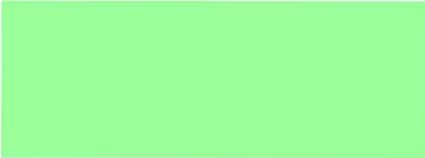


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



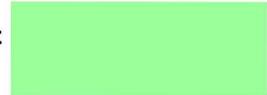
U.S. Citizenship
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Services

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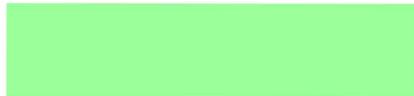


DATE: **JUL 31 2014** Office: TEXAS SERVICE CENTER

FILE:



IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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, Texas Service Center, on June 12, 2013, and is now before the Administrative Appeals Office (AAO) on appeal. We will dismiss the appeal.

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 as an actress. 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.

On appeal, the petitioner claims that she 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 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 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)).

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. ANALYSIS

A. 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.” It is the petitioner’s burden to establish that the evidence meets 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, which, by definition, means recognition beyond the awarding entity.

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).

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

The petitioner based her eligibility for this criterion on her receipt of the [REDACTED] for [REDACTED] and on her receipt of the 2007 [REDACTED]. The director found that the petitioner's receipt of the [REDACTED] qualified for a nationally or internationally recognized award for excellence in the field. Regarding the [REDACTED], the director determined that "[e]nsemble awards do not qualify under this criterion," and the petitioner did not establish that the award was nationally or internationally recognized for excellence in the field of endeavor. As the petitioner demonstrated that she only received one nationally or internationally recognized prize or award for excellence in the field of endeavor, the director determined that the petitioner did not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

Regarding the [REDACTED], the petitioner submitted sufficient documentation establishing that it is a nationally or internationally recognized prize or award for excellence in the field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). Regarding the [REDACTED] Award, the petitioner submitted documentary evidence reflecting that she was specifically acknowledged as being part of the ensemble, and she was recognized by the awarding entity for the [REDACTED] category. Thus, the petitioner demonstrated that she received the [REDACTED] Award.

However, the petitioner has not established that the [REDACTED] Award is nationally or internationally recognized for excellence in the field pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i). The petitioner submitted documentation from the [REDACTED] and screenshots from [REDACTED] reflecting that the [REDACTED] "object is to award excellence in the professional performing arts in Melbourne," and that the award "is the most revered accolade an artist can receive in Australia's cultural capital." The documentation also indicated that "[a]ll productions viewed by the [REDACTED] must be Melbourne premieres and only Australian produced (and rehearsed) productions are eligible." The petitioner did not submit any documentary evidence of the recognition of the Green Room Award beyond its awarding entity, the [REDACTED]. *Cf Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO need not rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media).

On appeal, the petitioner claims:

[T]he fact that the [REDACTED] recognize the excellence in professional performing arts in Melbourne does not make it local or regional. By that logic The [REDACTED] is not even regional but merely local as it recognizes excellence in the professional performing arts on Broadway, which is merely a small district within New York City. However, it is universally known that the [REDACTED] represent the pinnacle of theatrical excellence and are recognized nationally and internationally.

The petitioner also submits a letter from [REDACTED] who indicated that "Melbourne based awards and prizes, including [REDACTED] awards, have national currency." The single opinion from Ms. [REDACTED] and the evidence from the [REDACTED] is not

sufficient to establish that, like the [REDACTED] are nationally recognized beyond that awarding entity for excellence in the field. The petitioner has not demonstrated that her receipt of a [REDACTED] qualifies for the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

Section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires receipt of more than one nationally or internationally recognized prize or award for excellence. 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 a single instance of service as a judge 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. See *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at *1, *12 (D.C. Cir. March 26, 2008); *Snapshot.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).

In response to the director’s request for evidence, pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the petitioner cited to chapter 22.2(i)(1)(C) of the Adjudicator’s Field Manual, which states in pertinent part:

Also, although some items in the regulatory lists occasionally use plurals, as indicated above, it is entirely possible that the presentation of a single piece of evidence in that category may be sufficient.

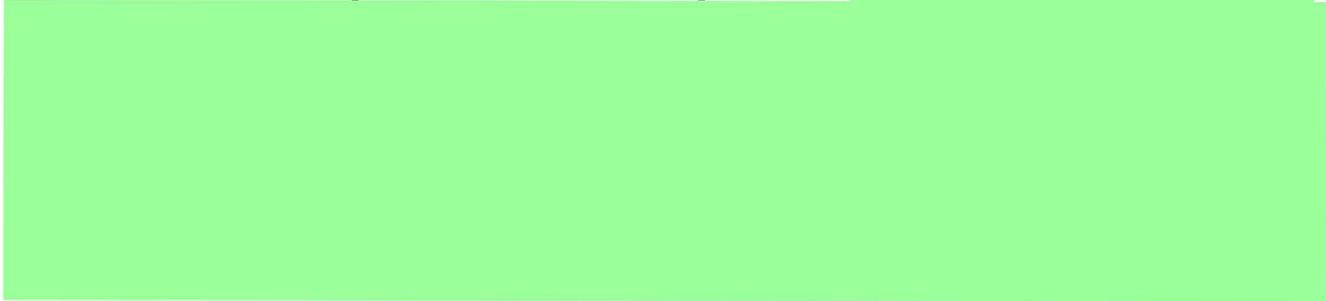
Regarding the regulation at 8 C.F.R. § 204.5(h)(3)(i), the petitioner may submit a single piece of evidence demonstrating that he or she received multiple nationally or internationally recognized prizes or awards for excellence in the field of endeavor. For example, the petitioner could submit a document from an awarding entity indicating that the petitioner received multiple nationally or internationally recognized awards for excellence. Thus, this submission of a single piece of evidence would meet the plain language of this regulatory criterion. In this case, the petitioner has established that she has only received one nationally or internationally recognized prize or award for excellence in the field; and therefore the petitioner does not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

Accordingly, the petitioner did not 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. 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.³ 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.”

A review of the record of proceeding reflects that the majority of the petitioner’s submitted articles were about the shows or productions in which she performed -



On appeal, the petitioner argues:

“[R]eviews” are ongoing critiques of artistic work and are done by critics in a specific field, theatre critics/reviewers, book critics/reviewers, movie critics/reviewers and so on. All major national and international publications have arts section, which are written and edited by prominent arts/theatre critics

* * *

It is standard procedure by critics to mention most major players when reviewing a show. The review will normally examine the main characters, the story and the creative team. A review rarely confines itself to just one lead actor. With cast sizes often reaching 40 performers, only the most important actors will be named in a review. Of these performers often only the most praiseworthy will be mentioned. Being mentioned in a review is a measure of the value a performer has added to a production

³ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the [redacted] but in a section that is distributed only in [redacted] County, Virginia, for instance, would indicate local coverage only.

Although the petitioner is briefly mentioned as one of the performers or is listed as a cast member, the “reviews” are about the shows. 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 our finding that articles about a show are not about the actor). Similarly, the petitioner submitted two articles from [REDACTED] that were about the [REDACTED] in which the petitioner was listed as one the winners. Although the petitioner’s name was mentioned in the articles, they were about the [REDACTED] and not about the petitioner. For these reasons, these articles do not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

The petitioner submitted the following articles that reflect published material about her and her work:



However, although at the time of filing the petitioner submitted a self-compiled spreadsheet of the circulation and readership statistics of the publications, she did not submit any documentation to support her assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). In response to the director’s request for evidence, the petitioner submitted documentation from [REDACTED] regarding various publications in Australia but no documentary evidence regarding [REDACTED] (items 1 – 4), in order to establish that they are professional or major trade publications or other major media consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). On appeal, the petitioner does not submit any additional evidence that was not previously submitted regarding these publications.

Regarding [REDACTED] item 5), in response to the director’s request for evidence, the petitioner submitted a letter from [REDACTED] who claimed that [REDACTED] and “receives over 73,327 average monthly visits and 119,633 average monthly page views.” The petitioner did not submit

independent, objective evidence establishing that the websites constitute major media. *See Braga v. Poulos*, No. CV 06 5105 SJO *aff'd* 2009 WL 604888 (concluding that self-serving assertions on the cover of a magazine as to the magazine's status is not reliable evidence of major media). Many newspapers or 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. The petitioner did not establish that Internet accessibility is a realistic indicator of whether a given website is "major media." On appeal, the petitioner does not submit any additional documentation regarding [REDACTED]

For the reasons discussed above, the petitioner did not demonstrate that she has had published material about her relating to her work in professional or major trade publications or other major media consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

Accordingly, the petitioner did not 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 petitioner did not previously claim eligibility for this criterion, either at filing or in response to the director's RFE. However, on appeal, the petitioner now argues that she meets eligibility for this criterion. The methods vary by which a petitioner can be notified of evidentiary requirements. For example, a petitioner is considered to be on notice through the specific requirements outlined within the regulations, or through various forms of communication from USCIS to a petitioner or applicant noting an evidentiary deficiency or requesting more evidence. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The regulation at 8 C.F.R. § 204.5(h)(3) notified the petitioner of the specific filing requirements to demonstrate eligibility under the extraordinary ability classification. In addition, the instructions to the Form I-140 petition state that the petitioner "must attach evidence with [the] petition showing that the alien has sustained national or international acclaim" and then lists the ten regulatory criteria, including evidence of "[p]articipation on a panel or individually as a judge of the work of others in the field or an allied field." As the petitioner was notified of the types of evidence that are required to demonstrate eligibility and was afforded the opportunity to provide the evidence prior to the issuance of an adverse decision, new eligibility claims will not be considered on appeal. *See Matter of Soriano*, 19 I&N Dec. at 766. Consideration of the petitioner's additional claims of eligibility must be accomplished through the filing of a new petition. *See id.* at 766. *Cf. Matter of Jimenez*, 21 I&N Dec. 567, 570 n.2 (BIA 1996) (finding that claims of eligibility for a waiver presented for the first time on appeal are not properly before the Board of Immigration Appeals and the Board will not issue a determination on the matter.) Although we maintain *de novo* review of appellate cases and a petitioner may supplement the record in regards to previous claims, a petitioner may not raise a previously unclaimed eligibility criterion on appeal. *See Matter of Soriano*, 21 I&N Dec. at 766. Our review is a determination as to whether the director erred in his determination below. If a claim was not previously made, there could not have been any error on the part of the director.

Notwithstanding the above, 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.” On appeal, the petitioner states “that as a former winner of the Helpmann Award [she] was invited to participate as a panelist in the voting process for these coveted awards.” In addition, the petitioner submitted an email from [REDACTED] who stated that the petitioner is a “registered voter” and has been an “active participant for the past two years.” The website page that the petitioner provided regarding the nominating panels for the Helpmann Awards states:

The [REDACTED] Administration Committee selects the Panel Chairs who then appoint Panelists to ensure broad geographic and artistic representation. All Chairs and Panelists participate on a voluntary basis and we thank them for their generous contribution.

Once all entries in the Awards are received, each Panel meets in late June and considers the entries. The Panels then select up to four entries for nomination per category, and recommend any entry within the artistic discipline to the [REDACTED] for consideration for the [REDACTED] nominations.

All Panelists are also eligible to vote in the Awards.

The petitioner provided no documentary evidence, such as the specific dates, panels, or nominations she participated in to demonstrate that after her invitation, she actually served as a panelist. Invitations to serve as a judge are not tantamount to evidence of one’s actual participation as a judge of others’ work. Further, although Ms. [REDACTED] indicates that the petitioner is eligible to vote for the [REDACTED], there is insufficient information establishing that the petitioner has actually voted for the [REDACTED].

For the reasons discussed above, the petitioner made no prior claim of her eligibility for this criterion and even if considered, the submitted evidence does not demonstrate that she served as a judge of the work of others in the same or an allied field of specification for which classification is sought consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

Accordingly, the petitioner did not establish that she 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 established eligibility for this criterion. As will be discussed, the documentary evidence submitted in support of this criterion is not sufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Therefore, as discussed below, the director’s decision will be withdrawn.

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.” The petitioner is an actress. When she is acting, she performs before an audience. As a performing artist, it is inherent to her occupation to perform. If we accept that a performance artist like the petitioner meets this criterion, it would render the regulatory requirement that the petitioner meet at least three criteria meaningless as this criterion would effectively be collapsed into the criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. The interpretation that this criterion is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under this criterion).

Therefore, while the petitioner’s performances have evidentiary value for other criteria, they cannot serve to meet this criterion. Instead, as the petitioner’s performances are far more relevant to the aforementioned leading or critical role criterion set forth at the regulation at 8 C.F.R. § 204.5(h)(3)(viii), they will be discussed separately within the context of that criterion. As such, we withdraw the decision of the director for this criterion.

Accordingly, the petitioner did not establish 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 established 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.” 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)(viii).

Accordingly, the petitioner established that she meets this criterion.

B. Summary

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

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who 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 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, we need not explain that conclusion in a final merits determination.⁴ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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

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.

⁴ 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).