



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 14 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a steel products manufacturing company. According to the initial filing, both the Form I-140 petition and the cover letter, the petitioner seeks to classify the beneficiary as an “alien of extraordinary ability” in business, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director issued a request for additional evidence (RFE) that explained the deficiencies in the initial evidence. In response, the petitioner asserted that there was a clerical error on the original petition and that the petitioner intended to request a lesser classification. The director determined that the petitioner was not permitted to change the classification sought and that the beneficiary had not met the requisite criteria for classification as an alien extraordinary ability. The director also noted in a footnote that the petitioner did not submit an approved Alien Employment Certification or an application for Schedule A designation as required for the lesser classification the petitioner referenced in response to the director’s RFE.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien’s “sustained national or international acclaim” and present “extensive documentation” of the alien’s achievements. See section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence for the beneficiary under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, the petitioner submits a November 1, 2012 letter contesting the director’s decision and additional documentary evidence. The petitioner asserts that the “beneficiary’s entry will substantially benefit prospectively the United States” and that the beneficiary meets the regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3)(ii), (iv), (v), (viii), and (ix). In addition, the petitioner correctly points out that the standard of proof in this matter is “preponderance of the evidence.” The “preponderance of the evidence” standard, however, does not relieve the petitioner from satisfying the basic evidentiary requirements required by the statute and regulations. Therefore, if the statute and regulations require specific evidence, the petitioner is required to submit that evidence. In most administrative immigration proceedings, the petitioner must prove by a preponderance of the evidence that he or she is eligible for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). The truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* at 376. In the present matter, the documentation submitted does not demonstrate by a preponderance of the evidence that the beneficiary meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3), and, therefore, that he satisfies the regulatory requirement of three categories of evidence.

I. LAW AND REGULATIONS

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). The instructions to the Form I-140, Immigrant Petition for Alien Worker, list the same evidentiary requirements.

II. PROCEDURAL ISSUES

The petitioner filed the Form I-140 on February 8, 2012. In Part 2 of the Form I-140, the petitioner checked box "a," indicating that it seeks to classify the beneficiary as an alien of extraordinary ability. In addition, the petitioner submitted a January 17, 2012 letter stating that the petitioner sought classification of the beneficiary as "an individual of extraordinary ability in the business community." In support of the petition, the petitioner submitted letters describing the beneficiary's work experience; an offer of employment to the beneficiary; prevailing wage information for "Industrial Production Managers," "General and Operations Managers," "Construction Managers," and "Architectural and Engineering Managers"; an evaluation of the beneficiary's education, training and experience from Dr. [REDACTED] Professor of Marketing at [REDACTED]; certificates in the German language reflecting the beneficiary's training courses and educational credentials; and information about the petitioner.

On June 9, 2012, the director issued the RFE asking that the petitioner provide certified English language translations of all foreign language documents, documentation to establish that the beneficiary's entry will substantially benefit prospectively the United States, and qualifying evidence for the beneficiary under at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3). The director's RFE specifically stated that the petitioner had not submitted evidence for the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i) – (iv), (vi), (vii), and (x). In addition, the director pointed to specific deficiencies in the evidence submitted for the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(v), (viii), and (ix).

In response to the RFE, the petitioner submitted no further documentary evidence. Instead, the petitioner's response consisted of an August 30, 2012 letter stating:

It has come to our attention that a clerical error was made The Form I-140, Immigrant Petition for Alien Worker was completed incorrectly. Part 2 should have been noted as Box D "A member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a national Interest Waiver)." Instead a clerical error was made and Box A "An alien of extraordinary ability" was checked.

At this time, we respectfully request the initial submission be adjudicated as an alien of exceptional ability rather than an alien of extraordinary ability. In support of this request, we have submitted newly signed . . . Form I-140, Immigrant Petition for Alien Worker.

As the petitioner did not submit certified English language translations of the foreign language documents, documentation to establish that the beneficiary's entry will substantially benefit prospectively the United States, or qualifying evidence for the beneficiary under at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3), the director denied the petition on March 18, 2013. With regard to the petitioner's request for a change of classification to "an alien of exceptional ability" pursuant to section 203(b)(2) of the Act, as stated above, the petitioner initially checked box "a" under Part 2 of the Form I-140 petition requesting to classify the beneficiary as an alien of extraordinary ability. The petitioner also signed the Form I-140 under penalty of perjury, certifying that "this petition and the evidence submitted with it are all true and correct." There is no statute, regulation, or case law that permits a petitioner to change the classification of a petition. Further, the Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, 286 Fed. Appx. 963 (9th Cir. July 10, 2008).

Furthermore, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140 covered the cost of the director's adjudication of the I-140 petition under section 203(b)(1)(A) of the Act. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource,

or service.¹ If the petitioner seeks classification of the beneficiary under a different immigrant visa classification, then the petitioner must file a separate Form I-140 petition, with the accompanying fee, requesting the new classification.

In denying the petition, the director noted the references to first preference classification both on the Form I-140 itself and the cover letter. The director then cited to *Matter of Izummi*, 22 I&N Dec. 169, 176 (Comm'r 1998), which concluded that a petitioner may not make material changes to a petition, such as requesting a different classification, in an effort to make a deficient petition conform to USCIS requirements. The director also concluded that the petitioner had not overcome the deficiencies the director identified in the RFE; thus, the petitioner had not established the beneficiary's eligibility for the original classification sought. In a footnote, the director also noted that the petitioner had not submitted the requisite Alien Employment Certification or Schedule A application required for the lesser classification.

On appeal, the petitioner does not explain how the director's analysis was incorrect based on the evidence of record at the time of the decision. Instead, the petitioner submits new evidence and discussion addressing the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(ii) and (iv) for the first time, and additional evidence and arguments pertaining to the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(v), (viii), and (ix).

At issue on appeal is whether the director erred in his determination that the petitioner did not submit qualifying evidence for the beneficiary under at least three of the ten regulatory categories of categories of evidence at 8 C.F.R. § 204.5(h)(3). See 8 C.F.R. § 103.3(a)(1)(v) (requiring summary dismissal if specific errors of law or fact are not identified.) At filing, through the regulations and the form instructions, the petitioner was on notice of the required evidence. The petitioner did not submit the required evidence at filing. In the RFE, the petitioner was specifically advised of the deficiencies regarding the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and afforded the opportunity to provide additional evidence. The petitioner did not submit the requested evidence in response to the RFE, submitting only a request for change of classification. A benefit request shall be denied where evidence submitted in response to the director's request for evidence does not establish filing eligibility at the time the petitioner filed the benefit request. 8 C.F.R. § 103.2(b)(12). Further, if the petitioner or applicant does not respond to a request for evidence or to a notice of intent to deny by the required date, USCIS may summarily deny the benefit request as abandoned, denied the benefit request based on the record, or deny for both reasons. 8 C.F.R. § 103.2(b)(13)(i).

A petitioner must establish eligibility at the time of filing and each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. See 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(8), (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As the petitioner did not

¹ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html>.

submit required evidence, the director correctly determined that the petitioner had not established the beneficiary's eligibility for the benefit sought.

With regard to the new documentary evidence and arguments submitted on appeal, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the petitioner may not offer evidence for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

As the director was correct in his determination that the petitioner had not established the beneficiary's eligibility for the benefit sought, the director's decision to deny the petition is affirmed.

III. ANALYSIS

A. Case Law

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 decision to deny the petition, the court took issue with our evaluation of evidence submitted to meet a given evidentiary criterion.² 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. On appeal, counsel asserts that the circuit decision in *Kazarian* must be read in conjunction with *Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich. 1994), *Muni v. INS*, 891 F. Supp. 440, 443 (N.D. Ill. 1995), and other district court decisions. *Buletini* states: "Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in [the regulation], the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard." 860 F.Supp. at 1234. The following year, the *Muni* court included a final section entitled "Totality of the Evidence" in which it evaluated whether the evidence submitted established national or international acclaim. The court expressly stated: "While the satisfaction of the three-category production requirement does not mandate a finding that the petitioner

² 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).

has sustained national or international acclaim and recognition in his field, it is certainly a start.” *Muni*, 891 F. Supp. at 445-46. The court went on to fault the legacy Immigration and Naturalization Service for not articulating why the evidence did not establish such acclaim.

The concept that adjudication of this classification involves more than counting evidence is also apparent from *Matter of Price*, 20 I&N Dec. 953 (Assoc. Comm’r 1994). In that decision, the agency did not simply “count” the evidence, but rather assessed it under the regulatory standards at 8 C.F.R. § 204.5(h)(2), (3).

This decision will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence for the beneficiary 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.*

B. Evidentiary Criteria at 8 C.F.R. § 204.5(h)(3)

At the time of filing, the beneficiary was working as Director, Cold Roll Mill for the petitioner. The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(h)(3).³

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

In the November 1, 2012 letter submitted in support of the appeal, the petitioner asserts for the first time in these proceedings that the beneficiary meets this regulatory criterion based not on his membership in associations, but on his leadership role as chairman of the [REDACTED] of the [REDACTED]. The petitioner’s appellate submission includes an October 5, 2012 letter from [REDACTED] Manager of [REDACTED] and former chairman of [REDACTED] from 2001 – 2007, stating that the beneficiary was “asked to become Chairman of the [REDACTED] in May of 2012 and is conducting his first meeting in October” 2012 in California. As the beneficiary’s chairmanship of the [REDACTED] post-dates the filing of the petition in February 2012, it is not probative of the beneficiary’s eligibility at the time of filing. Again, 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. at 49.

Regardless, the petitioner did not claim that the beneficiary was eligible for the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ii) initially or in response to the director’s RFE. The director’s RFE listed the category of evidence at 8 C.F.R. § 204.5(h)(3)(ii) and specifically stated: “No evidence has been provided for this criterion.” The petitioner’s response to the RFE did not offer any specific

³ On appeal, the petitioner does not claim that the beneficiary meets any of the regulatory categories of evidence not discussed in this decision. Therefore, we have not considered whether the beneficiary meets the remaining categories of evidence.

arguments or evidence to overcome the director's finding. As such, the director did not err in determining that the petitioner had not established the beneficiary's eligibility for this criterion. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the petitioner may not offer evidence for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 764; *see also Matter of Obaigbena*, 19 I&N Dec. at 533.

In light of the above, the petitioner has not established that the beneficiary meets this regulatory 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 asserts for the first time in these proceedings that the beneficiary meets this regulatory criterion based on his role as [REDACTED] for the [REDACTED] and his coordination of "the review and selection of potential papers that will be presented at the association's Annual Conference." According to the October 5, 2012 letter from [REDACTED] however, the beneficiary was "asked to become [REDACTED] in May of 2012" and did not conduct his first meeting until October 2012. As the beneficiary's chairmanship of the [REDACTED] post-dates the filing of the petition, it is not probative evidence to establish his eligibility at the time of filing. Again, 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. at 49.

Regardless, the petitioner did not claim that the beneficiary was eligible for the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(iv) initially or in response to the director's RFE. The director's RFE included the category of evidence at 8 C.F.R. § 204.5(h)(3)(iv) and specifically stated: "No evidence has been provided for this criterion." The petitioner's response to the RFE did not offer any specific arguments or evidence to overcome the director's finding. Again, as the issue was never raised as a claim of eligibility before the director, the director did not err in determining that the petitioner had not established the beneficiary's eligibility for this criterion. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the petitioner may not offer evidence for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 764; *see also Matter of Obaigbena*, 19 I&N Dec. at 533.

In light of the above, the petitioner has not established that the beneficiary meets this regulatory criterion.

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

In the November 1, 2012 letter submitted on appeal, the petitioner states: "[The petitioner] provided a letter with its original petition describing [the beneficiary's] original contributions, which was supplemented by industry expert letters." The petitioner initially submitted a January 17, 2012 letter of support from [REDACTED] Corporate Counsel of the petitioning organization, and three letters

from the beneficiary's former colleagues discussing his work experience (which the petitioner identified as Exhibit A in the initial submission).

With regard to the beneficiary's "contributions to the industrial management field," Ms. [REDACTED] stated only: "[The beneficiary's] accomplishments and original contributions have been recognized throughout the business world. In this regard, please see Exhibit A letters from prominent business organizations attesting to [the beneficiary's] contributions." The preceding letter from Ms. [REDACTED] of the petitioning company did not provide a description of the beneficiary's original contributions as the petitioner claims on appeal. 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). In addition, although Ms. [REDACTED] asserted that the beneficiary's "original contributions have been recognized throughout the business world," the three letters in Exhibit A are limited to the beneficiary's former coworkers who discuss the beneficiary's contributions to his employer. Vague, solicited letters from colleagues that do not specifically identify original contributions in the field or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian*, 580 F.3d at 1036. In 2010, the *Kazarian* court reiterated that the conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. Regardless of the field, the plain language of the phrase "contributions of major significance in the field" requires evidence of an impact beyond one's employer and clients or customers. See *Visinscaia v. Beers*, --- F. Supp. 2d ---, 2013 WL 6571822, at *6, 8 (D.D.C. Dec. 16, 2013) (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole).

The director's RFE acknowledged the petitioner's submission of the preceding letters, but found that they were not sufficient to demonstrate the beneficiary's original contributions of major significance in the field because they focused on the beneficiary's duties and performance in relation to others at the company.

The opinions of the beneficiary's references are not without weight and have been considered by the director. 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 beneficiary'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 business professional in the steel industry who has made original contributions of major significance in the field. While the petitioner asserts on appeal that USCIS cannot reject unchallenged expert testimony, USCIS may evaluate the content of those letters in deciding their probative value. See also *Visinscaia*, 2013 WL 6571822, at *6 (concluding that USCIS' decision to give limited weight to uncorroborated assertions from practitioners in the field was not arbitrary and capricious).

The director requested further evidence demonstrating that the beneficiary's contributions were original and of major significance in the field. The director's RFE listed examples of the types of evidence that could assist the petitioner in demonstrating the beneficiary's eligibility for the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(v). The petitioner's response to the RFE, however, did not offer any specific arguments or evidence to overcome the director's findings. Thus, the director did not err in determining that the petitioner had not established the beneficiary's eligibility for this criterion.

The petitioner's appellate letter further states: "We now provide additional letters that describe in further detail [the beneficiary's] original contributions of major significance in the field." Regarding the additional letters of support now submitted with the appeal, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the petitioner may not offer evidence for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 764; *see also Matter of Obaigbena*, 19 I&N Dec. at 533.

In light of the above, the record supports the director's finding that the petitioner did not establish that the beneficiary meets this regulatory criterion.

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

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence that the beneficiary "has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." Ms. [REDACTED], however, comments on what the beneficiary "will" be doing as Director of the [REDACTED] for the petitioner rather than explaining how he has already "performed" in a leading or critical role in the position. Ms. [REDACTED]'s speculation about the duties she expects the beneficiary to perform is not evidence, and does not establish that he had already performed in a leading or critical role for the petitioner at the time of filing. Again, 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. at 49.

In addition, Ms. [REDACTED] asserted that the beneficiary performed "leading roles" for "major organizations" including [REDACTED] and [REDACTED]. Ms. [REDACTED]'s letter mentioned the beneficiary's job responsibilities for the preceding companies, but did not point to any specific documentation or evidentiary exhibits in support of the beneficiary's eligibility for this regulatory criterion.

The petitioner's initial evidence included a letter from [REDACTED] I, Vice President of Human Resources for [REDACTED], mentioning the beneficiary's work for [REDACTED] and [REDACTED] in the 1980s and 1990s, including his experience as "Head of the technology department for pickling, rolling and skin pass mill." In addition, the petitioner initially submitted the letter from [REDACTED] General Manager of Technical Sales at [REDACTED] listing the beneficiary's duties as "Project Manager of Technical Sales in the Strip Processing Lines Division" at [REDACTED]. The petitioner also submitted a letter from [REDACTED]

General Manager at [REDACTED], stating that the beneficiary worked for that company as a Sales Manager and an Assistant Manager of Business Area Management.

In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien is responsible for the success or standing of the organization. The petitioner did not provide an organizational chart or other similar evidence to establish where the beneficiary's managerial positions fit within the overall hierarchy of the above companies such that the petitioner has established the leading nature of the beneficiary's roles. The submitted documentation also does not establish that the beneficiary contributed to the companies in a way that was significant to their success or standing in the steel industry. Accordingly, the initial evidence did not establish that the beneficiary served in leading or critical roles for the petitioner, [REDACTED]

and [REDACTED]. Furthermore, the petitioner did not submit documentary evidence showing that [REDACTED] and [REDACTED] had distinguished reputations during the time period that the beneficiary worked with those companies.

With regard to the petitioner's reputation, the petitioner submitted the company's annual report for 2010/2011, its marketing materials, and information about the company posted on its website. The promotional nature of the information a company generates internally about itself, however, is not sufficient to demonstrate that the company has a distinguished reputation. USCIS need not rely on self-promotional material. *Cf. Braga v. Poulos*, No. CV 06 5105 SJO, *aff'd* 317 Fed. Appx. 680 (C.A.9) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). In addition, the petitioner submitted two local news articles posted on the websites of [REDACTED] (Alabama) and [REDACTED] (Alabama) that discuss the petitioner's opening of a large steel mill in [REDACTED] Alabama and the scope of the construction project. The articles, however, do not discuss the petitioner's reputation within the field. Accordingly, the petitioner did not submit objective documentary evidence showing that the petitioner has a distinguished reputation.

The director's RFE acknowledged the petitioner's submission of the "statistical documentation" from the petitioner's annual report and marketing materials, but stated that the petitioner had not demonstrated "that the beneficiary has performed in leading or critical roles for organizations or establishments that have a distinguished reputation." The director requested further evidence demonstrating that the beneficiary meets the requirements of the category of evidence at 8 C.F.R. § 204.5(h)(3)(viii). The director's RFE listed examples of the types of evidence that could assist the petitioner in demonstrating the beneficiary's eligibility for this regulatory criterion. The petitioner's response to the RFE, however, did not offer any further evidence or arguments to demonstrate that the beneficiary has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. Therefore, the director did not err in determining that the petitioner had not established the beneficiary's eligibility for this criterion.

The petitioner's appellate letter states:

[W]e now provide additional testimonials confirming [the beneficiary's] leading and critical roles with [the petitioner], [REDACTED] with [REDACTED] and with [REDACTED]. Further, we now provide additional testimonials confirming [the beneficiary's] leading and critical roles with several organizations, which also confirm the distinguished reputations of these organizations.

Regarding the new testimonial evidence now submitted with the appeal, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 764; *see also Matter of Obaigbena*, 19 I&N Dec. at 533.

In light of the above, the record supports the director's finding that the petitioner did not establish that the beneficiary meets 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 petitioner initially submitted an October 15, 2010 letter from the petitioner to the beneficiary offering him a salary of "\$190,000 annually through 2013." The petitioner, however, did not submit documentary evidence (such as payroll records or a Form W-2, Wage and Tax Statement, from the petitioner) to demonstrate the actual salary the beneficiary had already earned. 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 addition, the petitioner submitted July 13, 2011 "Online Wage Library – FLC [Foreign Labor Certification] Wage Search Results" for the [REDACTED] Alabama area indicating that the Level 4 (fully competent) prevailing wage for Industrial Production Managers was \$104,894 yearly, for General and Operations Managers was \$125,549 yearly, for Construction Managers was \$89,877 yearly, and for Architectural and Engineering Managers was \$122,554 yearly.⁵ The petitioner, however, must submit evidence showing that the beneficiary has earned a high salary or other significantly high remuneration relative to others in the field, not just a salary that is above the amount paid to the majority of fully competent managers in the [REDACTED] Alabama area. Furthermore, the accompanying occupational descriptions for "Construction Managers" and "Architectural and Engineering Managers" were not similar to the beneficiary's job duties as Director of a [REDACTED] in the steel industry such that the salaries for those two occupational categories would represent appropriate bases for comparison in demonstrating that the beneficiary's salary was high in relation to others in the field.

The petitioner must present evidence of objective earnings data showing that the beneficiary has earned a "high salary" or "significantly high remuneration" in comparison with those performing similar work during the same time period. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc.

⁵ A "prevailing wage" is defined as "trade and public work wages paid to the majority of workers in a specific area." *See* <http://www.businessdictionary.com/definition/prevailing-wage.html>, accessed on May 13, 2014, copy incorporated into the record of proceeding.

Comm'r 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding average salary information for those performing lesser duties is not a comparison to others in the field); *Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N.D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

The director's RFE acknowledged the petitioner's submission of the petitioner's job offer letter to the beneficiary and the wage information from the FLC Data Center, but found that they were not sufficient to demonstrate that the beneficiary has commanded a high salary or other significantly high remuneration for services in relation to others in the field.

The petitioner's letter in support of the appeal states: "The Service's disregard of the Department of Labor's Office of Foreign Labor Certification Online Wage Library has no basis. This resource is a particularly strong and long standing tool . . ." The "prevailing wage" information the petitioner submitted from the U.S. Department of Labor's Online Wage Library reflected the yearly wage paid to the majority of fully competent managers in the [REDACTED] Alabama area and, therefore, was not sufficient to demonstrate that the beneficiary has commanded a high salary relative to others in the field. Thus, the director did not err in requesting that the prevailing wage information be accompanied by further evidence showing that the beneficiary's salary was "high relative to others working in the field."

The director's RFE listed examples of various types of evidence that could assist the petitioner in demonstrating the beneficiary's eligibility for the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ix). For instance, the director listed examples such as "Copies of the beneficiary's W-2 or 1099 forms for years in which the beneficiary has received high salary in the field of endeavor" and a "List compiled by credible professional organization(s) of the top earners in a field." The petitioner's response to the RFE, however, did not offer any further evidence or arguments to demonstrate that the beneficiary commanded a high salary relative to others in his specific field. Thus, the director did not err in determining that the petitioner had not established the beneficiary's eligibility for this criterion.

The petitioner's appellate letter further states: "[W]e are providing additional salary documentation to corroborate the Department of Labor data previously provided." Regarding the new salary data the petitioner now submits with the appeal, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 764; *see also Matter of Obaigbena*, 19 I&N Dec. at 533.

In light of the above, the record supports the director's finding that the petitioner did not establish that the beneficiary meets this regulatory criterion.

C. Summary

The petitioner has failed to submit evidence for the beneficiary satisfying the antecedent regulatory requirement of three categories of evidence.

IV. MOOTNESS

Finally, a review of USCIS records indicates that the petitioner has filed other Form I-140 petitions in the beneficiary's behalf, two of which USCIS approved. The beneficiary filed a Form I-485 Application to Adjust Status, receipt number [REDACTED] which USCIS approved on May 7, 2014. Because the beneficiary has adjusted to lawful permanent resident status, the matter at hand is moot.

V. 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 for the beneficiary 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. Although we conclude that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, we need not explain that conclusion in a final merits determination.⁶ Rather, the proper conclusion is that the petitioner has failed submit evidence for the beneficiary satisfying the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122.

The petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved. Moreover, the matter is moot based on the beneficiary's adjustment to lawful permanent resident status.

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.

⁶ Appellate review for employment-based petitions is 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, the jurisdiction to conduct a final merits determination is the office that made this decision, the most recent 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).