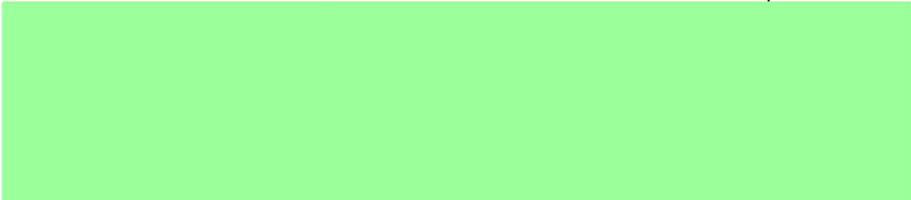




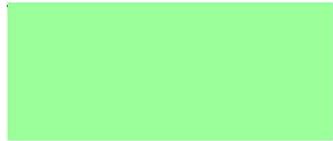
U.S. Citizenship  
and Immigration  
Services

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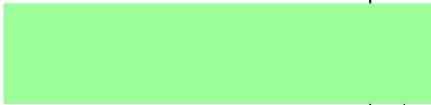


DATE: **MAR 04 2013**

Office: TEXAS SERVICE CENTER

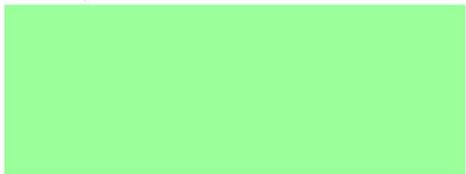


IN RE:           Petitioner:  
                    Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner is a publisher of interactive entertainment software. It seeks to classify the beneficiary as an "alien of extraordinary ability" in the arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A) as a design specialist in the software publishing industry. The director determined that the petitioner had not established the requisite extraordinary ability for the beneficiary and failed to submit extensive documentation of her sustained national or international acclaim.

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

On appeal, counsel asserts that the beneficiary meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(v), (viii), and (ix). The AAO acknowledges that the standard of proof is preponderance of the evidence, as noted by counsel on appeal. The "preponderance of the evidence" standard, however, does not relieve the petitioner from satisfying the basic evidentiary requirements required by the statute and regulations. Therefore, if the statute and regulations require specific evidence, the petitioner is required to submit that evidence. See section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. §§ 204.5(h)(2) and (3). In this matter, the documentation submitted by the petitioner fails to demonstrate by a preponderance of the evidence that that the beneficiary meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3). For the reasons discussed below, the AAO will uphold the director's decision.

## I. LAW

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

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

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

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

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(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. 723 101<sup>st</sup> Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 580 F.3d 1030 (9<sup>th</sup> Cir. 2009) *aff'd in part* 596 F.3d 1115 (9<sup>th</sup> 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 for the beneficiary 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.*

<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).

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## II. ANALYSIS

### A. Evidentiary Criteria<sup>2</sup>

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

In the director's decision, he determined that the petitioner failed to establish the beneficiary's eligibility for this regulatory criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of *major significance* in the field." [Emphasis added.] Here, the evidence must be reviewed to see whether it rises to the level of original artistic or business-related contributions "of major significance in the field." The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3<sup>rd</sup> Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2<sup>nd</sup> Cir. Sep 15, 2003).

The petitioner submitted video game credits for [REDACTED] identifying the beneficiary among the numerous artists who provided digital animation for the video games. The petitioner also submitted internet screenshots from [REDACTED] and *Wikipedia* entries providing information about various video games, but the submitted information does not mention the beneficiary or her specific contribution to the video games. Further, with regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.<sup>3</sup> See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8<sup>th</sup> Cir. 2008). Accordingly, the AAO will not assign weight to information for which *Wikipedia* is the source. There is no documentary evidence showing that the beneficiary's specific original work as part of a team of numerous digital animators was of major significance to the field.

The petitioner submitted a letter of support from [REDACTED] stating:

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

<sup>3</sup> Online content from *Wikipedia* is subject to the following general disclaimer:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . ***Wikipedia cannot guarantee the validity of the information found here.*** The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

See [http://en.wikipedia.org/wiki/Wikipedia:General\\_disclaimer](http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer), accessed on February 22, 2013, copy incorporated into the record of proceeding.

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[The beneficiary] has contributed to the artistic community by creating unique digital animation, such as transforming human figures into highly realistic and detailed characters. For instance, in the creations of [REDACTED] the human elements in the games are very realistic and unparalleled. Truly, [the beneficiary's] extraordinary skill as an artist greatly sets her apart from other multi-media artists in the field.

[REDACTED] does not specify her qualifications for assessing contributions in the digital animation field. [REDACTED] states that the beneficiary has created "unique digital animation" for video games developed by her employers, but [REDACTED] fails to provide specific examples of how the beneficiary's specific digital animation work has significantly impacted the software publishing industry or otherwise constitutes original artistic contributions of major significance in the field. [REDACTED] also asserts that the beneficiary's "extraordinary skill as an artist greatly sets her apart from other multi-media artists in the field." Assuming the beneficiary's artistic skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 (Comm'r 1998). While the beneficiary has performed digital animation work for [REDACTED] and [REDACTED] there is no documentary evidence demonstrating that the beneficiary's specific work for her employers equates to original artistic contributions of major significance in the field. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the beneficiary's original contributions be "of major significance in the field" rather than limited to her employers and the animated video game products that they create.

Regarding [REDACTED] comments, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of a reference's statements and how she became aware of the beneficiary's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a design specialist who has made original contributions of major significance in the field.

In response to the director's request for evidence, counsel states:

The Beneficiary . . . has contributed to the artistic community by being a leading expert in the utilization of the following: ZBrush, Maya, 3dsMax, Photoshop, Body Paint. Traditional arts; Illustration, Oil Painting, and Clay Sculpting. [The beneficiary] is one of the few great artists who continue to develop unique techniques in the industry. Specifically, she has developed three demo reels to assist others in further[ing] the understanding of 3D art animation. The Beneficiary's demo reels may be found at:

[redacted] Truly, [the beneficiary's] extraordinary skill as an artist greatly sets her apart from other cinematic artists in the field.

Counsel asserts that the beneficiary is "has contributed to the artistic community by being a leading expert" in the utilization of ZBrush, Maya, 3dsMax, Photoshop, Body Paint, illustration, oil painting, and clay sculpting, but counsel does not point to specific evidence in the record of original contributions made by the beneficiary in which she utilized those artistic mediums. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel also states that the beneficiary has "developed three demo reels to assist others in further[ing] the understanding of 3D art animation." There is no documentary evidence demonstrating that the beneficiary's demo reels are extensively utilized by other digital animators in the field, have been adopted by various universities as part of their training curricula, or otherwise constitute artistic contributions of major significance in the software publishing industry.

On appeal, counsel states:

The Petitioner provided sufficient documentary evidence in the form of the Beneficiary's game credits and artwork. . . . By looking at the Beneficiary's game credits and art techniques together, the Officer would have determined that the Beneficiary's unique art techniques resulted in the creation of successful game designs.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of *major significance in the field*." [Emphasis added.] The mere fact that the beneficiary has participated on a large team of digital animators to create successful game designs does not demonstrate that her specific work has had "major significance" in the field. The petitioner has failed to identify the "unique art techniques" originally developed by the beneficiary or to provide specific examples regarding how her particular techniques are of major significance to the software publishing industry. Without additional, specific evidence showing that the beneficiary's original work has been unusually influential, has substantially impacted her field, or has otherwise risen to the level of artistic or business-related contributions of major significance, the AAO cannot conclude that she meets this regulatory criterion.

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

The petitioner submitted video game credits for [redacted] identifying the beneficiary among the numerous artists who provided digital animation for the video games.

The letter from [redacted] states:

The Design Specialist plays a key role in the creation of transforming works of art into our software games, such as, [redacted]

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Currently, our studio, [REDACTED] has developed [REDACTED] which is a spin-off game in the [REDACTED]

[REDACTED] is a colorful masterpiece. It is the first game to deliver a cross-platform experience that allows kids to bring toys to life in a magical world via the [REDACTED] [The beneficiary] is a crucial member of our [REDACTED]

[The beneficiary] has been an important figure in the artistic development of our games. Her extraordinary artistic skills have ensured the success of our products. [The beneficiary's] job duties as a Design Specialist will continue to include the following: Design art works for commercial development. Responsible for performing multi-media design services in support of the company's digital animation, motion graphics and visual effects design for proprietary products. Responsible for utilizing state-of-the-art computer design programs and applications, including for 3D, concept, animation, storyboard and figurative design, modeling, digital effects, digital editing, layout, computer-generated illustration and interface art/design. These services are highly artistic and advanced in nature requiring professional skills of the university level with applicable outstanding professional experience and reputation. [The beneficiary] plays a significant part of our game design process.

In response to the director's request for evidence, the petitioner submitted additional documentation indicating that the beneficiary was among the numerous artists involved in creating the [REDACTED] software game. The petitioner also submitted documentation indicating that [REDACTED] has received numerous awards, such as the [REDACTED]. In addition, the petitioner submitted information about [REDACTED] its other software products, and the awards those products have won. The preceding documentation submitted by the petitioner is sufficient to demonstrate that [REDACTED] has a distinguished reputation.

The next issue is whether the beneficiary has performed in a leading or critical role for [REDACTED]. Not every employee working for a distinguished organization meets the elements of this criterion. On appeal, counsel states that the petitioner "may submit 'comparable evidence'" and that "[c]omparable evidence may be in the form of expert opinion letters attesting to the [beneficiary's] abilities." Specifically, counsel asserts that the director "failed to take into account [REDACTED] letter attesting to the Beneficiary's contributions to [REDACTED]" As previously noted, [REDACTED] does not specify her qualifications for providing an "expert opinion" in the digital animation field. Furthermore, the regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten categories of evidence "do not readily apply to the beneficiary's occupation." Thus, it is the petitioner's burden to demonstrate why the regulatory criteria at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the alien's occupation and how the evidence submitted is "comparable" to the specific objective evidence required at 8 C.F.R. §§ 204.5(h)(3)(i) – (x). The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the beneficiary's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to satisfy the plain language requirements

of at least three categories of evidence at 8 C.F.R. § 204.5(h)(3), the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

Regardless, the AAO finds that this regulatory criterion readily applies to the beneficiary's occupation and, therefore, the AAO will consider [REDACTED] letter. While [REDACTED] asserts that the beneficiary "plays a significant part" of [REDACTED] game design process and that the beneficiary is "an important figure in the artistic development" of the company's games, the petitioner has not established that the beneficiary performed in a leading or critical role for the company as a whole. In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien is responsible for the success or standing of the organization. The petitioner failed to submit organizational charts or similar documentary evidence to demonstrate where the beneficiary's Design Specialist position fit within the overall hierarchy of [REDACTED]. In addition, the letter from [REDACTED] fails to explain how the beneficiary's role was leading or critical relative to that of [REDACTED] other Design Specialists, let alone the company's top officers and executives. Further, the submitted evidence does not establish that the beneficiary was responsible for [REDACTED] success or standing to a degree consistent with the meaning of "critical role."

[REDACTED] further states:

[The beneficiary] has served in lead roles as a Design Specialist and/or animator for companies that have a strong and distinguished reputation, including . . . [REDACTED]. At these distinguished companies, [the beneficiary] created key artistic features for the following multi-million dollar products: [REDACTED] teams with her extraordinary artistic abilities.

The petitioner, however, failed to submit letters of support from [REDACTED] discussing the beneficiary's "lead roles as a Design Specialist and or animator" for those companies. Further, the petitioner failed to submit documentary evidence showing that the preceding companies have a distinguished reputation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. In addition, the regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence of experience "shall" consist of letters from employers. [REDACTED]

[REDACTED] the AAO finds her comments to be of limited probative value in demonstrating the significance of the beneficiary's role for the latter companies. Regardless, the petitioner failed to submit organizational charts or similar documentary evidence to demonstrate where the beneficiary's Design Specialist and Animator positions fit within the overall hierarchy of the preceding companies. The AAO acknowledges that beneficiary participated on design and animation teams for various video games, but there is no evidence showing that her role on those teams was leading or critical to the latter companies' overall operations. Further, the letter from [REDACTED] fails to explain how the beneficiary's role was leading or critical relative to that of [REDACTED] other Design Specialists and Animators, let alone the companies' top officers and executives. Lastly, the submitted evidence does not establish that the beneficiary was responsible for the preceding companies' success or standing to a degree consistent with the meaning of "critical role."

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

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

The petitioner submitted the beneficiary's Form W-2 Wage and Tax Statements for 2010 and 2011 reflecting wages of \$53,958.40 and \$53,202.41 respectively. The petitioner also submitted U.S. Department of Labor prevailing wage online search results for "Multimedia Artists and Animators" in Albany, New York reflecting a Level 1 wage (entry) of \$36,338 per year, a Level 2 wage (qualified) of \$44,387 per year, a Level 3 wage (experienced) of \$52,437 per year, and a Level 4 wage (fully competent) of \$60,486 per year.<sup>4</sup> The AAO notes that the beneficiary's wages in 2010 and 2011 were below those of fully competent workers in her field. In addition, the petitioner submitted a U.S. Department of Labor "Prevailing Wage Determination" for "Multimedia Artists and Animators" reflecting a Level 1 wage (entry level) of \$36,337.60 per year. Counsel asserts that because the beneficiary's wage is substantially higher than the prevailing entry level wage, the petitioner has demonstrated the beneficiary's receipt of a high salary. Counsel's argument is not persuasive. As the beneficiary's online resume submitted by the petitioner indicates that she has worked in the field since 2005, the entry level prevailing wage is not a proper basis for comparison with her 2010 and 2011 wages. The petitioner must submit evidence showing that the beneficiary has earned a *high* salary or other *significantly high* remuneration relative to others in the field, not simply a salary that is above the amount paid to the majority of entry level workers in the Albany, New York area.

In addition, the petitioner submitted results from the "Game Developer Salary Survey 2012" for "Artists and Animators" indicating that the "average" yearly salary for those with less than three years of experience is \$49,481, those with three to six years of experience is \$63,214, and those with more than six years of experience is \$97,833. The survey also indicates that females in the industry receive an average salary of \$52,875 per year and that males receive an average salary of \$79,124 per year. The AAO cannot ignore that that beneficiary's wages are significantly below those of workers with three to six years of experience and with more than six years of experience. Regardless, the plain language of this regulatory criterion requires the petitioner to submit evidence showing that the beneficiary has earned a *high* salary or other *significantly high* remuneration in relation to others in the field, not simply a salary that is slightly above "average" for her gender. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding average salary information for those performing lesser duties is not a comparison to others in the field); *Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N.D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

<sup>4</sup> A "prevailing wage" is defined as "trade and public work wages paid to the majority of workers in a specific area." *See* <http://www.businessdictionary.com/definition/prevailing-wage.html>, accessed on February 22, 2013, copy incorporated into the record of proceeding.

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

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

The director stated: "At the time of filing the petitioner requested this criterion to be considered, but the petitioner did not submit evidence in response to the request for additional evidence." Therefore, the director found that the petitioner failed to establish the beneficiary's eligibility. On appeal, the petitioner does not contest the director's finding for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Regardless, the plain language of this criterion indicates that it applies to "the performing arts," not the software publishing industry. Accordingly, the petitioner has not established that the beneficiary meets this regulatory criterion.

#### B. Summary

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

## II. CONCLUSION

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

Even if the petitioner had submitted the requisite evidence for the beneficiary under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.<sup>5</sup> Rather, the proper conclusion is that the beneficiary has failed to satisfy the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122.

<sup>5</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).

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

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.