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



U.S. Citizenship
and Immigration
Services

DATE: **DEC 15 2014** Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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 as a senior pastry chef, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), which makes visas available to aliens who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for this visa classification.

For the reasons discussed below, we agree that the petitioner has not established his eligibility for the exclusive classification sought. Specifically, the petitioner has not submitted qualifying evidence of a one-time achievement pursuant to 8 C.F.R. § 204.5(h)(3), or evidence that satisfies at least three of the ten regulatory criteria set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x). As such, the petitioner has not demonstrated that he is one of the small percentage who are at the very top in the field of endeavor, and that he has sustained national or international acclaim. *See* 8 C.F.R. § 204.5(h)(2), (3). Accordingly, we will dismiss the petitioner’s appeal.

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) sets forth a multi-part analysis. First, a petitioner can demonstrate the alien’s sustained acclaim and the recognition of the alien’s achievements in the field through evidence of a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit this evidence, then a petitioner must submit sufficient qualifying evidence that meets at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The submission of evidence relating to at least three criteria, however, does not, in and of itself, establish eligibility for this classification. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination). *See also Rijal v. USCIS*, 772 F.Supp.2d 1339 (W.D. Wash. 2011) (affirming USCIS’ proper application of *Kazarian*), *aff’d*, 683 F.3d. 1030 (9th Cir. 2012); *Visinscaia v. Beers*, 4 F.Supp.3d 126, 131-32 (D.D.C. 2013) (finding that USCIS appropriately applied the two-step review); *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the “truth is to be determined not by the quantity of evidence alone but by its quality” and that USCIS examines “each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true”).

II. ANALYSIS

On appeal, the petitioner claims:

[He] readily meets at least 4 of these criteria demonstrating his extraordinary ability in the culinary arts, with a particular focus in the highly-specialized field of fine Kosher pastry design, including:

1. He has performed in lead/critical roles with organizations/establishments with distinguished reputations.
2. He has made major artistic and business-related contributions to the field of culinary arts, with a particular focus on the development of high quality bakery and dessert products for the international Kosher food industry.
3. He and his work have been displayed/featured at major culinary exhibitions and showcases.
4. His work has been otherwise recognized by leading experts in the field of international culinary arts.

Regarding the petitioner's reference to numbers 1 – 3 above, they relate to the regulatory categories of evidence regarding the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), and the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Regarding the petitioner's reference to number 4 above, there is no specific criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(i)-(x) that would be met by simply demonstrating that the petitioner's work has been recognized by experts in the field. Therefore, we will consider the petitioner's evidence as to how it relates to any of the claimed criteria on appeal.

Furthermore, the director determined that the petitioner did not submit any evidence regarding the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix), and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x). In addition, the director determined that the petitioner did not meet the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii) and the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). On appeal, the petitioner did not contest the findings of the director for these criteria or offer additional arguments. Therefore, the petitioner has abandoned these issues. *See 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).

A. Evidentiary Criteria

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

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)(v) requires that the evidence must rise to the level of original 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 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

The petitioner submitted copies of a few of his recipes, as well as evidence reflecting that his recipes were published twice in [REDACTED] and that his recipes and work were used as promotional material for [REDACTED]. The petitioner, however, did not demonstrate that his recipes are original contributions of major significance in the field. Submitting samples of the petitioner's work is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) without documentary evidence demonstrating that his work has been of major significance in the field. The petitioner submitted no evidence reflecting how his recipes meet this criterion. For example, the petitioner did not submit any evidence showing that his original recipes

are used throughout his field or have garnered significant attention, so as to demonstrate that they are of major significance in the field.

The petitioner also submitted recommendation letters that praise him for his work as a chef but do not indicate that he has made original contributions of major significance in the field. The letters provide only general statements without offering any specific information to establish how the petitioner's work has been of major significance. For instance, [REDACTED] Chef for the [REDACTED] [REDACTED] stated that the petitioner "is one of only three chefs who have passed all the steps of creation in sugar." Chef [REDACTED] did not provide any further information to demonstrate how this qualifies as a contribution of major significance in the field.

Moreover, [REDACTED] General Manager for [REDACTED] stated that the petitioner "is one of the only pastry cooks who knows [sic] how to address a dish with different ideas and an endless creative touch." Again, Mr. [REDACTED] did not further explain how this constitutes an original contribution of major significance in the field. Mr. [REDACTED] did not, for example, elaborate on the influence or impact of the petitioner's work on the field that would be reflective of the significance of the petitioner's work.

In addition, [REDACTED] Owner of [REDACTED] stated that the petitioner "is uniquely qualified and positioned to positively impact the American baking industry" and "[h]is passion, creativity, experience and technical skill combine to create a rare individual who affects others across an industry." Mr. [REDACTED] did not indicate how the petitioner's skills or personal traits are original contributions of major significance in the field. Having a diverse skill set is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the petitioner has already used those unique skills to impact the field at a significant level in an original way. Furthermore, assuming the petitioner's 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 labor certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Assoc. Comm'r 1998). Further, Mr. [REDACTED] generally speculates about how the petitioner will affect the field at some point in the future. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), further provides that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. The assertion that the petitioner's work is likely to be influential is not adequate to establish that his work is already recognized as major contributions in the field.

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 that one would expect of a musician who has made original contributions of major significance in the field. *Cf. Visinscaia v. Beers*, 4 F.Supp.3d at 134-135 (concluding that USCIS' decision to give little weight to uncorroborated assertions from professionals in the field was not arbitrary and capricious).

While those familiar with the petitioner's work generally describe it as "extraordinary," there is insufficient documentary evidence demonstrating that the petitioner's work is of major significance. This regulatory criterion not only requires the petitioner to make original contributions, the regulatory criterion also requires those contributions to be of major significance. Vague, solicited letters that repeat the regulatory language but do not explain how the petitioner's contributions have already influenced the field is insufficient to establish original contributions of major significance in the field. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009), *aff'd in part*, 596 F.3d 1115. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, No. 95 CIV. 10729, *1, *5 (S.D.N.Y. Apr. 18, 1997). In 2010, the *Kazarian* court reiterated that the USCIS' conclusion that the "letters from physics professors attesting to [the petitioner's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. Moreover, the letters considered above primarily contain bare assertions of the petitioner's status in the field without providing specific examples of how those contributions rise to a level consistent with major significance in the field. Without supporting evidence, the petitioner has not met his burden of establishing his present contributions of major significance in the field. Further, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

Without additional, specific evidence showing that the petitioner's work has been majorly influential, widely applied throughout his field, or has otherwise risen to the level of contributions of major significance, the petitioner has not established that he meets this criterion.

Accordingly, the petitioner did not establish that he meets 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 did not establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at artistic exhibitions or showcases."

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 claimed:

[His] work has been displayed and featured at major international culinary exhibitions and showcases, including but not limited to: the [redacted] the [redacted] event sponsored by [redacted] (based [sic] on his recognition as one of the area's outstanding pastry chefs; and the [redacted] bakery seminar in [redacted]

The petitioner submitted a letter from [redacted] Chair of the [redacted] Chef at [redacted], who stated that they “conducted seminars for advanced bakers at [redacted] through the work of the [petitioner].” In addition, the petitioner submitted a letter from [redacted] Head Chef for [redacted] Director of [redacted] [redacted] who stated that they decided to take [redacted] “events into nature or on the river,” and they turned to the petitioner “to advise, supervise and lead the process.” Further, the petitioner submitted a document entitled, [redacted] Finally, the petitioner submitted photographs with handwritten captions reflecting [redacted],” and “[redacted]

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires that the petitioner's work has been displayed “at artistic exhibitions and showcases.” The petitioner has not demonstrated that his work was displayed at any artistic exhibitions or showcases consistent with the plain language of this regulatory criterion. The petitioner did not submit sufficient documentary evidence establishing that conducting seminars or lectures in a teaching environment equates to displaying his work at artistic exhibitions or showcases. Similarly, making pastries for events on behalf of [redacted] is not displaying his work at an exhibition or showcase. The petitioner did not identify an exhibition or showcase that displayed his work while employed by [redacted] Furthermore, being recognized at a luncheon is not reflective of having his work displayed at an exhibition or showcase. Finally, submitting photographs without primary evidence that his work has been displayed at artistic exhibitions or showcases do not meet the plain language of this regulatory criterion. The petitioner submitted no documentation demonstrating that the [redacted] are considered exhibitions and showcases and that his work was displayed. As the petitioner has not demonstrated that he has displayed his work at any artistic exhibitions or showcases, he has not established that he meets the plain language of this regulatory criterion.

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 submitted a letter from [REDACTED], Manager of [REDACTED] who stated that the petitioner was “invited personally by us between the months of 8-10/2012 as a Culinary Consultant for the factory,” and he “produced with the team a presentation of new desserts and was selected as a model chef for the dessert collection.” Mr. [REDACTED] did not provide any further information that would demonstrate that the petitioner performed in a leading or critical role for [REDACTED]. The record lacks specific information showing how the petitioner’s role as a culinary consultant was leading or contributed to the overall success of the company. Further, the petitioner submitted a letter from [REDACTED] to the petitioner thanking him for his “hard work, [his] ethics, effort and loyalty, during his time [he] worked with [the hotel].” None of these personal traits, however, are indicative of the petitioner performing in a leading or critical role. Moreover, the petitioner did not submit any documentary evidence establishing that [REDACTED] kitchen have distinguished reputations.

In addition, the petitioner submitted letters that confirmed the petitioner’s employment but did not provide any evidence that the petitioner’s roles were leading or critical. For instance, [REDACTED] confirmed that the petitioner worked as a pastry chef for the hotel from May 1, 1995 to April 9, 1996. Moreover, [REDACTED] confirmed that the petitioner worked as a pastry chef from January 1998 to January 1999. Further, [REDACTED], Chairman of the [REDACTED], stated that the petitioner “supervised the kitchen and confectionary operations of the [REDACTED].” Job titles alone, however, do not establish the nature of the petitioner’s roles as either leading or critical. The letters do not describe how the petitioner’s position fits within the overall hierarchy of the organizations or the duties the petitioner performed for the organizations. The letters fall short of specifying how the petitioner contributed to the organizations in a way that is significant to their success or what roles he played in the organizations’ activities. Furthermore, although the petitioner submitted screenshots from [REDACTED] the petitioner did not submit any independent, objective evidence establishing that the hotels have distinguished reputations. USCIS need not rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff’d* 2009 WL 604888 (9th Cir. 2009) (concluding that self-serving assertions on the cover of a magazine as to the magazine’s status is not reliable evidence of major media). Regardless, the screenshots are about the hotels rather than about the kitchen or pastry departments. There is no evidence demonstrating that the these departments have distinguished reputations.

Finally, the petitioner submitted job letters from [REDACTED] Director of [REDACTED] who specifically described the petitioner’s job responsibilities as a senior pastry chef since 2009 and an employment contract from the restaurant group. The documentary evidence does demonstrate that he performed in a leading role for [REDACTED]. The petitioner did not establish that [REDACTED] has a distinguished reputation. The petitioner submitted a single screenshot from [REDACTED] that provides a brief history of the business. The petitioner did not submit any independent, objective evidence demonstrating the reputation of [REDACTED]. *See Braga v. Poulos*, No. CV 06 5105 SJO *aff’d* 2009 WL 604888. The petitioner did not submit, for example, any evidence that distinguishes [REDACTED] from other similar restaurants.

Even if the petitioner were to establish that [REDACTED] has a distinguished reputation, which he did not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires the petitioner to perform in a leading or critical role for “*organizations or establishments* (emphasis added)” in the plural. The use of the plural 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. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of “letter(s).” Thus, the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS’ ability to interpret significance from whether the singular or plural is used in a regulation. *Cf. Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at *1, *12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005, at *1, *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for “a” bachelor’s degree or “a” foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

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

B. Summary

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

III. O-1 NONIMMIGRANT STATUS

On appeal, the petitioner claims:

[T]he decision fails to give any mention whatsoever to the fact that the Service, in previously considering virtually the same evidence submitted with the initial I-140 filing (but not including any of the substantial evidence subsequently submitted with the RFE response), has approved 3 O-1 petitioner for [him] over the past 5 years recognizing his extraordinary ability as a senior pastry chef.

Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states that “[t]he term ‘extraordinary ability’ means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(o)(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines extraordinary ability as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt

of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the petitioner's receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Further, an approval of a nonimmigrant visa does not mandate the approval of a similar immigrant visa. Each case must be decided on a case-by-case basis upon review of the evidence of record.

Many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103. Some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of the alien's qualifications).

Applications or petitions are not required to be approved where the petitioner has not demonstrated eligibility because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r. 1988). Agencies need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of the alien, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, *1, *3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

An application or petition that does not comply with the technical requirements of the law may be denied by us even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conducts appellate review on a *de novo* basis).

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 his or her 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 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. As the petitioner has not done so, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of presenting evidence that satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3) and (4). *Kazarian*, 596 F.3d at 1122. Nevertheless, although we need not provide the type of final merits determination referenced in *Kazarian*, a review of the evidence in the aggregate supports a finding that the petitioner has not demonstrated the level of expertise required for the classification sought.¹

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

ORDER: The appeal is dismissed.

¹ We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep’t of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). 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* INA §§ 103(a)(1), 204(b); 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).