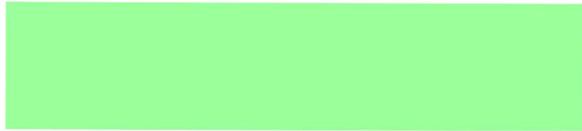


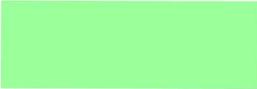


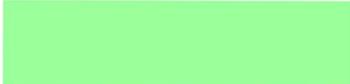
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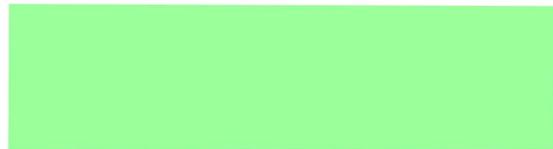
DATE: JAN 23 2015 Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

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

The petitioner seeks classification as an “alien of extraordinary ability” in the arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), which makes visas available to aliens who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation. The director determined that the petitioner had not satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3), which requires documentation of a one-time achievement or evidence that meets at least three of the ten regulatory criteria.

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

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien’s entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term “extraordinary ability” refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

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

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

II. ANALYSIS

A. Evidentiary Criteria¹

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 established 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.” However, for the reasons outlined below, a review of the record of proceeding does not reflect that the petitioner submitted sufficient documentary evidence establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

¹ We have reviewed all of the evidence the petitioner has submitted and will address those criteria the petitioner claims to meet or for which the petitioner has submitted relevant and probative evidence.

The petitioner claimed eligibility for this criterion based on his receipt of the [REDACTED] and the [REDACTED] from the [REDACTED]. The director found that the [REDACTED] did not qualify as a lesser nationally or internationally recognized prize or award for excellence. The director, however, determined that the petitioner's receipt of the [REDACTED] met the plain language of this regulatory criterion. Based on the petitioner's single receipt of a nationally or internationally recognized prize or award for excellence, the director found that the petitioner established eligibility for this criterion.

Regarding the [REDACTED], at the initial filing of the petition, the petitioner, through counsel, claimed that he received "the prestigious and notable [REDACTED] [REDACTED]. The petitioner, however, submitted no documentation to establish that the [REDACTED] is, in fact, an [REDACTED] or that it is awarded by the [REDACTED]. The petitioner submitted a photograph of the award and screenshots from [www.\[REDACTED\]](http://www.[REDACTED]). The screenshots claim that the [REDACTED] "is the premier award" and "is one of the most sought-after awards by industry leaders, from large international films to local production companies and ad agencies." In his decision, the director cited the screenshots as the basis for his favorable determination. The petitioner, however, did not submit any independent, objective evidence demonstrating that the [REDACTED] are nationally or internationally recognized for excellence consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). There is no evidence beyond the awarding entity's claims that the awards are nationally or internationally recognized for excellence. USCIS need not rely on unsubstantiated claims. *See 1756, Inc. v. U.S. Att'y Gen.*, 745 F. Supp. 9, 15 (D.D.C. 1990) (holding that an agency need not credit conclusory assertions in immigration benefits adjudications); *see also Visinscaia*, 4 F.Supp.3d at 134-35 (upholding USCIS' decision to give limited weight to uncorroborated assertions from practitioners in the field). 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As such, the petitioner did not establish that his receipt of the 2008 Telly Award meets the plain language of this regulatory criterion.

Regarding the [REDACTED] the petitioner submitted a certificate from [REDACTED] reflecting that he received the achievement award as an employee with [REDACTED]. The petitioner did not submit any other documentation regarding the [REDACTED] so as to demonstrate that the achievement award is nationally or internationally recognized for excellence in the field. There is no evidence establishing that the achievement award qualifies as a nationally or internationally award for excellence consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). Therefore, we agree with the director that the [REDACTED] does not meet the plain language of this regulatory criterion.

Although not discussed in the director's decision, at the initial filing of the petition, the petitioner also claimed eligibility for this criterion based on [REDACTED]. Specifically, the petitioner, through counsel, claimed:

Although the [REDACTED] identif[ies] [the petitioner's] current employer [REDACTED] as the recipients of the award the actual recipient of the awards is [the petitioner], since his innovative and exceptional 3D Imagery Design works on the clients' projects were the basis of the company receiving the awards and the awards were given for [the petitioner's] 3D Imagery Design work.

The petitioner also submitted a letter from [REDACTED] Managing Director for [REDACTED] who claimed that the petitioner directly contributed to the number of awards and recognitions that [REDACTED] received including the [REDACTED]. In addition, the petitioner submitted screenshots from [www.\[REDACTED\]](http://www.[REDACTED]) regarding [REDACTED] award reflecting:

Each year, [REDACTED] places a strong emphasis on recognizing supplier performance excellence through the Supplier of the Year award, which is [REDACTED] premier recognition for our global supply chain partners who demonstrate distinguished performance in quality, affordability and reliability in 16 different categories.

Further, the petitioner submitted a [REDACTED] news release reflecting that [REDACTED] recognizes "organizations' exceptional performance and contributions to [REDACTED] success" and listed numerous organizations, including [REDACTED] that received awards. Moreover, the petitioner submitted an email with an attached photo claiming it to be the [REDACTED]

According to the news release, the [REDACTED] was awarded to [REDACTED] rather than to the petitioner. Further, the award is granted to "organizations" rather than to individuals. An award that was not specifically presented to the petitioner is not tantamount to his receipt of a nationally or internationally recognized award for excellence. It cannot suffice that the petitioner was one member of a large group or an organization that earned collective recognition. Regardless, the petitioner did not submit any documentation establishing that the Supplier of the Year award is recognized beyond [REDACTED] as a nationally or internationally recognized award for excellence pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). Therefore, the Supplier of the Year award does not meet the plain language of this regulatory criterion.

Finally, had the petitioner submitted supporting documentary evidence showing that his [REDACTED] met the elements of this criterion, which he has not, 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. *Cf. Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at *1, *12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005, at *1, *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for “a” bachelor’s degree or “a” foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

For the reasons stated above, we withdraw the decision of the director for this criterion. Accordingly, the petitioner did not establish that he meets this criterion.

Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The director determined that the petitioner did not establish eligibility for this criterion. In the petitioner’s brief submitted on appeal, he did not contest the findings of the director for this criterion or offer additional arguments. Therefore, the petitioner has abandoned this issue. *See Sepulveda v. U.S. Atty 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 did not establish that he meets this criterion.

Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media.

At the initial filing of the petition, the petitioner, through counsel, did not specifically request eligibility for this criterion in his cover letter. Rather, the petitioner claimed:

Because of [the petitioner’s] extraordinary work and skills in 3D imagery design, [the petitioner] and his 3D imagery design work on the [redacted] have been published nationally and internationally in major aviation and entertainment media such as [redacted]

* * *

[The petitioner’s] 3D images and animations are currently being shown on [redacted] websites and is published in [redacted]

The petitioner also submitted several articles from the October [REDACTED] edition of [REDACTED] a letter from [REDACTED] Senior Marketing Manager for [REDACTED] stating that the petitioner has worked on the [REDACTED] marketing campaign that was “published in our brochures, in-flight magazine, internal communications, point of sale material in our retail estate, emails and on our website”; screenshots from www.[REDACTED] and a sworn statement from [REDACTED] Publishing Director, and [REDACTED], Audience Development Director, stating that [REDACTED] has a paid average circulation of 550,000.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires “[e]vidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media.” In general, scholarly articles are written by and for experts in a particular field of study, are peer-reviewed, and contain references to sources used in the articles. In this instance, the petitioner’s documentary evidence reflected images of the petitioner’s work in promotional materials; none of the material was authored by the petitioner, and the material did not contain the characteristics of scholarly articles. Further, the director concluded that [REDACTED] did not constitute professional publications in the petitioner’s field of 3D imagery design. As such, the director issued a request for evidence (RFE) pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) and explained how the evidence did not meet this regulatory criterion. In response to the director’s RFE, the petitioner did not contest the preliminary findings of the director for this criterion, offer additional arguments, or otherwise submit evidence establishing that he has authored scholarly articles in professional or major trade publications or other major media. In the director’s decision, the director indicated that the petitioner “did not address the insufficiencies relating to this criterion.”

On appeal, the petitioner contends that the director “failed to consider ‘comparable evidence’ for the field and industry in assessing satisfaction of the criterion” and claims:

The postings of [the petitioner’s] articles in popular aviation industry leading publications and websites do constitute authored published materials in “professional major media” and evidence the widespread recognition of [the petitioner] as an outstanding 3D Imagery Designer and professional. Satisfaction of this regulatory criterion is not limited to the traditional “scholarly publications” that would be used in other traditional industries and professions; thus [the petitioner] has satisfied this criterion of the regulation in support of the EB-1 petition.

Regarding the claim regarding the director’s failure to consider comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4), the petitioner did not specifically request at either the initial filing of the petition or in response to the director’s RFE that the petitioner’s documentary evidence should be considered comparable to the scholarly articles criterion. Rather, in response to the director’s RFE, the petitioner claimed that comparable evidence can be used for the display criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Furthermore, the director did, in fact, address in his decision the claim of comparable evidence. Specifically, the director stated:

8 C.F.R. Section 204.5(h)(4) states that if the above standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish the [petitioner's] eligibility. Counsel makes use of this regulation in her response to the RFE letter, however, she did not declare and demonstrate why the standards do not readily apply to the [petitioner's] occupation. The burden is on the petitioner to demonstrate this. As such, this evidence will not be considered in the context of "comparable" evidence.

Regarding comparable evidence, the regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. Moreover, the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish the [petitioner's] eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, the petitioner must explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x). 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).

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation as a 3D graphic imagery designer cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner's brief mentions evidence that specifically addresses three of the ten criteria at the regulation at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Further, the petitioner did not provide any documentation establishing that the regulatory categories of evidence are not appropriate to the profession of a 3D graphic imagery designer. Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. Finally, the petitioner did not explain and we are not persuaded that submitting images of the petitioner's work is comparable to authoring scholarly articles in professional or major trade publications or other major media.

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

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The director determined that the petitioner did not establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires “[e]vidence of the display of the alien’s work in the field at artistic exhibitions or showcases.” The petitioner submitted documentary evidence reflecting that he designed a [REDACTED] that was displayed on video boards during the [REDACTED] games. The director determined:

This criterion has not been met because the evidence does not indicate that the [petitioner’s] works were displayed at artistic exhibitions or showcases (virtual or otherwise). [REDACTED] football games cannot be considered as being artistic exhibitions or showcases, as they are athletic competitions.

On appeal, the petitioner’s brief claims:

The USCIS limits application of the law by failing to recognize that the display of the [petitioner’s] work at an [REDACTED] football game is a “Showcase” in satisfaction of the regulation. The regulation requires a display of the [petitioner’s] work at either “artistic exhibition” or “showcase”, not an “artistic showcase”; thus, then venue of the display is not limited to an “artistic” forum. A plain meaning of the word conveys that the definition of a Showcase is “an event, occasion, etc. that shows the abilities or good qualities of someone or something in an attractive or removable way”. Marriam-Webster [sic] Online Dictionary, *Showcase* (Page 1).

We are not persuaded by the petitioner’s attempt to parse the regulation. The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is applied to visual artists is longstanding and has been upheld by a federal district court. *See 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 8 C.F.R. § 204.5(h)(3)(vii)). Therefore, as this regulatory criterion applies to visual artists, the exhibitions or showcases must also be artistic in nature. Since the petitioner’s work was displayed on the video board at an athletic event, it was not displayed at an artistic exhibition or showcase. As such, we concur with the director’s conclusion for this criterion.

Moreover, on appeal, the petitioner’s brief claims that his “3D imagery design work was part of the artistic [REDACTED] Washington.” The petitioner submitted an unidentified document with an advertisement for ‘ [REDACTED] ’ from February [REDACTED] - March [REDACTED] (unidentified year). The petitioner also submitted six screenshots purportedly of the petitioner’s work for the mask display.

The petitioner’s documentary evidence does not establish that his work was actually displayed at either [REDACTED]. The petitioner, for example, did not submit

any documentary evidence from the event confirming that the petitioner's work was displayed. Moreover, as the petitioner did not previously make this claim or submit documentary evidence and the evidence does not reflect the year the event took place, the petitioner did not demonstrate that the exhibition occurred prior to the filing of the petition. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Had the petitioner submitted documentary evidence establishing that his work was actually displayed prior to the filing of the petition, which he did not, the plain language of this regulatory criterion also requires the petitioner's work to be displayed at more than one artistic exhibition or showcase.

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

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

The director determined that the petitioner 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." In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien contributed in a way that is of significant importance to the outcome of the organization or establishment's activities.

A review of the record of proceeding reflects that the petitioner submitted reference letters detailing the petitioner's critical roles with [REDACTED] for his work on the [REDACTED] virtual tour and [REDACTED] marketing campaign. The petitioner also submitted documentary evidence establishing that [REDACTED] have distinguished reputations. For these reasons, we concur with the findings of the director for this criterion.

Accordingly, the petitioner established that he meets this criterion.

B. Summary

For the reasons discussed above, we agree with the Director that the petitioner has not submitted the requisite initial evidence, in this case, evidence that satisfies three of the ten regulatory criteria.

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 his or her field of endeavor.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor,” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. § 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. As the petitioner has not done so, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of presenting evidence that satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3) and (4). *Kazarian*, 596 F.3d at 1122. Nevertheless, although we need not provide the type of final merits determination referenced in *Kazarian*, a review of the evidence in the aggregate supports a finding that the petitioner has not demonstrated the level of expertise required for the classification sought.²

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

ORDER: The appeal is dismissed.

² We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep’t of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, we maintain the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii); *see also* INA §§ 103(a)(1), 204(b); DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).