACTED] entitled [REDACTED] and [REDACTED]. The reviews briefly mention the petitioner and her sister but are not primarily about them. Instead, the reviews are about the [REDACTED] show in general. The petitioner submitted promotional material from the magazine's own website reflecting that [REDACTED] is a guide for visitors to and residents of Las Vegas. As previously discussed, USCIS need not rely on self-promotional material. *See Braga v. Poulos*, at 680. Regardless, there is no evidence showing that [REDACTED] qualifies as a form of major media.
6. An August 2003 review in the [REDACTED] entitled [REDACTED]. The review does not mention the petitioner and 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). As previously discussed, the petitioner submitted information from www.lasvegasnewspapers.com stating that the *Las Vegas Sun* and the *Las Vegas Review-Journal* have a daily joint readership of 461,400 Clark County, Nevada adults. Rather than submitting readership data specific to the [REDACTED] the petitioner submitted *combined* readership data for both of the preceding local newspapers. There is no evidence showing the distribution of the [REDACTED] alone relative to other U.S. newspapers to demonstrate

that the submitted review was published in a form of "major" media.

7. A Friday, August 8, 2003 article in the [REDACTED] entitled [REDACTED] by [REDACTED]. While the petitioner and her sister are pictured in addition to another act, the article is not about them. Instead, the article is about the [REDACTED] show in general and [REDACTED] change in formula to [REDACTED]. As previously discussed, there is no evidence showing the distribution of the [REDACTED] alone relative to other U.S. newspapers to demonstrate that the submitted article was published in a form of "major" media.
8. A 2006 review by [REDACTED] in *ISTOE*. The review is not primarily about the petitioner and the petitioner did not submit evidence of the circulation or distribution of *ISTOE*.

The above reviews are not "about" the petitioner or the petitioner and her sister. Moreover, the petitioner has not established that the preceding local entertainment guides and newspapers qualify as professional or major trade publications or other major media.

In addition to the above promotional materials and reviews, the petitioner submitted the following:

1. A photograph of the petitioner and her sister as part of a series of photographs of [REDACTED] in a November 2006 issue of [REDACTED]. The plain language of this regulatory criterion requires the submission of "[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, and any necessary translation." A photograph in a series of photographs is not published material about the petitioner and does not meet the preceding regulatory requirements. Moreover, the record lacks evidence such as the distribution and circulation of [REDACTED] in comparison to other publications so as to demonstrate that it constitutes a professional or major trade publication or some other form of major media.
2. An undated article in [REDACTED] about a visit from a circus school in which the petitioner and her sister are mentioned in one sentence. This article is not about the petitioner and the petitioner failed to submit any evidence such as the circulation or distribution of [REDACTED] in comparison to other publications so as to demonstrate that it constitutes a professional or major trade publication or some other form of major media.
3. A 2003 article by an unidentified author in [REDACTED] about the petitioner and her sister joining [REDACTED]. The petitioner did not submit any information such as the circulation or distribution of [REDACTED] in comparison to other publications so as to demonstrate that it constitutes a professional or major trade publication or some other form of major media.

4. A purported extract from an unidentified magazine interview of the petitioner and her sister that is actually printed from a "Green Card" subfolder of a "My Documents" folder on a personal computer.
5. An article entitled [REDACTED] posted at [REDACTED] dated September 28, 2008. The author is listed as [REDACTED]. The article is about the petitioner and her sister. On appeal, counsel acknowledges that no information about this publication is available. Thus, the petitioner is unable to demonstrate that it constitutes a professional or major trade publication or some other form of major media.
6. A [REDACTED] interview with the petitioner and her sister in [REDACTED]. This article is about the petitioner and her sister. As noted by counsel on appeal, the petitioner submitted evidence that the magazine has a profile on *Facebook* and a Twitter account. Counsel does not explain how purchasing the profile and account, which are available to anyone, demonstrates that the magazine has a significant distribution to qualify as a major trade publication or some other form of major media. The magazine's *Facebook* page, submitted by the petitioner, shows a total of 2,059 fans. The petitioner, however, did not submit any means of comparison, for example, the total number of *Facebook* fans for other major magazines. The record contains no evidence addressing the magazine's print circulation or distribution in comparison to other publications so as to demonstrate that it constitutes a professional or major trade publication or some other form of major media.
7. An article by [REDACTED] in [REDACTED] entitled [REDACTED]. The date of the article was not provided as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The article discusses the [REDACTED] show in general and comments on [REDACTED]. Two of the [REDACTED] commented on in the article are the petitioner and her sister. The AAO is not persuaded that this article could be considered to be "about" the petitioner. The petitioner submitted promotional material from [REDACTED] own website stating that the magazine has [REDACTED] in the United States. [REDACTED] Once again, USCIS need not rely on self-promotional material. *See Braga v. Poulos*, at 680. The AAO notes that a national publication is not precluded from consideration as major media simply because it is aimed at a specific demographic. The record, however, contains no evidence comparing the claimed circulation of [REDACTED] with other nationally circulated magazines in the United States.
8. A Sunday, October 19, 2003 article about the petitioner and her sister entitled [REDACTED] by [REDACTED] in the [REDACTED]. The petitioner submitted information from www.lasvegasnewspapers.com stating that that the Sunday versions of the *Las Vegas Sun* and the *Las Vegas Review-Journal* have a Sunday joint readership of 568,700 Clark County, Nevada.

adults. Rather than submitting readership data specific to the [REDACTED] the petitioner submitted *combined* readership data for both of the preceding local newspapers. There is no evidence showing the distribution of the Sunday [REDACTED] alone relative to other U.S. newspapers to demonstrate that the submitted review was published in a form of “major” media.

On appeal, counsel asserts that local publications in Las Vegas are widely distributed to tourists, with the “potential to reach more individuals than some national publications.” The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is no evidence of qualifying materials about the petitioner and her sister in media that have been documented to be professional or major trade publications or other major media. Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires published material about the alien “in professional or major trade publications or other major media” in the plural. As previously discussed, the use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Thus, the use of the words “publications” and “media” reveal once again that the regulation requires more than one qualifying article. In the absence of such evidence, the petitioner has not established that she meets this regulatory criterion.

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

Counsel initially asserted that the act performed by the petitioner and her sister has made a major impact internationally because it is unexpected for large women to play sexy and provocative roles and because it aims to “break down stereotypes about beauty and sex.” Counsel relied on the published material and reference letters as demonstrating the petitioner’s contributions.

On appeal, counsel asserts that the director erred in dismissing the reference letters. The AAO will consider those letters below. Counsel also asserts that the director should not have dismissed the fan mail as representing the opinions of too few. In addition, counsel asserts that the director should not have dismissed the published material merely because it did not appear in entertainment magazines. Finally, counsel asserts that the director’s analysis of whether the petitioner’s contributions were of “major” significance was too subjective. Counsel concludes that the record demonstrates that the petitioner [REDACTED] [REDACTED]’ noting that a journalist wrote about auditioning for a [REDACTED] show after learning of the petitioner and sister.

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 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). Moreover, the contributions must be to the entire

field. To be considered an original contribution of major significance in the performing arts, the contribution must be both novel and demonstrably influential on the field as a whole rather than a single journalist. Significantly, the regulations include separate criteria for published material and performing a leading or critical role for an establishment with a distinguished reputation. 8 C.F.R. §§ 204.5(h)(3)(iii) and (viii). If the regulations are to be interpreted with any logic, it must be presumed that the regulation views evidence of such coverage and roles as separate evidentiary requirements from contributions. To hold otherwise would render meaningless the statutory requirement for extensive evidence and the regulatory requirement that a petitioner submit evidence under three separate categories of evidence. Thus, the fact that the petitioner has been covered in media of undocumented significance is not determinative evidence under 8 C.F.R. § 204.5(h)(3)(v).

asserts that the petitioner and her sister developed the in 1997, whose characters were incorporated into . While asserts that it is very rare for a show to incorporate existing characters into their shows, review in the quotes a representative of as stating that all the characters in the show were all honed by the actors and actresses before joining the show.

a performer who directed the petitioner and her sister in two acts, asserts that the producers increased the petitioner's role in the show due to audience response. While concludes generally that the petitioner and her sister have made "a valuable contribution to the entertainment industry in America," he does not explain their influence other than to assert that they are recognized by audience members, critics, peers and high ranking performers. 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.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

an actor, writer and producer, asserts that he met the petitioner and her sister in 1995 when they were participating as actresses and circus instructors in . While praises the petitioner's ability, he does not explain how she has impacted the field.

The petitioner also submitted fan mail. Counsel challenges the director's consideration of the amount of the petitioner's fan mail. Fan mail, however, derives from audience members and not members of the field. As such, fan mail, regardless of the amount, is not a useful tool for measuring the petitioner's impact in her field.

The opinions of the petitioner's references are not without weight and have been considered above. 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 a circus performer who has made original contributions of major significance in the field. The letters considered above primarily contain bare assertions of widespread recognition and vague claims of contributions without specifically identifying contributions and providing specific examples of how those contributions have influenced the field at large. Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian*, 580 F.3d 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. Without additional, specific evidence showing that the petitioner's original work has been unusually influential or has otherwise risen to the level of artistic contributions of major significance, the AAO cannot conclude that she meets this regulatory criterion.

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

Throughout the proceeding, counsel has asserted that the petitioner's performances are qualifying evidence pursuant to 8 C.F.R. § 204.5(h)(3)(vii). On appeal, counsel asserts that the director erred in concluding that this regulation applies only to the visual arts. Specifically, counsel asserts that the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) does not restrict it to the visual arts and concludes that [REDACTED] shows fall under the dictionary definition of "exhibition."

While counsel focuses on the definition of "exhibition," the AAO finds that the word "display" reveals that this criterion was designed for the visual arts. Specifically, Webster's New College Dictionary 334 (3rd ed. 2008) defines "display" as follows: "To put forth for *viewing*." (Emphasis added.) The first noun definition incorporates the verb definition as follows: "The act of displaying." *Id.* Consistent with these definitions, a display of work involves the presentation for viewing of a completed, tangible piece of art that exists independently of the artist whereas a performance is an ongoing activity of the performer.

Counsel points to the petitioner's performance for [REDACTED] but counsel fails to specifically explain how the petitioner's preshow audience interactions and song and dance numbers in [REDACTED] equate to "the display" of the petitioner's work at artistic exhibitions or showcases. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at artistic exhibitions or showcases." The petitioner is a circus performer. When she is engaged in the role of a circus clown or entertaining the audience in [REDACTED] she is not displaying her work in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing her work as part of a large circus ensemble, she is not displaying her work. In addition, to the extent that the petitioner is a

performing artist, it is inherent to her occupation to perform. The AAO notes that the ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. The petitioner's performing role in [REDACTED] will be addressed under the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii).

The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court, including a case involving a performer with another [REDACTED] show. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Accordingly, the petitioner has not established that she 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.

On appeal, counsel asserts that the petitioner performs in a leading or critical role for [REDACTED]. The petitioner's appellate submission includes a [REDACTED] program that identifies numerous members of the cast. The program specifically identifies the petitioner as simply a "character" while other performers are referred to as "principal character." For instance, both [REDACTED] and [REDACTED] have the title of "principal character." That said, the petitioner is featured prominently on the promotional materials for [REDACTED] in the reviews of the show and frequently participates in promotions of the show. As noted by counsel, the petitioner also receives individual fan mail. Given that evidence in the aggregate, the AAO is satisfied that the petitioner performs in a critical role for the show. The next issue, then, is whether [REDACTED] constitutes an organization or establishment with a distinguished reputation. The petitioner, however, failed to demonstrate how a circus show such as [REDACTED] equates to an "organization" or "establishment." The AAO does not question that the [REDACTED] entertainment production company, which has attracted 100 million spectators since 1984 according to documentation in the record, is an organization that enjoys a distinguished reputation as a whole. The petitioner, however, does not perform in a leading or critical role for the [REDACTED] company as a whole, which employs 5,000 individuals according to materials in the record. Even if the petitioner were to demonstrate that an individual show such as [REDACTED] is an organization or establishment for purposes of the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the AAO will not presume that every [REDACTED] show is necessarily distinguished. Rather, it is the petitioner's burden to demonstrate that the organization or establishment for which she performs a leading or critical role has a distinguished reputation. While the petitioner submitted predominantly favorable reviews, [REDACTED] indicates in his review that the initial reviews were "mixed" although he acknowledges that the reviews have improved after the show's "wobbly beginning." While [REDACTED] states that the show provides its peers "with some stiff competition," he characterizes the show as the [REDACTED] that is still "young and growing." He concludes that when the show is "fully grown, it will be hard to beat." The petitioner did not submit any evidence as to how [REDACTED] ranks against other [REDACTED] shows. Without such evidence, the AAO cannot determine the show's individual reputation.

Even if the AAO accepted that [REDACTED] qualifies as an organization or establishment with a distinguished reputation, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence that the petitioner has performed in a leading or critical role for distinguished “organizations or establishments” in the plural. As previously discussed, the use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Therefore, the AAO would have to consider whether the petitioner has performed in a leading or critical role for any other organization or establishment.

The petitioner submitted an April 19, 1998 statement from [REDACTED] of the [REDACTED] confirming that the petitioner and her sister were instructors at the [REDACTED] School and that they taught classes twice a week. [REDACTED] submitted by the petitioner, mentions the [REDACTED] as one of eight circus groups in Brazil but does not single it out as enjoying a distinguished reputation. Even if the AAO accepted that the school enjoyed a distinguished reputation in 1998 when the petitioner taught there, the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires more than mere employment at an entity with a distinguished reputation; rather, the petitioner’s role must be leading or critical. In examining whether a role is leading or critical, the AAO looks at the role itself rather than how the petitioner performed in the role. The petitioner did not submit an organizational chart to demonstrate how an instructor position fits within the overall hierarchy of the school. While the AAO does not question the school’s need to employ competent teachers, the AAO is not persuaded that teaching classes two days a week is a leading or critical role for the school.

[REDACTED] further confirms that the petitioner had worked for the [REDACTED] since August 2001. The petitioner also submitted a 2002 download of a page from the [REDACTED] advising that the petitioner and her sister were instructors at the academy and participated in the company’s productions. The translation indicates that the petitioner and her sister taught daily classes in tumbling, contortion, springboard and other circus modalities although that portion of the foreign language document appears to be on a second page that was not submitted into the record. While counsel asserts that the petitioner participated in televised events for this academy, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The record contains no evidence that the petitioner’s role with the academy was leading or critical or that the academy enjoys a distinguished reputation.

In light of the above, the petitioner has not established that she 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 her Form W-2 Wage and Tax Statements for 2008 and 2009 reflecting wages of \$145,293.20 and \$146,321.19 respectively. The petitioner also submitted evidence from careerfonet.org reflecting that the 90th percentile hourly wage for entertainers and performers, sports and related workers in 2008 was \$31.31 in the United States and \$48.98 in Nevada. Assuming a full-time yearlong position, the 90th percentile hourly wage in Nevada annualizes to

\$101,878.40. Given that the petitioner is earning significantly more than the 90th percentile in her field, the petitioner has submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(ix). Accordingly, the petitioner has established that she meets this regulatory criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence in accordance with the regulation at 8 C.F.R. § 204.5(h)(3).

C. Prior P-1 Nonimmigrant Visa Status

The AAO notes that the petitioner has been in the United States as a P-1 nonimmigrant, a visa classification that requires her to perform “with an entertainment group that has been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time.” See section 214(c)(4)(B) of the Act, 8 U.S.C. § 1184(c)(4)(B). While USCIS has approved prior P-1 nonimmigrant visa petitions filed on behalf of the petitioner, these prior approvals do not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased standard. Each case 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 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.³ Rather, the proper conclusion is that the 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 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.

³ 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).