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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[REDACTED]

DATE: **JAN 23 2013**

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

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:

[REDACTED]

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

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

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

The petitioner’s priority date established by the petition filing date is April 13, 2012. On April 24, 2012, the director served the petitioner with a request for evidence (RFE). After receiving the petitioner’s response to the RFE, the director issued his decision on July 30, 2012. On appeal, the petitioner submits a brief with new documentary evidence. Counsel’s appellate brief asserts that the director introduced “new evidentiary requirements not required by the language of the statute in violation of the Kazarian decision.” For the reasons discussed below, the AAO upholds the director’s ultimate determination that the petitioner has not established his eligibility for the classification sought.

I. LAW

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

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

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

- (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
- (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

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

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

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

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

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

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

¹ Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

II. ANALYSIS

A. Standard of Proof

On appeal, counsel asserts that director failed to properly apply the preponderance of the evidence standard of proof. Counsel cites the most recent precedent decision related to the preponderance of the evidence standard of proof; *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). Regarding this and related decisions, counsel stated: “[I]f the petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is ‘more likely than not’ or ‘probably true,’ the petitioner has satisfied the standard of proof.” The cited decisions, and this preponderance standard, focus on the factual nature of claims within evidence; not whether such claims satisfy a regulatory requirement. *Id.* at 376. The preponderance of the evidence standard does not preclude USCIS from evaluating the evidence. The *Chawathe* decision also stated:

[T]he “preponderance of the evidence” standard does not relieve the petitioner or applicant from satisfying the basic evidentiary requirements set by regulation. There are no regulations relating to a corporation’s eligibility as an “American firm or corporation” under section 316(b) of the Act. Had the regulations required specific evidence, the applicant would have been required to submit that evidence. *Cf.* 8 C.F.R. § 204.5(h)(3) (2006) (requiring that specific objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability).

Id. at 375 n.7. The final determination of whether the evidence meets the plain language requirements of a regulation lies with USCIS, not with counsel. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm’r 1988) (finding that the appropriate entity to determine eligibility is USCIS in a scenario whereby an advisory opinion or statement is not consistent with other information that is part of the record). Ultimately, the truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-* 20 I&N Dec. 77, 80 (Comm’r 1989)). The *Chawathe* decision further states:

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id. As the director concluded that the petitioner had not submitted relevant and probative evidence satisfying the regulatory requirements, the director did not violate the appropriate standard of proof. The standard of proof issue is separate and distinct from counsel’s assertion that the director may have gone beyond the regulatory requirements, which the AAO will address below. The AAO affirms the

director's ultimate conclusion that the petitioner did not submit probative evidence to establish his eligibility.

B. Two-step Analysis

On appeal, counsel takes issue with the fact that after the director determined that the petitioner's evidence failed to satisfy at least three of the regulatory criteria listed at 8 C.F.R. § 204.5(h)(3)(i)-(x), the director did not perform a final merits determination. The *Kazarian* court faced a similar scenario, whereby the AAO had concluded that the alien in that case had not satisfied at least three of the regulatory criteria. The court stated:

Whether an applicant for an extraordinary visa presents two types of evidence or none, the proper procedure is to count the types of evidence provided (which the AAO did), and the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded). 8 C.F.R. § 204.5(h)(3).

Kazarian, 596 F.3d at 1122. As the *Kazarian* court did not transition to a final merits determination in the case before it, that court did not find that a final merits analysis was required where a petitioner does not satisfy at least three of the regulatory criteria. A final merits analysis, in a case whereby the petitioner has not established eligibility under at least three of the regulatory criteria, would serve no purpose as satisfying the minimum regulatory requirements of three criteria is prerequisite to establishing eligibility. 8 C.F.R. § 204.5(h)(3).

C. Evidentiary Criteria²

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

This criterion contains several evidentiary elements the petitioner must satisfy. According to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i), the evidence must establish that the alien is the recipient of the prizes or the awards (in the plural). The clear regulatory language requires that the prizes or the awards are nationally or internationally recognized. The plain language of the regulation also requires the petitioner to submit evidence that each prize or award is one for excellence in the field of endeavor rather than simply for participating in or contributing to an event or to a group. The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion.

The petitioner provided media coverage of various prizes or awards and photographs of three awards. The director determined that the petitioner failed to meet the requirements of this criterion. On appeal, counsel asserts that the director introduced evidentiary requirements that are not contained within the regulation. While not all of the director's language derives from the regulation, the AAO affirms the

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

director's ultimate conclusion that the petitioner has not satisfied all the elements required by this criterion.

While the petitioner submitted several photographs of prizes or awards, the petitioner's name is only discernible on three of the awards; (1) the [REDACTED] (2) the [REDACTED]

Where the regulations require specific, objective evidence of achievements, such as awards, the primary evidence of such awards would be copies of the awards themselves. 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. An example of secondary evidence might be media reports of the competition results. Affidavits attesting to awards, therefore, would need to "overcome the unavailability of both primary and secondary evidence." Regarding any prizes or awards in which the petitioner did not submit primary evidence of the award, such as a photograph of the award in which his name is recognizable, the petitioner has not demonstrated that the required evidence is unavailable or cannot be obtained, and therefore these undocumented awards cannot establish eligibility pursuant to 8 C.F.R. § 103.2(b)(2).

Regarding the three awards listed above being nationally or internationally recognized prizes or awards, the petitioner only submitted an Internet-based media report originating from [REDACTED] which discussed the petitioner's receipt of the [REDACTED] Counsel's appellate brief asserts that an "awards' national or international recognition can be inferred from their titles alone," and supports this assertion indicating this position was expressed in *Muni v. INS*, 891 F. Supp. 440 (N.D.Ill.1995) and "upheld by *Kazarian*." The only reference to *Muni v. INS* within the *Kazarian* decision appears in the paragraph where the *Kazarian* court acknowledged the existence of several court decisions relating to the extraordinary ability classification; the court placed no reliance upon, nor did it affirm the *Muni* decision's specific discussion of awards. In fact, the *Kazarian* court did not discuss the awards criterion at all. Regarding the *Muni* decision, in contrast to the broad precedential authority of the case law of a United States circuit court, the USCIS is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the USCIS; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. Regardless, while the *Muni* court did conclude that the alien's awards were "self-explanatory" the court also noted that the publications that reported these awards included "the largest hockey magazine."

The AAO will not presume the significance of an award from its title or even the issuing authority. For example, the President of the United States signs letters of appreciation for retiring civil service workers.³ Similarly, the presidential physical fitness award is not a nationally or internationally

³ See <https://g1arng.army.pentagon.mil/Programs/RPLOA/Pages/default.aspx>, accessed on December 17, 2012, a copy of which is incorporated into the record of proceeding.

recognized award for excellence in athletics.⁴ However, the simple fact that an individual in a position of high authority signs a document, does not transform the document into a nationally or internationally recognized item. National and international recognition results, not from the individual who signed the prize or the award or through the award's title, but through the awareness of the accolade in the eyes of the field nationally or internationally. This can occur through several means; for example, through media coverage. A national or international level competition may issue lesser awards that merely receive local or regional recognition, which do not meet the plain language requirements of this criterion. The record lacks evidence that [REDACTED] is a form of major media, or that the [REDACTED] is a nationally or internationally recognized prize or award. Even if the petitioner were to demonstrate the [REDACTED] award is qualifying, this award is but a single award. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires evidence of "prizes or awards" in the plural, consistent with the statutory requirement for extensive documentation. See section 203(b)(1)(A)(i) of the Act.

For the reasons discussed above, the AAO affirms the director's ultimate finding that the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation.

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.

This criterion contains several evidentiary elements the petitioner must satisfy. First, the petitioner must demonstrate that he is a member of more than one association in his field. Second, the petitioner must demonstrate both of the following: (1) that the associations utilize nationally or internationally recognized experts to judge the achievements (in the plural) of prospective members to determine if the achievements are outstanding, and (2) that the associations use this outstanding determination as a condition of eligibility for prospective membership. It is insufficient for the association itself to determine if the achievements were outstanding, unless nationally or internationally recognized experts in the petitioner's field, who represent the association, render this determination. The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion.

The director determined that the petitioner's evidence met the requirement of this criterion. The AAO departs from the director's favorable eligibility determination related to this criterion for the reasons outlined below.

The petitioner claimed eligibility for this criterion based on his membership on specific soccer teams. On a case by case basis, a petitioner may demonstrate that an athletic team satisfies the regulatory requirements provided he demonstrates that the team meets each of this criterion's elements as outlined below. The petitioner demonstrated that he was a member of more than one team. Regarding membership requirements, the petitioner's evidence under this criterion mainly focused

⁴ Rather, it represents students reaching the 85th percentile in certain physical activities. See <https://www.presidentschallenge.org/celebrate/physical-fitness.shtml>.

on the prestige of the league in which his team performed, or on the success of the team itself. He did not however, provide any evidence that might demonstrate that the associations utilize nationally or internationally recognized experts to judge the achievements of prospective members to determine if the prospective member's previous achievements are outstanding. Nor did the petitioner provide any evidence that might demonstrate that the associations use this outstanding determination as a condition of eligibility for prospective membership. USCIS will not presume exclusive membership requirements from the general reputation of a given association. Consequently, the petitioner has not submitted sufficient evidence to establish that inclusion on these teams satisfies each of this criterion's requirements.

Consequently, the petitioner has not submitted evidence that satisfies the requirements of this criterion and the AAO withdraws the director's determination that the petitioner met the requirements of this criterion.

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

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

The petitioner initially provided numerous media articles; some of which were about the petitioner and relating to his work. The director's RFE requested circulation data relating to the forms of media noted in the RFE. The petitioner responded to the RFE with additional examples of published material, but failed to document the circulation or distribution statistics of any publication or website. The director determined that the petitioner failed to meet the requirements of this criterion.

On appeal, the petitioner provided circulation information relating to the forms of media that the director requested in the RFE. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8), (12). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, USCIS will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The regulation at 8 C.F.R.

§ 204.5(h)(3)(iii) does not list publications that are presumed major and the AAO will not determine which publications require no further evidence that they constitute major media. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, USCIS need not, and does not consider the sufficiency of the evidence submitted on appeal.

The petitioner submitted an article from the [REDACTED], however it is not about the petitioner. Only the [REDACTED] article by [REDACTED] titled, [REDACTED] is about the petitioner and relates to his work in the field. The record lacks evidence to support the position that these are forms of major media. The AAO will not presume that evidence satisfies a regulatory requirement when corroborating evidence is not on record. Even if USCIS were to acknowledge the evidence from the [REDACTED] and the [REDACTED] were forms of major media, the [REDACTED] article is but one piece of qualifying evidence. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires evidence of published material in "professional or major trade publications or other major media" in the plural, consistent with the statutory requirement for extensive documentation. *See* section 203(b)(1)(A)(i) of the Act. A single form of evidence is insufficient to meet this criterion's requirements.

Regarding the remaining published material, the petitioner has failed to establish the circulation data of these forms of media within the proceedings before the director, to compare with the circulation statistics of similar [REDACTED] media. Consequently he has failed to establish the presented publications are a form of major media. *See Noroozi v. Napolitano*, 11 CIV. 8333 PAE, 2012 WL 5510934 *9 (S.D.N.Y. Nov. 14, 2012). The petitioner also provided no information related to the distribution data of the publications to establish this published material has a national rather than a regional reach within the [REDACTED]. Publications with only a regional reach are not considered to be major media and the petitioner has not established that these publications are professional or major trade publications as required by the regulation.

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

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

This criterion requires not only that the petitioner was selected to serve as a judge, but also that the petitioner is able to produce evidence that he actually participated as a judge. 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). Additionally, these duties must have been directly judging the work of others in the same or an allied field in which the petitioner seeks an immigrant classification within the present petition. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director determined that the petitioner's evidence met the requirements of this criterion. The AAO departs from the director's favorable eligibility determination related to this criterion for the reasons outlined below.

Within the initial submission, the petitioner claimed his evidence satisfied this criterion based on his performance as a soccer coach. The director requested additional evidence, concluding that coaching is not evidence of judging. In response to the director's RFE, counsel put forth a definition of judge originating from Merriam-Webster's online dictionary; however, counsel erroneously relied upon the verb form of the definition of "judge," which focuses on the evaluation of some action or some object when the regulation uses the noun form of the word. The proper definition of a judge in this context is: "one who judges: as (a) a public official authorized to decide questions brought before a court; (b) *often capitalized*: a tribal hero exercising leadership among the Hebrews after the death of Joshua; (c) one appointed to decide in a contest or competition: umpire; (d) one who gives an authoritative opinion."⁵ It is clear that the proper form of the term judge connotes serving in a formal judging capacity rather than having some evaluative duties. Serving as a coach where part of one's job duties includes evaluating athletes does not equate to participation as a judge of the work of others in the field. The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv). The regulation cannot be read to include every informal instance of evaluating athletes as a coach. There is no evidence on record demonstrating that the petitioner actually served "as a judge of the work of others."

Therefore, the petitioner has not submitted evidence that satisfies this criterion's requirements and the AAO withdraws the director's determination that the petitioner's evidence met the requirements of this criterion.

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

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role's matching duties. A critical role should be apparent from the petitioner's impact on the organization or the establishment's activities. The petitioner's performance in this role should establish whether the role was critical for organizations or establishments as a whole. The petitioner must demonstrate that the organizations or establishments (in the plural) have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-Webster's online dictionary defines distinguished as, "marked by eminence, distinction, or excellence."⁶ Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U.S. 304, 306 (1893). Therefore, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or an

⁵ See <http://www.merriam-webster.com/dictionary/judge>, accessed on December 17, 2012, a copy of which is incorporated into the record of proceeding.

⁶ See <http://www.merriam-webster.com/dictionary/distinguished>, accessed on December 17, 2012, a copy of which is incorporated into the record of proceeding.

equivalent reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

Within the initial submission, the petitioner discussed his leading or critical roles on soccer teams as a player and as a coach, but failed to specify what evidence corroborated his assertions. The burden is on the petitioner to establish eligibility. In response to the director's RFE the petitioner provided awards he received as a member of several soccer teams, letters from the petitioner's collaborators who are familiar with his work, and evidence that a soccer suite was named after the petitioner. The director determined that the petitioner failed to meet the requirements of this criterion.

On appeal, counsel asserts that the director's introductory paragraph in which the director interpreted the regulation at 8 C.F.R. § 204.5(h)(3)(viii) was an instance of "unilaterally imposing novel substantive or evidentiary requirements beyond those set forth" in the regulation. Notwithstanding the director's interpretation of this criterion, the petitioner must demonstrate his evidence meets the plain language requirements of this criterion.

Within these proceedings, the petitioner has claimed he performed in a leading or critical role for the following organizations:

The petitioner submitted the same evidence considered above under the awards criterion as evidence under this criterion. The regulations contain a separate criterion for awards, 8 C.F.R. § 204.5(h)(3)(i), and awards by themselves are not sufficient to demonstrate the petitioner performed in a leading or in a critical role for any of the named organizations.

Counsel asserts that because the director determined that the petitioner's evidence satisfied the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii), that every organization that the petitioner named under the membership criterion enjoys a distinguished reputation. Once again, the regulation contains a separate criterion for memberships, 8 C.F.R. § 204.5(h)(3)(ii), and evidence directly relating to one criterion is not presumptive evidence to meet another criterion. To hold otherwise would undermine the statutory requirement for extensive evidence and the regulatory requirement that a petitioner satisfy three separate criteria.

Counsel's assertion that all of the organizations identified by the petitioner under the membership criterion enjoy a distinguished reputation is not a sufficient claim as 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. 503, 506 (BIA 1980). The unsupported assertions of counsel in a brief are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. at 188-89 n.6.

On appeal, counsel discusses an organization that the petitioner had not claimed in the previous proceeding before the director, the [REDACTED]. In response to the RFE, the petitioner did provide one piece of evidence in the form of a letter from [REDACTED] but neither the initial filing statement nor the RFE response statement contained

any reference to this organization under this criterion. The purpose of the RFE is to elicit further information that clarifies whether the petitioner has established eligibility for the benefit sought as of the filing date of the petition. See 8 C.F.R. §§ 103.2(b)(8) and (12). As in the present matter, where the director put the petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept new eligibility claims offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. at 766; *Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the director to consider this evidence, he should have specified how this evidence relates to 8 C.F.R. § 204.5(h)(3)(viii) in response to the director's RFE. *Id.* Under the circumstances, the AAO will not consider the sufficiency of the new eligibility claims on appeal.

Regarding the [REDACTED] the petitioner provided exhibit 72 in the RFE response. This evidence relates to the [REDACTED] rather than the [REDACTED] and although it appears to be from the [REDACTED] website it does not bear any indication of the origin of the evidence. Without an indication of the source of this evidence, USCIS will not presume it is from the league's official website. Even if USCIS were to accept that the two leagues are the same organization, this evidence does not establish how the petitioner performed in a leading or critical role for the league as a whole. As this is the only identified evidence presented relating to the [REDACTED] it will not serve to satisfy this criterion's requirements.

The evidence relating to [REDACTED] consists of a letter from [REDACTED] of the team, evidence that [REDACTED] named a suite after the petitioner, and evidence relating to memorabilia that [REDACTED] sells that still bears the petitioner's photograph and name. The letter from [REDACTED] verified the timeframe in which the petitioner played for the team, during the 1990's, and simply indicated that he found the petitioner "to be a very good player and professional." [REDACTED] letter does not demonstrate that the petitioner's role with this organization was leading or critical. That the team continues to sell memorabilia bearing the petitioner and that it named a suite after him is notable, but the petitioner failed to submit evidence that either of these notable accomplishments represent that he performed in a leading or a critical role for [REDACTED]. The petitioner did not provide evidence from [REDACTED] depicting the criteria it utilized for naming this or other suites. USCIS will not presume the petitioner qualifies under this criterion without probative evidence demonstrating such eligibility. Furthermore, [REDACTED] player profile website and a publication, titled [REDACTED] [REDACTED] also failed to describe the manner in which the petitioner performed in a leading or critical role for the organization. It is important to note that the [REDACTED] includes "every player who has appeared for the gunners at first team level since 1886," and it is not clear how a publication listing every first team level member for more than 120 years demonstrates that the petitioner performed in a leading or critical role for [REDACTED]. Although the petitioner has failed to demonstrate that the evidence on record satisfied all of this criterion's requirements, he has demonstrated that [REDACTED] enjoys a distinguished reputation.

The petitioner provided a letter from [REDACTED] in support of his claim that he performed in a leading or critical role for [REDACTED]. [REDACTED] letter identified the petitioner as the head coach of [REDACTED] and stated that the petitioner was an excellent judge of talent and ability in building a team. He also stated the petitioner

coached the team on a daily basis and would select from a large group of the team's players to represent [REDACTED] in each match. [REDACTED] indicated that due to the petitioner's coaching skills, one of [REDACTED] players, who was also the league's leading scorer, was selected to play for a team in another league, Major League Soccer. That a single player moved to a more prestigious soccer league is insufficient to demonstrate the petitioner performed in a leading or critical role for [REDACTED] as a whole. Regardless, that evidence does not establish the distinguished reputation of [REDACTED]. On appeal, counsel's appellate brief asserts the distinguished reputation of [REDACTED] is apparent from its membership in the [REDACTED]. Counsel failed to sufficiently explain how [REDACTED] itself enjoyed a distinguished reputation. The evidence identified within the RFE relating to [REDACTED] reputation includes the letter from [REDACTED] and what appears to be a press release from an unnamed news source titled, [REDACTED] letter referenced the [REDACTED] organization, but did not speak to its reputation. The unidentified press release indicated that the organization was in fifth place in the league standings, and that the team "will be hoping to get a few more wins to put them into play-off contention." This press release also does not demonstrate that [REDACTED] has attained a distinguished reputation.

Regarding the soccer team [REDACTED], counsel's initial filing statement asserted the petitioner performed in a leading or critical role for this organization without specifying what evidence supported this position. The initial filing statement asserted the petitioner served as the captain of this team and that this organization was "the most prestigious and historic club in [REDACTED]" 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. 503, 506 (BIA 1980). The unsupported assertions of counsel in a brief are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). Even though the director's RFE specifically named [REDACTED] as one of the entities claimed under the leading or critical role criterion at the time of filing, the leading or critical role portion of the petitioner's RFE response failed to mention [REDACTED] name or to specify any evidence that should be considered relating to this organization.

On appeal, the [REDACTED] evidence that the petitioner claims the AAO should apply to the leading or critical role criterion consists of: (1) an article that appeared on the website [REDACTED] (2) an interview from an unspecified publication; (3) a screen printout of a video purportedly about the petitioner; and (4) a photograph of the petitioner. This evidence was already part of the record, but not applied to this criterion in the RFE response. As the petitioner did not afford the director the opportunity to consider such evidence, the director could not have committed an error in law or an error in fact as it relates to this evidence under the criterion at 8 C.F.R. § 204.5(h)(3)(viii).

The petitioner only provided one out of four pages of the article on the [REDACTED] website and the interview in the unspecified publication failed to allude to any leading or critical role that the petitioner performed for [REDACTED]. Again, the regulation contains a separate criterion for awards, 8 C.F.R. § 204.5(h)(3)(i) and memberships, 8 C.F.R. § 204.5(h)(3)(ii), and evidence directly relating to one criterion is not presumptive evidence to meet another criterion. To hold otherwise would undermine the

statutory requirement for extensive evidence and the regulatory requirement that a petitioner satisfy three separate criteria.

Regarding [REDACTED] within the initial filing, counsel failed to identify the evidence to support the petitioner's eligibility claim relating to this organization. In response to the RFE, counsel's statement indicated that the petitioner played for this organization from 2000 – 2004, that this organization honored the petitioner by naming a suite after the petitioner, and that this organization is a [REDACTED]-based elite level soccer team." The petitioner played for this organization for four years, and within this brief period, the petitioner received awards to include the player of the year award, and the organization named a suite after the petitioner. This evidence in the aggregate sufficiently demonstrates that the petitioner performed in a leading or critical role for [REDACTED]

Within the proceedings before the director the petitioner failed to specify what evidence supported the assertion that [REDACTED] is an elite level soccer team, which is not necessarily equivalent to being an organization with a distinguished reputation. On appeal counsel identifies additional evidence that was submitted within the previous proceeding that was directly applicable to different regulatory criteria, to assist the petitioner in meeting this criterion's requirements. Even this evidence, however, relates to the petitioner's role on the team rather than the reputation of the team.

Within the initial proceedings, counsel provided the number of times the petitioner appeared in [REDACTED] games and the number of goals he scored. In response to the director's RFE, the petitioner provided a letter from [REDACTED] letter combined with the petitioner's player of the year award for [REDACTED] sufficiently describes the petitioner's performance during his time with the organization to demonstrate that his role was critical to the organization's success. In reference to this organization's reputation, counsel stated: [REDACTED] is one of the most exclusive soccer teams in the world," but the petitioner offered no evidence that directly speaks to this organization's reputation. [REDACTED] letter indicated that the organization reached the [REDACTED] but offered no explanation of the significance of this event. It is not clear if this event is an ordinary tournament, a specialty tournament, or if it was the league championship. Regardless, a single appearance in a tournament is generally not sufficient to establish that an organization is marked by eminence, distinction, excellence, or an equivalent reputation.

The evidence presented by the petitioner does not meet the requirements of this 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 plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires the petitioner to submit evidence of a "high salary or other significantly high remuneration for services, in relation to others in the field." Average salary information for those performing work in a related but distinct occupation with different responsibilities is not a proper basis for comparison. The petitioner must submit

documentary evidence of the earnings of those in his occupation performing similar work at the top level of the field.⁷

The director determined that the petitioner failed to meet the requirements of this criterion. The petitioner initially provided evidence relating to the amount paid by one organization to another for the petitioner to play for the paying team, termed as a “transfer fee.” The director requested additional evidence establishing that the petitioner’s salaries earned were high as compared with others in his field. In response to the RFE, counsel stated the director’s request was erroneous as the petitioner had provided “documentation that his services have commanded significantly higher compensation than others working in the field of soccer playing and coaching.” A review of the referenced evidence does not bear out counsel’s assertions. Within the RFE response, counsel equates the “transfer fee” to the petitioner’s salary, which is not an appropriate comparison. The plain language requirements of this criterion make it clear that petitioner must be the recipient of a salary or another form of remuneration for his services in the field. Specifically, the pertinent dictionary definition of command is: “to demand or receive as one’s due.”⁸ Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U.S. at 306. A transfer fee paid from one organization to another is not equivalent to the petitioner “commanding” a salary or remuneration as he did not demand or receive it as his due. The petitioner also provided the letter from [REDACTED] as evidence under this criterion. [REDACTED] letter stated: [REDACTED] joined [REDACTED] in September 1997 for £250,000.” This appears to be the same amount that [REDACTED] paid to another team as the transfer fee. More importantly, throughout the proceedings, the petitioner failed to provide USCIS with evidence of other salaries in his field with which to compare his salary.

On appeal, counsel reiterates the previous assertion that because the petitioner’s employers paid another team in exchange for the rights for the petitioner to play for their team, that this fee is sufficient evidence to satisfy the plain language requirements of this criterion. This view ignores precedent on the matter that requires the petitioner to present evidence of objective earnings data showing that he has earned a “high salary” or “significantly high remuneration” in comparison with those performing similar work during the same time period. *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 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).

⁷ While the AAO acknowledges that a district court’s decision is not binding precedent, the AAO notes that in *Racine v. INS*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated, “[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine’s ability with that of all the hockey players at all levels of play; but rather, Racine’s ability as a professional hockey player within the NHL. This interpretation is consistent with . . . the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.”

⁸ See <http://www.merriam-webster.com/dictionary/command>, accessed on January 15, 2013, a copy of which is incorporated into the record of proceeding

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

D. Summary

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

III. CONCLUSION

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

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the 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, it is not necessary to explain that conclusion in a final merits determination.⁹ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soriano*, 19 I&N Dec. at 766. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁹ 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).