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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: **JUL 19 2013** Office: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Handwritten signature of Ron Rosenberg in black ink.

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” as a model, 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 August 1, 2011. On February 17, 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 June 11, 2012. On appeal, the petitioner submits a brief with additional documentary evidence. The petitioner identifies the director’s broad error as abusing his discretion by not considering all of the evidence presented. The petitioner also identifies the director’s error as a matter of law in that he “imposed additional requirements and failed to conduct his analysis of the petitioner’s eligibility and comparable evidence in accordance with the applicable legal standards.” For the reasons discussed below, the AAO upholds the director’s ultimate determination that the petitioner has not established her 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.<sup>1</sup> With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

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

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. 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.*

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

## II. ANALYSIS

### A. Previously Approved O-1 Petition

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude the agency from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

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

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center as the law is clear that an agency is not bound to follow an earlier determination as to a visa applicant where that initial determination was based on a misapplication of the law. *Glara Fashion, Inc. v. Holder*, 11 CIV. 889 PAE, 2012 WL 352309 \*7 (S.D.N.Y. Feb. 3, 2012); *Royal Siam v. Chertoff*, 484 F.3d 139, 148 (1st Cir.2007); *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 177 (D.Mass.2000) (Dkt.10); *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp.2d 800, 803 (E.D.La.1999), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

### B. Preponderance of the Evidence Standard

On appeal, counsel asserts that instead of applying the preponderance of the evidence standard of proof, the director "imposed novel substantive or evidentiary standards beyond those set forth in the regulations." The record does not support counsel's assertion that the director held the petitioner's evidence to an elevated standard beyond that which is required by most administrative immigration cases; the preponderance of the evidence standard of proof. The most recent precedent decision related to the preponderance of the evidence standard of proof is *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). This decision, and this standard, focuses 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).

25 I&N Dec. at 375 n.7. The final determination of whether the evidence meets the plain language requirements of a regulation lies with USCIS. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm’r 1988) (finding that the appropriate entity to determine eligibility is USCIS 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)). 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 her eligibility.

### C. Comparable Evidence

Several of the criteria are written in terms broadly applicable. 56 Fed. Reg. 60897-01, 60898. The regulation at 8 C.F.R. § 204.5(h)(4) allows an alien to submit comparable evidence if the alien is able to demonstrate that he or she is unable to qualify for this classification because the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to the alien’s occupation. *See also* 56 Fed. Reg. at 60898-99. It is the petitioner’s burden to explain why the regulatory criteria do not readily apply to her occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x). The petitioner has not established that the regulatory criteria do not readily apply in her occupation as a model. Where an alien is simply unable to meet or submit sufficient documentary evidence of at least three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. Significantly, counsel asserts that the published material criterion at 8 C.F.R. § 204.5(h)(3)(iii) is not applicable to the petitioner’s occupation, yet he also asserts within the proceeding that the submitted evidence satisfies this criterion’s requirements. An additional example relates to the prizes or awards criterion at 8 C.F.R. § 204.5(h)(3)(i), wherein counsel asserts this criterion is not applicable to the petitioner’s occupation, yet the book titled *The Modeling Life* submitted under the published material criterion contains an entire section on modeling contests. Counsel mentioned evidence in the appellate brief or within the

proceedings before the director that specifically addressed at least five of the ten criteria at 8 C.F.R. § 204.5(h)(3). As such, the petitioner has not met the requirements for submitting comparable evidence.

D. Evidentiary Criteria<sup>2</sup>

*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 she 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 director determined that the petitioner failed to meet the requirements of this criterion. On appeal, the petitioner takes issue with the director's determination regarding material that appeared in the following publications:

Regarding the article titled, [REDACTED] this article is about the petitioner and relates to her work in the field. This article served as the cover story, which included the petitioner's photograph on the cover. The petitioner also established that it appeared in qualifying media. As such, this article will contribute to the petitioner meeting the plain language requirements of this criterion.

Regarding the article titled, [REDACTED] that appeared in [REDACTED] the evidence on record demonstrated that this published material is about the petitioner and is related to her work in the field. The petitioner provided circulation statistics relating to [REDACTED] revealing that it has a weekly circulation sufficient to demonstrate that this publication is a form of major media.<sup>3</sup>

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

<sup>3</sup> See [REDACTED] accessed on May 28, 2013, a copy of which is incorporated into the record of proceeding.

In view of the foregoing, the petitioner has demonstrated her eligibility under this criterion and as a result, the AAO withdraws the director's adverse determination as it relates to this criterion.

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

The plain language of this regulatory criterion contains multiple evidentiary elements that the petitioner must satisfy. The first is evidence of the petitioner's contributions (in the plural) in her field. These contributions must have already been realized rather than being potential, future contributions. The petitioner must also demonstrate that her contributions are original. The evidence must establish that the contributions are scientific, scholarly, artistic, athletic, or business-related in nature. The final requirement is that the contributions rise to the level of major significance in the field as a whole, rather than to a project or to an organization. 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 (3<sup>rd</sup> Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2<sup>nd</sup> Cir. Sep 15, 2003). Contributions of major significance connotes that the petitioner's work has significantly impacted the field. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director determined that the petitioner failed to meet the requirements of this criterion. Initially, the petitioner explained her original contribution of major significance in her field as follows: "due to the very nature of the images and advertisements she creates . . . she brings increased revenues, media and brand recognition to her clients and to the industry as a whole." The director determined that the petitioner's claims and her evidence were insufficient to satisfy this criterion's requirements and noted the deficiencies within the RFE. In response to the RFE, the petitioner reiterated her previous claims and introduced a new claim under this criterion. Specifically, counsel asserted that the petitioner "has changed the industry norm and proven that successful and highly sought after models don't have to be 5'10" or 5'11, but can be 5'6" and still land contract after contract with big companies."

On appeal, counsel points out that the director incorrectly noted the number of support letters submitted as evidence under this criterion and infers that USCIS should discuss each letter instead of reviewing all the letters, discussing a portion of them, and summarizing the remaining letters that are determined to be insufficient. While it is apparent that the director misstated the number of letters submitted under this criterion, USCIS need not cite from each and every letter in support of a petition. *Noroozi v. Napolitano*, 11 CIV. 8333 PAE, 2012 WL 5510934 \*8 (S.D.N.Y. Nov. 14, 2012) (citing *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 n. 17 (2d Cir.2006)).

Counsel quoted most of the letter from [redacted] Head of [redacted] office, within the initial statement and within the RFE response. [redacted] extolled the petitioner's many accomplishments and high profile modeling jobs. While such accomplishments are notable, [redacted] did not identify how such accomplishments were contributions that were "original" or "of major significance" in the petitioner's field as a whole. As such, [redacted] letter will not serve as a contributing piece of evidence that demonstrates the petitioner's eligibility under this criterion.

President of the [REDACTED] stated: “[The petitioner’s] contributions to my company, as well as to the fashion industry as a whole, have been completely original, as no one else in the world would be able to capture her exact look in any given photograph. As anyone would agree, originality is key in this industry, and very hard to come by.” [REDACTED] opinion of the petitioner’s impact on the modeling field as a whole through an “exact look in any given photograph” is insufficient to establish her eligibility under this criterion. She did not discuss any aspect attributable to the petitioner’s work that was original beyond the fact that no two models look identical, or explain how the petitioner’s look has impacted the petitioner’s field such that it can be considered to be of major significance. Rather, she simply asserts that the petitioner has contributed to her company, which is not a contribution of major significance in the field, “as well as to the fashion industry as a whole” without providing any support for that broader assertion. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990)

[REDACTED] a fashion photographer and co-owner of [REDACTED] identified the petitioner’s “impact on the fashion and advertising industries [to the extent] that she has actually raised the bar for models around the world.” Such a description of intangible attributes without some corroborating evidence of an actual impact in her field due to her work does not amount to contributions in the petitioner’s field that are both original and of major significance in accordance with the regulation.

[REDACTED] Vice President of [REDACTED] indicated that the petitioner qualified as an alien of extraordinary ability because of her associations with prominent individuals in the modeling community as well as her appearance in prominent advertising campaigns. [REDACTED] also pointed to the petitioner’s longevity in the modeling profession as “one of a very small percentage of models working in” the field. 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc.*, 745 F. Supp. at 15. [REDACTED] also described the roles the petitioner performed for companies, but did not describe the manner in which this constituted as a contribution to the petitioner’s field as a whole. Additionally, the regulations contain a separate criterion regarding the petitioner’s leading or critical role performed for organizations or establishments that enjoy a distinguished reputation at 8 C.F.R. § 204.5(h)(3)(viii).

[REDACTED] Director of [REDACTED] asserts that as a “petite” model, the petitioner “has changed the industry norm.” As an example, [REDACTED] asserts that [REDACTED] partnered with [REDACTED] in 2009 when the lineup was all petite models. [REDACTED] further asserts that [REDACTED] signed the winner of the competition and concludes: “knowing [the petitioner’s] reputation in the industry and seeing how well clients respond to her gave our agency confidence to offer a representation and management contract to the winner of the ‘short’ season of [REDACTED] [REDACTED] does not assert that [REDACTED] elected to run a season of shorter models based on the petitioner’s influence in the field, only that [REDACTED] gained confidence to

promote their new shorter model based on the petitioner's ability to work in the field. [REDACTED] letter does not affirm a wider influence in the field that rises to the level of a contribution of major significance.

While the petitioner has enjoyed an enduring and successful career in modeling, the letters in support of her petition are not sufficient to satisfy this criterion's requirements. She has established her ability to continuously work in a competitive field; however, such an ability is not an original contribution of major significance in her field.

The Board of Immigration Appeals (BIA) has stated that testimony should not be disregarded simply because it is "self-serving." See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998); *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); see also *Matter of Acosta*, 19 I&N Dec. 211, 218 (BIA 1985)). The Board clarified, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Matter of S-A-*, 22 I&N Dec. at 1332. If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. at 1136.

Within the appellate brief counsel cites to *Muni v. INS*, 891 F. Supp. 440, 444 (N.D. Ill. 1995) and states: "[T]he examiner cannot substitute his or her judgment for that of experts, nor can the examiner ignore evidence that clearly satisfies a category." In this matter, however, the content of the letters does not provide sufficient detail of the petitioner's impact in the field such that the petitioner has established that she has made contributions of major significance in the field.

Within the RFE response, counsel cited to *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012) stating: "In the present matter, the RFE did not question the credentials of the experts, take issue with their knowledge of the [sic] [the petitioner's] skills and achievements, or otherwise find any reason to doubt the veracity of their testimony." Counsel asserted that since none of the aforementioned factors were present, the expert's testimony should be considered to be reliable, relevant, and probative. As noted in *Matter of Skirball Cultural Center*, 25 I&N Dec. at 805, the regulation at 8 C.F.R. § 214.2(p)(6)(ii)(A) specifically permits a petitioner to satisfy that evidentiary requirement with affidavits, testimonials or letters. No such language appears at 8 C.F.R. § 204.5(h)(3)(v). Thus, that decision involved a different analysis.

The submission of letters from experts 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 *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988); 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" but rather is admissible only if it will assist the trier of fact to understand the evidence or to determine a fact in issue). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; see also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Additionally, each letter submitted in support of the petitioner's eligibility claim appears

to have been drafted in response to the petitioner's efforts in attaining either approval of an immigrant or a nonimmigrant petition in the United States. While letters authored in support of the petition have probative value, they are most persuasive when supported by evidence that already existed independently in the public sphere.

Ultimately, the letters demonstrate that the petitioner is a successful model who is demonstrating the potential to be a successful model at her height. While [REDACTED] suggests that the petitioner has opened up the field for shorter models, the record contains no evidence that the average height of models has decreased notably since the petitioner began modeling. Even if the petitioner had established such an influence and that it constitutes a contribution of major significance, it would only be one such contribution. The plain language of the regulation requires evidence of contributions in the plural. The record contains no evidence of other original contributions of major significance in the field.

In view of the foregoing, the petitioner has not submitted evidence that satisfies the requirements of this criterion.

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

This criterion contains multiple evidentiary elements the petitioner must satisfy. The plain language of this criterion requires that the work in the field is directly attributable to the alien. Generally, 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts. This interpretation is longstanding and has been upheld by a federal district court in *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*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)). The alien's work also must have been displayed at artistic exhibitions or showcases (in the plural). Therefore, it is the petitioner's burden to demonstrate that the display of her work in the field claimed under this criterion occurred at artistic exhibitions or at artistic showcases. The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion.

Initially, the petitioner claimed that evidence originating from "press and media coverage from major national news outlets" constituted qualifying evidence under this criterion. Subsequent to the director's RFE, the petitioner amended her claim to include "high-profile fashion events, runway shows, and other showcases related to her modeling work for major companies and advertisements," and asserted that her evidence should be considered as comparable evidence. On appeal, she again claims that her evidence should qualify as comparable evidence. The director determined that the petitioner failed to meet the requirements of this criterion. As noted within this decision, the petitioner is not eligible to qualify for this immigrant classification based on comparable evidence as she has not demonstrated that the regulatory criteria are not readily applicable to her occupation.

Even if USCIS were to consider the petitioner's claims of comparable evidence, "press and media coverage from major national news outlets" and "high-profile fashion events, runway shows, and other showcases related to her modeling work for major companies and advertisements" are not a display of

the petitioner's work; they are a display of a product that the petitioner is presenting on behalf of a person or a company.

Consequently, the petitioner has not submitted evidence that meets the plain language requirements of this criterion, nor has the petitioner explained how modeling the artistic fashions of others is comparable to display of her own work.

*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. The petitioner also has the responsibility to demonstrate that she actually performed the duties listed relating to the leading role. 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 the organization or establishment as a whole. The petitioner must demonstrate that the organizations or establishments (in the plural) have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-Webster's online dictionary defines distinguished as, "marked by eminence, distinction, or excellence."<sup>4</sup> Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U.S. at 306. Therefore, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or an equivalent reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director determined that the petitioner failed to meet the requirements of this criterion. Specifically, the director determined that the petitioner's performances were consistent with those of a professional model. The director also stated: "General statements about your work being 'leading' or 'critical' without any description of specific instances in which you performed in leading or critical capacities for a particular establishment is not sufficient to establish eligibility for this criterion." On appeal, counsel asserts that the director did not provide any specific examples of how the evidence was insufficient.

On appeal counsel indicates that the director only named two of the 13 expert letters within the NOID. The only letter the petitioner references on appeal is from [REDACTED] President and Founder of [REDACTED] serves as a full-service production and casting company for several companies, including Frederick's of Hollywood. [REDACTED] asserted that the petitioner served in a leading or a critical role for [REDACTED] does not explain how she is authorized to represent [REDACTED] as the record lacks evidence that she is employed by the company. Additionally, [REDACTED] stated: "I can firmly state that [REDACTED] role has been *absolutely critical* to the success of each [REDACTED] ad campaign [sic] she has appeared in, and

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<sup>4</sup> See <http://www.merriam-webster.com/dictionary/distinguished>, accessed on May 28, 2013, a copy of which is incorporated into the record of proceeding.

ultimately, to our business as a casting and production company.” (Emphasis in the original). That the petitioner was critical to the success of ad campaigns is not sufficient to satisfy this criterion’s requirements.

On appeal, counsel also asserts that the petitioner’s work for [REDACTED] satisfies this criterion and points to the evidence provided in the RFE response. This evidence consists of photocopies of catalog pages and website printouts containing photographs of what appears to be the petitioner, and website pages from [REDACTED]. As further evidence relating to [REDACTED], the petitioner provided a second letter from [REDACTED] in which [REDACTED] asserts that the petitioner performed in a leading role for [REDACTED] through being the only model in the [REDACTED] advertisements in the company’s advertising campaign in 2011. The record does not document the manner in which [REDACTED] is authorized to represent or speak on behalf of [REDACTED] nor does it contain evidence from any individual who appears to be in a position to represent [REDACTED]. Consequently, this evidence is not sufficient to satisfy the plain language requirements of this criterion.

Accordingly, the petitioner has not submitted evidence that satisfies this criterion’s requirements.

*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 her occupation performing similar work at the top level of the field.<sup>5</sup>

The petitioner initially provided U.S. Government statistics relating to average or median modeling wages and salaries, 2005 through 2010 Form 1040, U.S. Individual Income Tax Return (tax return) documents, multiple invoices for the petitioner’s work completed in 1997 and 1998, and documentation that appears to be pay reports from an unidentified employer deriving from [REDACTED]. The director notified the petitioner that the submitted evidence was not sufficient within the RFE primarily noting the lack of evidence of the compensation of others with which to compare with the petitioner’s claimed high remuneration examples. In response, the petitioner submitted a report from the U.S. Census Bureau reflecting median earnings of “models, demonstrators, and product promoters,” a letter from the

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<sup>5</sup> 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.”

petitioner's modeling agency, and the petitioner's 2011 tax return. The comparative wage data derives from the Foreign Labor Certification (FLC) Data Center's Online Wage Library, which relies on the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) wage estimates.<sup>6</sup> The OES program collects data on wage and salary workers in nonfarm establishments in order to produce employment and wage estimates for about 800 occupations. The BLS produces occupational employment and wage estimates for over 450 industry classifications at the national level. The employment data are benchmarked to average employment levels.<sup>7</sup> Moreover, footnote one states that the estimates "do not include self-employed workers." The petitioner's tax returns reflect that she receives modeling income as an independent contractor, listed on her schedule C. Thus, she has not established that the BLS statistics are representative of the modeling industry as a whole, which, as is apparent from the petitioner's own tax returns, includes self-employed models.

The plain language of the regulation requires the petitioner to establish the petitioner's salary is high or that her remuneration has been significantly high when compared to others in the field. As such, the evidence, consisting of average statistics limited to one particular geographic area, do not meet this requirement.

On appeal, counsel asserts that the director abused his discretion and imposed additional requirements on the petitioner in the following manner: (1) requiring the petitioner to submit evidence of the "**earnings of those in your occupation performing similar work at the top level of the field;**" and (2) requiring the petitioner to submit evidence that she earned a high salary or significantly high remuneration "**in comparison with those performing similar work during the same time period.**" (Emphasis in the original.)

As stated by the director, the petitioner must submit evidence of earnings in comparison with those performing similar work. *Matter of Price*, 20 I&N Dec. 953, 955 (Assoc. Comm'r 1994); 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). The Associate Commissioner in *Matter of Price* compared the alien's monetary earnings with his rankings among those in the top of his field performing similar work. Notably the Associate Commissioner compared the alien's 1991 winnings to the remaining Professional Golfers' Association Tour during the same year. *Matter of Price*, 20 I&N Dec. at 955. Therefore, the petitioner must compare her income with income earned by those in her field during the same time period for those in her field.

Counsel's appellate brief also asserts that although USCIS policy states that some governmental statistics "may be helpful in evaluating" evidence under this criterion, that USCIS has "decided that it no longer will accept wage information published from the Department of Labor website when considering whether a petitioner's salary is high in relation to others in the field – even though the Department of Labor is the U.S. government's own agency and primary source of wage information

<sup>6</sup> <http://www.flcdatacenter.com/faq.aspx>

<sup>7</sup> [http://www.bls.gov/oes/oes\\_emp.htm#estimates](http://www.bls.gov/oes/oes_emp.htm#estimates)

and statistics.” The policy in place at USCIS does not state that its officers are to utilize the information contained on these websites as the determining factor regarding whether an alien has commanded a high salary or other significantly high remuneration in relation to others in the field; it merely states that the information contained in the websites “may” be helpful. In this matter, the BLS website is not helpful as it omits self-employed models such as the petitioner herself.

In reference to the petitioner’s tax returns, these documents are not accompanied by any Internal Revenue (IRS) Form W-2, Wage and Tax Statement documents (W-2s), or IRS Form 1099-MISC, Miscellaneous Income documents (1099s) that might serve to corroborate what amount of the monetary figures are attributable to the petitioner’s salary or remuneration for her services as a model even though the director specifically requested IRS Form W-2s or IRS Form 1099s within the RFE. While the petitioner’s schedule C indicates that her income listed on that form results from modeling, the petitioner did not submit the underlying IRS Forms 1099s. The invoices for the petitioner’s work relate to the years covering 1997 and 1998 and cannot serve to corroborate any of the information from the tax returns from 2005 through 2011. Nevertheless, the petitioner provided two types of reports; one that appeared to report her earnings for one full calendar year, and a second report that reflected individual job assignments covering the period from November 18, 2008, through August 20, 2010.

As the plain language of the regulation requires the petitioner to establish the petitioner’s salary is high or that her remuneration has been significantly high when compared to others in the field, the report from the U.S. Census Bureau reflecting median earnings is insufficient, as median statistics do not meet this requirement. [REDACTED] Director of the [REDACTED] stated: “Based on our current accounting reports, our *highest* earning models earn an average annual income of \$40,000 - \$60,000.” One company’s assertion of its highest earning models is not sufficient to demonstrate that this figure is representative of the petitioner’s field as a whole, and as such will not be considered representative of “a high salary or other significantly high remuneration for services, in relation to others in the field.”

Further, [REDACTED] Vice President of [REDACTED] stated: “Although wages and salaries vary amongst models, it is common industry knowledge that top models who have established reputations as the best, earn an annual salary exceeding \$100,000. This six-figure salary is reserved for the top 10% of models working today.” [REDACTED] did not support her statement with any corroborating reports, nor did the petitioner provide evidence to support [REDACTED] contention that any model earning more than \$100,000 is among the top ten percent in earnings in the modeling industry. The materials the petitioner submitted from the Department of Labor’s *Occupational Outlook Handbook* (OOH) state: “Hourly wages can be relatively high, particularly for supermodels and others in high demand.” The petitioner has not compared her wages with supermodels and others in high demand.

Ultimately, the plain language of the regulation requires the petitioner to establish the petitioner’s salary is high or that her remuneration has been significantly high when compared to others in the field. As such, average statistics limited to one particular geographic area that do not include self-employed

individuals in a field with a significant percentage of self-employed members do not meet this requirement.

Based on the foregoing, the petitioner has not submitted evidence that meets this criterion's requirements.

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

This criterion requires a petitioner to establish eligibility through volume of sales or box office receipts as a measure of the petitioner's commercial success in the performing arts. Counsel claimed that the petitioner qualifies under this criterion based on comparable evidence. As discussed within this decision, the petitioner is not eligible to claim comparable evidence as she has not demonstrated that the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to her occupation. Moreover, counsel fails to explain how appearing in high-profile campaigns is comparable evidence of the petitioner's personal commercial success. Therefore, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

#### E. 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 AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a

final merits determination.<sup>8</sup> Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122. It is briefly noted, however, that the published material is not recent and the most extensive coverage of the petitioner is in local publications. In addition, according to the OOH materials the petitioner submitted, creating public interest in buying products, displaying clothing and accessories, and appearing in printed publications and at fashion shows is inherent to the field of modeling. Finally, even if the petitioner established that her salary is within the top ten percent and is high pursuant to 8 C.F.R. § 204.5(h)(3)(ix), she has not compared her income with nationally or internationally acclaimed supermodels and others in high demand, including those who are self-employed, such that this evidence would be persuasive in a final merits determination. *See Matter of Price*, 20 I&N Dec. at 955.

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>8</sup> The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).