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

(b)(6)

DATE: MAR 2 6 2013 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The 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 the arts, 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 June 4, 2012. On June 11, 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 September 26, 2012. On appeal, the petitioner submits counsel's brief with new documentary evidence. 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.[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. Evidentiary Criteria[2]

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 a self-generated list of her prizes or awards, a letter from a photograph of three awards, a letter from the biography of a and a The director determined that the petitioner failed to meet the requirements of this criterion. Counsel's appellate brief indicated that the director incorrectly concluded that the two letters from simply summarized and listed the petitioner's personal achievements. A review of the letters does reveal that also briefly discussed the focus of the award criteria and the significance of receiving awards from the However, merely indicated that the petitioner had received first place recognition

Within the appellate brief, counsel claims that the director completely overlooked letter. However, a review of the director's decision reveals that he did discuss this letter, although he utilized rather than stating her name. As the petitioner did not submit evidence of the national or international recognition of her awards, such as national or widespread coverage of the accolades, she has not established that the field at the national level recognizes her awards. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally recognized in the field of endeavor and it is her burden to establish every element of this criterion. In this instance, there is no documentary evidence demonstrating that the preceding awards were recognized beyond the presenting organizations, nor are the awards commensurate with nationally or internationally recognized prizes or awards for excellence in the field. Accordingly, the petitioner has not established that she meets this criterion.

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

On appeal the petitioner submits a new article from Within the RFE the director requested evidence demonstrating "[t]he significance of the prizes or awards, to include the national or international recognition that the prizes or awards share." 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). The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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 evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the director to consider the submitted evidence, she should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO will not consider the sufficiency of the evidence submitted on appeal. Regardless, the article does not establish any recognition of the petitioner's awards outside of

As such, the petitioner has not submitted evidence that meets the plain language 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 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 petitioner provided the foreign language original and translation of an article titled, Also related to this article is a letter from
The petitioner also provided a foreign language article fror The director determined that the petitioner failed to meet the requirements of this criterion.

Regarding the article titled, although the petitioner asserted that the article appeared in , the translation also does not bear the publication name in which the article

appeared. Additionally, the translation does not bear the date of publication nor does it bear the author's name; both of which are required under the regulation at 8 C.F.R. § 204.5(h)(3)(iii), and in turn each of these is also required within the translation as the regulation at 8 C.F.R. § 103.2(b)(3) requires "a full English language translation." The letter from appears to be related to this article and laimed that an article about the petitioner appeared in edition number 88 of his publication. letter provided information about the distribution of the publication. The evidence relating to this journal's national or international reach is in the form of a letter from the publication itself rather than published circulation statistics from an official or independent website or other publicly available source. USCIS need not rely on the self-promotional material of the publisher. *See Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 317 F. App'x 680 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media).

Regarding the article the article is about the petitioner and relating to her work in the field. The translation also contains the title, date, and author required by the regulation. However, the petitioner failed to provide independent documentary evidence relating to the circulation data of this publication to compare with similar newspapers, and she has consequently failed to establish the is 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 documentary evidence related to the distribution data of the to establish this published material has a national rather than a regional reach. Publications with only a regional reach are not considered to be major media and the petitioner has not established this publication is a professional or major trade publication as required by the regulation. Within counsel's initial filing statement, he put forth several claims relating to this publication's popularity. The director's RFE requested "documentary evidence" of circulation information to support the petitioner's claims under this criterion, yet in response to the RFE, the petitioner, through counsel only made additional unsupported claims within the RFE response statement. 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. 1, 3 n.2 (BIA 1983); *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). On appeal, the petitioner failed to offer any additional evidence relating to this publication.

In view of the foregoing, 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 she 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 petitioner provided three letters in support of her claim under this criterion. The director determined that the petitioner met the requirements of this criterion. The AAO does not concur with the director's determination as it relates to this criterion.

The letter from owner of the alluded that the petitioner was a "savvy judge of art," but did not state that the petitioner had performed in a formal capacity as a judge of the work of others. Therefore, this evidence will not serve to satisfy the regulatory requirements for the petitioner.

Regarding the letter from although implied that the petitioner served as a judge, he failed to state that the petitioner has actually served in a formal judging capacity. stated: "It was very difficult to find a person that could be such an important collaborator for this level of school, not only as a judge of exhibitions, but also as a selector of new students and determining their individual talents. [The petitioner] is the artist that since that moment has been in charge of that very important help for me, the school and the selection of students for the school." This letter's author did not state that the petitioner served as a judge of the work of others in the same or an allied field, and as such, letter will not serve to meet the plain language requirements of this criterion.

The final letter from owner of the indicated that he invited the petitioner to participate in an exhibition and that he was honored to include the petitioner as a current representative. did not, however, indicate that the petitioner served in any capacity as a judge of the work of others, and as such, his letter will not satisfy this criterion's requirements.

Based on the above analysis, the AAO does not affirm, and withdraws the director's affirmative determination as it relates to this criterion. Therefore, the petitioner has not submitted evidence that meets the plain language requirements of 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 (3rd Cir. 1995)

quoted in APWU v. Potter, 343 F.3d 619, 626 (2nd 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 petitioner provided several letters from experts in her field. The director determined that the petitioner failed to meet the requirements of this criterion.

A review of the letters reveals that all of the authors hold a high respect for the petitioner's work and her abilities. Yet, none of the authors identified what was original about her work or her techniques, and more importantly, none described how her originality has impacted the field through any means. On appeal counsel references the letter from and asserts that the director "callously brushed off the fact that . . . regards the beneficiary in the highest esteem in her field of endeavor." Counsel also provided a quote from letter. The quote does not address the requirement of this criterion that the petitioner must have made original contributions in her field, and that these contributions were of major significance. The remaining letters bear the same shortcoming of in that fail to identify specific original contributions in the petitioner's field, in addition to providing a description of the impact of the contribution.

Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" was insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. The opinions of experts in the field are not without weight and have been considered. While such letters can provide important details about the petitioner's skills, they cannot form the cornerstone of a successful extraordinary ability claim. 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 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 id.* at 795; *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).

Based on the noted shortcomings within the expert letters, 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.

The director determined that the petitioner met the requirements of this criterion. The AAO affirms with the director's determination as it relates to 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."[3] 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 equivalent reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner requested that her activities in the art community be considered as comparable evidence. She also provided a letter from The director determined that the petitioner failed to meet the requirements of this criterion. On appeal, counsel asserts that the petitioner's participation as a judge and at cultural events as well as her donations to several organizations serve to meet this criterion. Participation as a judge, however, falls under its own criterion, 8 C.F.R. § 204.5(h)(3)(iv), and USCIS will not presume that evidence relating to that criterion is also presumptive evidence to meet this separate criterion.

Regarding the petitioner's activities in the art community qualifying as comparable evidence, 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. Where an alien is simply unable to meet or submit 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. As the petitioner has not even attempted to demonstrate that the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to her occupation, the petitioner may not claim her activities in the art community as comparable evidence to qualify for this immigrant classification. As such, no evidence that the petitioner submitted will be considered as comparable evidence.

Regarding the letter from she discussed the critical role that the petitioner "has played in the development of the arts as " This assertion is insufficient to meet the plain language requirements of this criterion, which requires the petitioner to have performed in a leading or

[3] *See* http://www.merriam-webster.com/dictionary/distinguished, accessed on March 5, 2013, a copy of which is incorporated into the record of proceeding.

critical role for organizations or establishments. The organization or establishment in this instance would be rather than the art department. also indicated that the petitioner "helped the develop its Painting and Drawing Curriculum. By introducing stained glass workshops in early 2010; she has created increased enthusiasm among the art students. The result has been an increase in enrollment." did not indicate that the increase in enrollment occurred at the university level or provide any statistical support for the claimed increase in enrollment in the department, and an increase in enrollment within the art program at the university is not sufficient to be considered a leading or a critical role for the university as a whole. Finally, the record lacks evidence that the petitioner is responsible for any increase, such as promotional material prominently featuring the petitioner and her curriculum.

The record is also lacking any actual evidence relating to the distinguished reputation of The only reference to the university's reputation is asserted throughout the proceedings within counsel's statements or appellate brief. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The 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). Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) also requires performance in a leading or critical role for "organizations or establishments" in the plural, which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. As the petitioner only claimed one organization or establishment under this criterion, even if she demonstrated her qualifying role at she would still have failed to satisfy the plain language requirements of this criterion.

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

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

This criterion anticipates a petitioner will establish eligibility through volume of sales or box office receipts as a measure of the petitioner's commercial success in the performing arts.

While the petitioner did not initially claim to satisfy this criterion, the petitioner asserted eligibility under this criterion based on the sale of her paintings in response to the director's RFE. The director determined that the petitioner failed to meet the requirements of this criterion.

On appeal, counsel states within the brief:

> Given that the beneficiary's field of endeavor is that of a Fine Artist, it is admittedly impossible to produce evidence of commercial success in the performing arts. However,

> taking the former two sets of criteria together, namely, "commanding high remuneration" and evidence of "commercial success", we feel that the prices her works command on the market can comparably meet the final two prongs; therefore, **this criterion can be said to have been met.**

(Bold in the original.)

First, the petitioner failed to assert her eligibility for the high salary or other significantly high remuneration criterion at 8 C.F.R. § 204.5(h)(3)(ix) prior to the appellate brief. The director's RFE stated that no evidence was submitted under the significantly high remuneration criterion. Within the RFE response, neither counsel nor the petitioner refuted this declaration by the director. The petitioner must claim every criterion that the petitioner would like to be considered before the director. New eligibility claims will not be considered on appeal in instances when the petitioner was notified of the types of evidence that are required to demonstrate eligibility and was afforded the opportunity to provide the evidence prior to the issuance of an adverse decision. *See Matter of Soriano*, 19 I&N Dec. at 766.

Additionally, counsel's analysis quoted above ignores the explicit regulatory requirement that all eligibility for the commercial success criterion must be demonstrated by evidence relating to the performing arts. Counsel acknowledges that the petitioner's occupation falls within the "Fine Arts," or more appropriately as a visual artist. It logically follows that as USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5, as expressed in *Kazarian,* 596 F.3d at 1121, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008), neither can USCIS ignore clearly stated regulatory requirements. Therefore, counsel's position is not persuasive.

Furthermore, the regulatory language at 8 C.F.R. § 204.5(h)(4) precludes the consideration of comparable evidence in this case, as there is no indication that the standards specified by the regulation at 8 C.F.R. § 204.5(h)(3) do not readily apply to the petitioner's occupation. In fact, as indicated in this decision, counsel mentioned evidence at the time of the initial petition filing or in response to the RFE that specifically addressed seven of the ten criteria at the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to meet or submit 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. As such, no evidence that the petitioner submitted will be considered as comparable evidence.

As a result of the above noted deficiencies, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

B. 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.[4] 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 (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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