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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: FEB 06 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 "MRosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on June 12, 2013, 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. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of her sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate “sustained national or international acclaim” and present “extensive documentation” of his or her 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, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific 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.

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

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO’s decision to deny the petition, the court took issue with the AAO’s evaluation of evidence submitted to meet a given evidentiary criterion.<sup>1</sup> With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent “final merits determination.” *Id.* at 1121-22.

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

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

## II. ANALYSIS

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

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

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

*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. On appeal, counsel claims the petitioner's eligibility for this criterion based on the following:

1. First place winner of the 2004 [REDACTED] competition;
2. Selected to participate in the [REDACTED]
3. Selected to attend the Free Training Initiative with the [REDACTED]
4. Selected to reprise her role in [REDACTED] at the [REDACTED] and [REDACTED]
5. The cast of [REDACTED] was awarded one of the [REDACTED]

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.” It is the petitioner’s burden to establish eligibility for every element of this criterion. Not only must the petitioner demonstrate her receipt of prizes and awards, she must also demonstrate that those prizes and awards are nationally or internationally recognized for excellence in the field of endeavor. In other words, the petitioner must establish that her prizes and awards are recognized nationally or internationally for excellence in the field beyond the awarding entities.

Regarding item 1, the petitioner submitted a letter from [REDACTED] who indicated that the petitioner received first place at the scholarship competition. Although Ms. [REDACTED] indicated that she was one of the adjudicators for the petitioner’s class, the petitioner did not submit primary evidence of her receipt of the award. 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. In this case, although the petitioner submitted a letter, the petitioner did not submit any documentary evidence demonstrating that primary evidence, such as evidence from the awarding entity, and secondary evidence do not exist or cannot be obtained. Regardless, the letter that has been provided is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary 58 (9th Ed., West 2009)*. Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746.

Regardless, academic study is not a field of endeavor, but rather training for a future field of endeavor. As such, academic scholarships, student awards, postdoctoral fellowships, and financial aid awards cannot be considered nationally or internationally recognized prizes or awards in the petitioner's field of endeavor. Therefore, the petitioner did not establish that her scholarship is a nationally or internationally recognized prize or award for excellence in the field. Although they may be prestigious, fellowships, scholarships, and other sources of competitive financial support are not nationally or internationally recognized prizes or awards because only other students – not recognized experts in the field – compete for such funding. Such support funding is presented not to established musicians and artists with active professional careers, but rather to students seeking to further their education. Academic awards and honors received while preparing for a vocation do not constitute a national or international prize or award for recognition in the field.

Moreover, although the petitioner submitted screenshots from the [REDACTED] the petitioner did not submit any independent, objective documentary evidence regarding the scholarship competition, so as to demonstrate that the scholarship is a nationally or internationally recognized prize or award for excellence in the field. USCIS need not rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO, *aff'd* 317 Fed. Appx. 680 (C.A.9).

Regarding items 2 – 4, they reflect the petitioner's selection to perform in roles or at theatres and festivals. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "prizes or awards." The petitioner did not demonstrate that her selections equate to "prizes or awards" consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). The petitioner did not establish that she received any prizes or awards based on her performances or roles.

Furthermore, regarding item 2, the petitioner submitted screenshots from [REDACTED] reflecting that "[d]ue to the huge interest in performing at the [REDACTED], admittance to the festival for performers is *now awarded by a lottery system* [emphasis added]." Thus, selection to perform at the [REDACTED] is not based on "excellence in the field of endeavor" as required by the regulation but rather through a lottery system.

Regarding item 5, the petitioner submitted screenshots from [REDACTED] that listed [REDACTED] as one of the top ten cast albums of 2012. However, there no indication that the website listing resulted in a prize or award, let alone a nationally or internationally recognized prize or award for excellence. Regardless, an award that was not specifically presented to the petitioner cannot be tantamount to her receipt of a nationally or internationally recognized award; it cannot suffice that the petitioner was one member of a large group that earned collective recognition. As 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 prizes or awards, the submission of screenshots that listed a show, in which she participated, as being in the top 10 cast albums of 2012 is insufficient to demonstrate that the petitioner received a nationally or internationally recognized award for excellence in the field. The petitioner did not submit any documentary evidence establishing that she received any prizes or

awards for her performance in [REDACTED]. Furthermore, the petitioner did not submit any documentary evidence demonstrating that the website listing is recognized as a national or international prize or award for excellence in the field.

As discussed above, the plain language of this regulatory criterion specifically requires the petitioner's receipt of prizes or awards that are nationally or internationally recognized for excellence in her field. The petitioner failed to establish that she 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. On appeal, counsel claims the petitioner's eligibility for this criterion based on the following:

1. An article entitled, [REDACTED] February 19, 2006, by [REDACTED]
2. An article entitled, [REDACTED] January 27, 2005, by [REDACTED]
3. An article entitled, "[REDACTED] January 27, 2005, by [REDACTED]
4. An article entitled, "[REDACTED] June 12, 2009, by [REDACTED]
5. A photograph with a caption entitled, "[REDACTED] June 13, 2008, [REDACTED]
6. A screenshot entitled, [REDACTED] unidentified date, by [REDACTED]
7. A screenshot entitled, "[REDACTED] unidentified date, unidentified author, [REDACTED]
8. A screenshot entitled, [REDACTED] August 15, 2012, by [REDACTED]
9. A screenshot entitled, [REDACTED] August 20, 2012, by [REDACTED]

10. A screenshot entitled, [REDACTED] August 14, 2012, unidentified author, [REDACTED]
11. A screenshot entitled, [REDACTED] August 16, 2012, unidentified author, [REDACTED]
12. A screenshot entitled, "[REDACTED] August 16, 2012, by [REDACTED]
13. A screenshot entitled, [REDACTED] August 20, 2012, by [REDACTED]
14. A screenshot entitled, [REDACTED] unidentified date, unidentified author, [REDACTED]
15. A screenshot entitled, [REDACTED] unidentified date, unidentified author, [REDACTED] and [REDACTED]
16. A screenshot entitled, [REDACTED] unidentified date, unidentified author, [REDACTED]

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 primarily 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.<sup>3</sup> 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.”

Regarding items 1 – 13, they reflect published material about shows rather than published material about the petitioner. Articles that are not about the petitioner do not meet this regulatory criterion. *See, e.g., Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*1, \*7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). For example, item 1 is a review for the show, [REDACTED] items 2 – 3 are reviews for the show, [REDACTED] items 4 – 5 are reviews for the show, [REDACTED] and items 6 – 13 are reviews for the show, [REDACTED] Although the articles briefly mention the petitioner as a cast member, none of the articles are about the petitioner relating to her field.

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<sup>3</sup> Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual’s reputation outside of that county.

Regarding items 14 – 15, they reflect promotional material for the show, [REDACTED]. Although item 14 lists the petitioner as being a cast member, item 15 makes no mention of the petitioner. Further, flyers, advertisements, posters, and other promotional material do not equate to “published material,” (with an identified author, title, and date) consistent with the plain language of this regulatory criterion as they are not independent, journalistic coverage of the petitioner relating to her work.

Regarding item 16, it reflects an interview with the petitioner in which her answers are recorded in the submitted material. The author does not discuss the petitioner, and the material does not qualify as published material about the petitioner relating to her work.

Notwithstanding the above, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires the material to be published “in professional or major trade publications or other major media.” As indicated above, the majority of the petitioner’s documentary evidence reflects articles that were posted on the Internet. However, articles posted on the Internet from a printed publication or from an organization are not automatically considered major media. In today’s world, many newspapers, publications, and organizations, regardless of size and distribution, post at least some of their stories on the Internet. To ignore this reality would be to render the “major media” requirement meaningless. However, international accessibility by itself is not a realistic indicator of whether a given website is “major media.” The petitioner did not submit any independent, objective evidence establishing that the websites are considered major media.

Similarly, regarding the printed publications, the petitioner did not submit any documentary evidence establishing that they are professional or major trade publications or other major media. On appeal, counsel claims that “[t]he media in which the reviews appear are some of the oldest publications in the U.S. and Canada, as well as publications regularly sought out by actors, musicians and theater-goers and those simply looking for entertainment in New York.” However, counsel did not submit any documentary evidence to support her assertions. The unsupported statements of counsel on appeal or in a motion 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).

Finally, 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.” However, items 6, 7, 10, 11, 14, 15, and 16 do not include the date and/or author of material as required by this regulatory criterion.

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.” The petitioner’s documentary evidence does not reflect published material about her relating to her work in professional or major trade publications or other major media.

Accordingly, the petitioner failed to establish that she meets 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.*

The director determined that the petitioner established eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence 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.” A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence establishing that she meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

Accordingly, the petitioner has established that she 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. On appeal, counsel claims the petitioner’s eligibility for this criterion based on the following:

1. Co-produced and performed in the lead role in [REDACTED] at the [REDACTED]
2. Selected to reprise the role in [REDACTED] at the [REDACTED]
3. The cast of [REDACTED] was awarded one of the Top Ten Cast Albums of 2012 by [REDACTED]
4. Performed with the [REDACTED] four times; and
5. Hosted [REDACTED] TV’s show, [REDACTED]

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 [emphasis added].” In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment.

Regarding item 1, the petitioner submitted a playbill for the show reflecting that she had a starring role in the show. However, counsel did not submit any documentary evidence to support her assertion that the petitioner co-produced the show. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. at 188-89 n.6. Regardless, the plain language of the regulation at 8 C.F.R.

§ 204.5(h)(3)(viii) requires the petitioner's leading or critical role be for "organizations or establishments." Therefore, the petitioner must establish that she performed in a leading or critical role for the [REDACTED] as a whole rather than limited to a show. However, the petitioner did not submit any other documentary evidence demonstrating that her role at the festival was leading or critical. The record of proceeding contains no documentation, for example, comparing the petitioner's role to the other participants at the festival, so as to demonstrate the petitioner performed in a leading or critical role. Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires the organizations or establishments to have a "distinguished reputation." The petitioner submitted screenshots from *Wikipedia*. However, as there are no assurances about the reliability of the content from this open, user-edited Internet site, weight will not be assigned to information from *Wikipedia*. See *Laamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8<sup>th</sup> Cir. 2008).<sup>4</sup> Moreover, while the petitioner submitted a screenshot from [REDACTED] regarding the 2013 festival, the petitioner did not submit any independent, objective evidence establishing that the [REDACTED] has a distinguished reputation. USCIS need not rely on self-promotional material. See *Braga v. Poulos*, at 680.

Regarding items 2 and 3, similar to item 1, the petitioner must demonstrate that she performed in a leading or critical role for the [REDACTED] as a whole rather than limited to the show, [REDACTED]. However, the petitioner did not submit any documentary evidence reflecting that her performance in the show constituted a leading or critical role for the [REDACTED]. There is no evidence differentiating the petitioner's role from the other performers, so as to reflect the petitioner's role was leading or critical. Regarding the reputation of the [REDACTED] the petitioner submitted photographs of promotional material for the [REDACTED] that indicates it was the winner of the 2013 [REDACTED]. However, the petitioner did not submit any documentary evidence regarding the significance of the award, so as to demonstrate that the theatre festival has a distinguished reputation. USCIS need not rely on self-promotional material. See *Braga v. Poulos*, at 680.

Regarding item 4, the petitioner submitted playbills from the [REDACTED] reflecting that she was a member of the choral roster for four shows. However, the petitioner did not submit any other documentary evidence that demonstrated that her roles were leading or critical. For example, the documentary evidence does not reflect that the petitioner was featured or received top billing in any

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<sup>4</sup> See also the online content from [http://en.wikipedia.org/wiki/Wikipedia:General\\_disclaimer](http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer), accessed on November 6, 2013, and copy incorporated into the record of proceeding is subject to the following general disclaimer:

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

of the shows consistent with the meaning of leading or critical pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). There is no evidence demonstrating how the petitioner's roles differentiated her from the other performers. In addition, the petitioner did not submit any documentary evidence establishing that the [REDACTED] has a distinguished reputation consistent with this regulatory criterion.

Regarding item 5, the petitioner submitted a letter, dated June 26, 2010, from [REDACTED] Producer/Director for [REDACTED] TV, who stated that the petitioner hosted seven episodes of the show, [REDACTED] and "[h]er work was critical to the production of [REDACTED]." However, Mr. [REDACTED] did not explain how the petitioner's hosting of seven episodes was leading or critical to [REDACTED] TV. The petitioner did not submit any organizational charts, for example, to demonstrate that her roles were leading or critical when compared to other employees at the television station. Based on Mr. [REDACTED] job title, it appears that he performed in a far more leading or critical role. Vague, solicited letters that do not specifically explain how the petitioner's roles were leading or critical are insufficient. Repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Furthermore, although Mr. [REDACTED] provided some background information regarding [REDACTED] TV, the petitioner did not submit any independent, objective evidence establishing that [REDACTED] TV has a distinguished reputation. USCIS need not rely on self-promotional material. *See Braga v. Poulos*, at 680.

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 she 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 failed to establish that she meets the plain language of this regulatory criterion.

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

The director determined that the petitioner did not establish eligibility for this criterion. In counsel's brief submitted on appeal, she did not contest the findings of the director for this criterion or offer additional arguments. Therefore, this issue is abandoned. *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).

Accordingly, the petitioner failed to establish that she meets this criterion.

## B. Summary

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

## III. O-1 NONIMMIGRANT

The petitioner indicated on her Form I-140, Immigrant Petition for Alien Worker, that she was last admitted to the United States on December 30, 2012, as an O-1 nonimmigrant. 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 her 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. 1103 (E.D.N.Y. 1989). 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. 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, the AAO’s authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of the alien, the AAO 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 the AAO 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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO 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 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 the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.<sup>5</sup> Rather, the proper conclusion is that the 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.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> The AAO maintains *de novo* review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. 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).