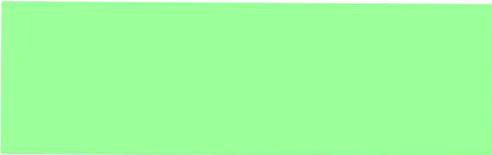


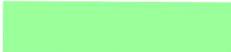
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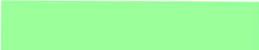
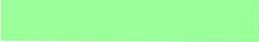
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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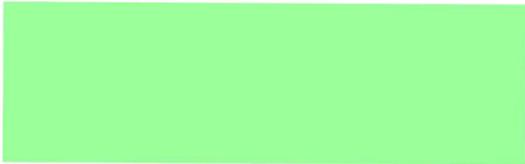


DATE: **AUG 29 2014** Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, on January 16, 2014, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in swimming. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his sustained national or international acclaim.

On appeal, the petitioner claims that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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 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, internationally 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 his appellate brief, the petitioner refers to a district court decision - *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994). The petitioner claims that it specifies that “an alien need only establish three of the ten enumerated criteria to establish eligibility for ‘Extraordinary Ability’ classification” and claims that this is a precedent decision. First, contrary to the petitioner’s claim, *Buletini* stated:

Once it is established that the alien’s evidence is sufficient to meet three of the criteria listed in 8 C.F.R. § 204.5(h)(3), the alien must be deemed to have extraordinary ability unless [USCIS] sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard.

Id. at 1234.

Buletini contemplates a final merits analysis to determine whether the alien has sustained national or international acclaim in light of meeting at least three of the criteria. Second, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge’s decision will be given due consideration when it is properly before us; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In this matter, there is a recent circuit court decision that is far greater authority.

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 our decision to deny the petition, the court took issue with our 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 our 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 we 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 we concluded).” *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

¹ Specifically, the court stated that we 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).

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, we 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.*

II. FIELD OF EXPERTISE

In Part 6 of Form I-140, Immigrant Petition for Alien Worker, the petitioner did not answer any of the questions relating to information about his proposed employment including his proposed job title and job description. According to the cover letter accompanying the petition, the petitioner claimed that his “extraordinary ability in the sport[] of swimming has garnered the attention of the swimming community.” Moreover, the petitioner claimed that he “*had* an absolutely extraordinary career in the field of swimming in China and on the International sports scene.” (emphasis added). Furthermore, the petitioner submitted a March 21, 2011 job offer letter from [REDACTED] Head Coach for [REDACTED] [REDACTED] “for the position of **Full time coaching**.” Finally, as will be discussed in detail below, the petitioner submitted documentary evidence regarding his competitive swimming career that occurred from 1988 to 1993. There is no evidence regarding his experience as a competitive swimmer since 1993, a period of 20 years prior to the filing of his petition. Thus, the record reflects that the petitioner is seeking to classify himself as an alien of extraordinary ability as a coach rather than as a competitor. Even though the petitioner submitted documentation regarding his involvement in past swimming meets as a competitor, which will be discussed later in this decision, the record reflects his intent to come to the United States as a coach.

The statute and regulations require the petitioner’s national or international acclaim to be *sustained* and that he seeks to continue work in his area of expertise in the United States. *See* sections 203(b)(1)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1153(b)(1)(A)(i) and (ii), and 8 C.F.R. §§ 204.5(h)(3) and (5). While a swimming coach and a swimming competitor share knowledge of the sport, the two rely on very different sets of basic skills. Thus, swimming instruction and swimming competition are not the same area of expertise. This interpretation has been upheld in federal court. In *Lee v. Ziglar*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

It is reasonable to interpret continuing to work in one’s “area of extraordinary ability” as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee’s extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

Id. at 918. The court noted a consistent history in this area. In the present matter, there is no evidence showing that the petitioner has sustained national or international acclaim through achievements as a swimming competitor subsequent to 1993 or that he intends to compete here in the United States. In fact, the petitioner submitted a letter from [REDACTED] [REDACTED] who claimed that the petitioner “*was* the top swimmer in [REDACTED] (emphasis added).” Although we acknowledge the possibility of an alien’s extraordinary claim in more than

one field, such as swimming competition and swimming instruction, the petitioner, however, must demonstrate “by clear evidence that the alien is coming to the United States to continue work in the area of expertise.” See the regulation at 8 C.F.R. § 204.5(h)(5).

The record of proceeding reflects that the petitioner intends to continue to work in the area of swimming instruction rather than the area of swimming competition. Ultimately, the petitioner must satisfy the regulation at 8 C.F.R. § 204.5(h)(3) through his achievements as a swimming instructor or coach.

III. ANALYSIS

A. Translations

At the initial filing of the petition, the petitioner submitted numerous foreign language documents with summary and non-certified English language translations. The regulation at 8 C.F.R. § 103.2(b) provides in pertinent part:

(3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Although in response to the director’s request for evidence (RFE) pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the petitioner submitted full and certified English language translations of the additional documents, the petitioner did not provide any full and certified English language translations for the initial documents.

As cited above, the regulation at 8 C.F.R. § 103.2(b)(3) specifically requires that any foreign language document that is submitted to USCIS must be accompanied by a full and certified English language translation. Because the petitioner did not comply with the regulation at 8 C.F.R. § 103.2(b)(3), the evidence submitted without proper translations is not probative and will not be accorded any evidentiary weight.

B. Evidentiary Criteria²

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

The director determined that the petitioner did not establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires “[d]ocumentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.” Moreover, it is the petitioner’s burden to establish that the evidence meets every

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

element of this criterion. Not only must the petitioner demonstrate his receipt of prizes and awards, he must also demonstrate that those prizes and awards are nationally or internationally recognized for excellence in the field of endeavor, which, by definition, means that they are recognized beyond the awarding entity.

The petitioner submitted diplomas reflecting that he finished in fifth place in the men's 400 meter individual medley and fourth place in the men's 1500 meter freestyle at the [REDACTED]. In addition, the petitioner claimed that he finished in second place in the men's 200 meter freestyle and first place in the men's 400 meters freestyle at the [REDACTED] and first place in the men's 400 meter freestyle medley at the [REDACTED].

Regarding the [REDACTED] the petitioner referred to newspaper articles that were submitted without certified and full English language translations as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(3). In addition, the regulation at 8 C.F.R. § 103.2(b)(2) provides in pertinent part:

- (i) The non-existence or other unavailability or required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the fact at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. The petitioner did not submit primary evidence of these finishes, such as documentation from the [REDACTED] and the petitioner did not submit any evidence establishing that primary evidence does not exist or cannot be obtained as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(2). As such, the petitioner did not demonstrate that he won any awards at the [REDACTED].

The petitioner does not claim, nor does the record of proceeding reflect, any nationally or internationally recognized prizes or awards for excellence as a swimming coach; rather the petitioner claims eligibility for this criterion based on purported awards as a past swimming competitor. *See Lee v. Ziglar*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise). Even if the awards were considered, the petitioner

submitted primary evidence only of his finishes at the [REDACTED] in which he finished in fourth and fifth place. The petitioner did not submit any documentary evidence establishing that such finishes are recognized for excellence in the field.

As discussed, the plain language of this regulatory criterion specifically requires that the petitioner demonstrate his receipt of nationally or internationally recognized prizes or awards for excellence in his field. In this case, the petitioner did not claim and did not submit any evidence establishing he received any prizes or awards as a swimming coach.

Accordingly, the petitioner did not establish that he meets this criterion.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

The director determined that the petitioner did not establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires “[d]ocumentation of the alien’s membership in associations in the field for which is classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.” In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association’s overall reputation.

On appeal, the petitioner claims that he was a member of the [REDACTED] as a swimmer. The petitioner claims that he “was selected to a member of the [REDACTED] purely due to his swimming prowess and his top ranking in the events of 400m and 1500m freestyle.” The petitioner also submitted a letter from [REDACTED] who indicated that the petitioner joined the national team as a swimmer in [REDACTED]. The record does not claim, nor does the record reflect, that the petitioner was a member of the [REDACTED] as a coach. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires “membership in associations in the field for which classification is sought.” *See Lee v. Ziglar*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise). Therefore, the petitioner’s membership as a swimmer on the [REDACTED] does not meet this criterion.

The petitioner also claims eligibility for this criterion based on his membership with the [REDACTED]. The petitioner submitted a document indicating that the petitioner represents the “Office of the Director” on the swimming committee. The document does not indicate the significance of this position, and the petitioner did not, submit any documentary

evidence establishing that he was granted membership with the [REDACTED] based on his achievements as a swimming coach. Moreover, according to the document, individual membership requires:

Age over 50 years, Love swimming, Individual has no bad record, Health, Comply with the provisions Swimming Association, After swimming association approved to become members.

Such requirements are not reflective of outstanding achievements consistent with the plain language of this regulatory criterion. Further, the document does not indicate how membership is judged, so as to reflect that membership is judged by recognized national or international experts in their disciplines or fields as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

Finally, the petitioner claims eligibility for this criterion based on his membership with the [REDACTED]. The petitioner submitted a document indicating that he is one of four secretaries for the organization. The petitioner did not submit any other documentary evidence demonstrating that he was granted membership with the association based on his achievements as a swimming coach. Moreover, the document does not indicate the membership requirements and whether membership is judged by recognized national or international experts in their disciplines or fields pursuant to this regulatory criterion. Submitting documentary evidence reflecting the petitioner's employment or involvement with a particular organization without evidence reflecting that the petitioner is a member of an association that requires outstanding achievements of its members, as judged by recognized national or international experts, is insufficient to meet the plain language of the regulation. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires the petitioner to show "membership in associations" rather than the petitioner's employment or involvement with organizations or businesses.

As discussed, the plain language of this regulatory criterion specifically requires that the petitioner's membership be with associations in his field that require outstanding achievements. In this case, the petitioner did not demonstrate that his memberships are in his field as a swimming coach that require outstanding achievements, as judged by recognized national or international experts.

Accordingly, the petitioner did not establish that he meets 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.

The director determined that the petitioner did not establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished 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." In general, in order for published material to meet this criterion, it must be about the petitioner and, as stated in the regulations, be printed in professional or

major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers. Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that “[s]uch evidence shall include the title, date, and author of the material, and any necessary translation.”

As discussed under the awards criterion above, the petitioner submitted only summary translations of articles that purportedly appeared in the [REDACTED]

Without full and certified translations, the petitioner has not established that the documentation reflects published material about him relating to his field and that the material was published in the purported publications. Furthermore, the petitioner did not include the title, author, and necessary translation as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Regardless, based on the summary blurbs, the material appears to reflect reports of his finishes at swimming competitions rather than published material about him relating to coaching. *See Lee v. Ziglar*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise).

Finally, the petitioner submitted an unidentified document reflecting background information regarding the publications. Since the document does not identify the source of the information and the petitioner provided no evidence corroborating the content, the petitioner has not established the publications are professional or major trade publications or other major media.

As discussed above, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “[p]ublished 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.” In this case, the petitioner’s documentary evidence does not reflect published material about him relating to a swim coach in professional or major trade publications or other major media.

Accordingly, the petitioner did not establish that he meets this criterion.

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

The director determined that the petitioner did not establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.” In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien contributed in a way that is of significant importance to the outcome of the organization or establishment’s activities.

The petitioner claimed eligibility for this criterion based on his membership with the [REDACTED]. As indicated under the membership criterion, the petitioner submitted a letter from [REDACTED] who indicated that the petitioner joined the national team as a swimmer in [REDACTED].

Although [REDACTED] provided highlights of the petitioner's competitive swimming career, he did not indicate if the petitioner ever performed in a role as a coach. *See Lee v. Ziglar*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise). Even if the petitioner's role as a competitive swimmer was considered for this criterion, Mr. [REDACTED] did not indicate how the petitioner performed in a leading or critical role. It is not persuasive to conclude that every member on a national sports team performs in a leading or critical role. Mr. [REDACTED] did not, for example, explain how the petitioner's role differentiated from the other swimmers or members on the national team. Moreover, the petitioner did not submit any documentary evidence demonstrating that the [REDACTED] has a distinguished reputation consistent with the plain language of this regulatory criterion.

Furthermore, at the initial filing of the petition, the petitioner also submitted a recommendation letter from [REDACTED] and three letters that were signed but did not identify the authors. Significantly, the letters either contain identical language when describing the petitioner's achievements and abilities, suggesting the language in the letters is not the authors' own. *Cf. Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an immigration judge's adverse credibility determination in asylum proceedings based in part on the similarity of some of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source). In addition, in response to the director's RFE, the petitioner submitted recommendation letters from [REDACTED]. All of the letters indicate the petitioner's prior personal swimming achievements and do not identify any of the petitioner's roles for any organizations or establishments, let alone a leading or critical role as a coach for organizations or establishments.

The opinions of the petitioner's references are not without weight and have been considered. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the references' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence. *Cf. Visinscaia v. Beers*, --- F. Supp. 2d ----, 2013 WL 6571822, at *6, *8 (D.D.C. Dec. 16, 2013) (concluding that USCIS' decision to give little weight to uncorroborated assertions from professionals in the field was not arbitrary and capricious).

Finally, the petitioner claimed eligibility for this criterion based on his role in the organization committee at the [REDACTED] China. To support this claim, the petitioner submitted a copy of his identification badge reflecting that he was part of the organizing committee. The petitioner did not submit any other documentation establishing that he

performed in a leading or critical role, let alone performed as a coach for the committee. Simply showing evidence that he is part of a committee does not demonstrate that his role was leading or critical. The petitioner did not identify his job duties or responsibilities or showed how he contributed in a way that is of significant importance to the outcome of the committee. In addition, the petitioner did not submit any documentary evidence demonstrating that the organizing committee of the [REDACTED] has a distinguished reputation.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.” The burden is on the petitioner to establish that he meets every element of this criterion. Without documentary evidence demonstrating that the petitioner has performed in a leading or critical role for organizations or establishments that have a distinguished reputation, the petitioner has not established that he meets the plain language of this regulatory criterion.

Accordingly, the petitioner did not establish that he meets this criterion.

C. Summary

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

IV. CONCLUSION

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

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

³ We conduct appellate review on a de novo basis. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). In any future proceeding, we maintain 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 eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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.