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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 15 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, a talent agency, filed this petition seeking to classify the beneficiary pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien with extraordinary achievement in the motion picture and television industry. The petitioner seeks to have the beneficiary work as a Cinematographer/Director of Photography for various employers in the United States for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has a demonstrated record of extraordinary achievement in the motion picture and television industry. In denying the petition, the director determined that the petitioner failed to establish that the beneficiary has been nominated for or has been the recipient of a significant national or international award, pursuant to 8 C.F.R. § 214.2(o)(3)(v)(A), or that he has met at least three of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(v)(B).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred by failing to consider evidence of a major film project offered to the beneficiary subsequent to the filing of the petition, and failed to give the proper weight to evidence submitted to establish the beneficiary's previous experience and critical roles in the film and television industry. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), provides classification to a qualified alien who has, with regard to motion picture and television productions, a demonstrated record of extraordinary achievement, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary achievement. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991).

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) provides the following pertinent definition:

Extraordinary achievement with respect to motion picture and television productions, as commonly defined in the industry, means a very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field.

The regulation at 8 C.F.R. § 214.2(o)(3)(v) states, in pertinent part:

Evidentiary criteria for an O-1 alien of extraordinary achievement in the motion picture or television industry. To qualify as an alien of extraordinary achievement in the motion picture or television industry, the alien must be recognized as having a demonstrated record of extraordinary achievement as evidenced by the following:

- (A) Evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or
- (B) At least three of the following forms of documentation:
 - (1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;
 - (2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;
 - (3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;
 - (4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;
 - (5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or
 - (6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(iii) provides:

The evidence submitted with an O petition shall conform to the following:

- (A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.

- (B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

In addition, the regulation at 8 C.F.R. § 214.2(o)(2)(ii) requires the petitioner to submit copies of any written contracts between the petitioner and the beneficiary; an explanation of the nature of the events or activities, along with an itinerary; and two consultations, one from an appropriate union and one from an appropriate management organization.

The decision of U.S. Citizenship and Immigration Services (USCIS) in a particular case is dependent upon the quality of the evidence submitted by the petitioner, not just the quantity of the evidence. The mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification. 59 Fed Reg at 41820.

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 2010). Similar to the regulations governing this nonimmigrant classification, the regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. Cf. 8 C.F.R. § 204.5(h)(3).

Specifically, the *Kazarian* court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at *6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both 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," 8 C.F.R. § 204.5(h)(2), and "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)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at *3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination. The final merits determination analyzes whether the evidence is consistent with the statutory requirement of "extensive documentation" and the regulatory definition of "extraordinary achievement" as a "very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field."

The AAO finds the *Kazarian* court's two part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability and extraordinary achievement at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). Therefore, in reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

In the present matter, the petitioner has not established that the beneficiary has a demonstrated record of extraordinary achievement to the extent that his accomplishments are recognized as outstanding, notable, or leading in the motion picture or television field. 8 C.F.R. §§ 214.2(o)(3)(ii) and (v).

II. The Beneficiary's Eligibility under the Evidentiary Criteria

The beneficiary in this matter is a native and citizen of Singapore. He was awarded a Bachelor of Communications majoring in film and video, from ██████████ in July 2006. In August 2008, he received a Master of Fine Arts in Filmmaking, majoring in Cinematography, from the ██████████ in Los Angeles, California.

If the petitioner establishes through the submission of documentary evidence that the beneficiary has been nominated for or has received a significant national or international award or prize in his or her field pursuant to 8 C.F.R. § 214.2(o)(3)(v)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. Here, the petitioner has not submitted evidence that the beneficiary has been nominated for or received a significant national or international award or prize comparable to an Academy, Emmy or Grammy Award.

As there is no evidence that the beneficiary has been nominated for or received a significant national or international award or prize, the petitioner must establish the beneficiary's eligibility under at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(v)(B). The petitioner has submitted evidence related to the criteria at 8 C.F.R. §§ 214.2(o)(3)(v)(B)(1), (3), (5) and (6). The remaining two criteria will not be addressed.

1. *Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements*

In order to meet criterion number one, the petitioner must submit evidence that the beneficiary has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts or endorsements. 8 C.F.R. § 214.2(o)(3)(v)(B)(1).

The AAO will first address the evidence submitted to establish that the beneficiary *has performed* services as a lead or starring participant in productions or events which have a distinguished reputation.

The record shows that the beneficiary worked in the role of cinematographer on the short films ██████████ in 2009. The beneficiary's other work in film and television has included

camera, electrical and sound department crew roles, including the following: [REDACTED]

[REDACTED]

In a letter dated December 7, 2009, counsel for the petitioner stated that the beneficiary meets this criterion based upon his role as cinematographer for the short films [REDACTED]. Counsel noted that [REDACTED] "has earned several awards at film festivals including the Delray Beach Film Festival and the West Hollywood Film Festival," and is scheduled for international distribution through the Canadian company Ouat! Media. Counsel also noted that [REDACTED] was selected by and is currently screening at several film festivals worldwide."

Counsel further stated that the beneficiary held "various crew positions for the [REDACTED]. Counsel stated that [REDACTED] will premiere on the Hallmark Channel in 2010, and that the made-for-television movies [REDACTED] are "also scheduled for release in 2010."

Counsel stated that [REDACTED] was produced by Insomnia Media Group, and stars actors [REDACTED]. The petitioner submitted an Internet Movie Database (IMDB) listing for the movie but did not provide any additional evidence related to this project.

Finally, counsel stated that the beneficiary "filled the critical role of Boom Operator" on [REDACTED] a full-length feature film produced in Singapore. Counsel stated that the film "gained cult status with its comprehensive online web marketing strategy and promotions as reported by Variety magazine," was screened at the TORUN Film Festival and Jakarta Film Festival, and received three nominations in the [REDACTED].

While the petitioner submitted evidence that the beneficiary worked on each of the above-referenced films, including testimonials, screen shots and various internet printouts, the petitioner did not provide critical reviews, advertisements, publicity releases, publications, contracts or endorsements related to these projects. *See* 8 C.F.R. § 214.2(o)(3)(v)(B)(1).

The director issued a request for additional evidence ("RFE") on January 4, 2010. The director requested that the petitioner "provide evidence to establish that the beneficiary has a sustained record of performing services as a lead or starring participant as a Cinematographer/Director of Photography in productions which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts or endorsements." The director advised that "the fact that the beneficiary played roles such as grip, best boy and boom operator do not establish the beneficiary's extraordinary ability as a Cinematographer/Director of Photography."

In response to the RFE, counsel indicated that that the beneficiary meets this criterion based on his role as Director of Photography on the film [REDACTED]. In this regard, counsel stated:

In that capacity, he was solely responsible for the camera and lighting crews, and for making the artistic and technical decisions needed to achieve the "vision" required by the [REDACTED]. He selected the film stock, lenses, filters, etc. to create the film noir look of the movie. He was ultimately responsible for decisions relating to filming, lighting, and framing.

We contend that [the beneficiary] as the Director of Photography, played a critical role in the production of that film.

[REDACTED]

Ouat! Media, Inc., a Canadian company that distributes shorts and other films to audiences around the world, has purchased the international distribution rights to [REDACTED]. According to the agreement, Ouat! Reserves the right to package and distribute the film worldwide for 4 years from November 2009.

The petitioner submitted a copy of the distribution agreement for the film, and evidence that the film was screened at the West Hollywood International Film Festival and the Delray Beach Film Festival.

Counsel further stated that the beneficiary meets this criterion based on his various crew positions on Hallmark Channel movies including [REDACTED] and [REDACTED]. Counsel noted that "Hallmark has produced family-oriented original programs, including an incredibly popular series of 'inspirational' made-for-TV movies." Counsel reiterated that all of these movies are scheduled for release in 2010. Finally, counsel emphasized that the miniseries "The Storm" was aired on NBC in July and August of 2009. Counsel contended that all of these productions "clearly have a distinguished reputation."

Counsel acknowledged the director's observation that the beneficiary's work as a "grip, best boy, and boom operator" does not demonstrate his extraordinary ability as a Cinematographer/Director of Photography. Counsel asserted that "his work on these projects "is directly related to his ability as a Cinematographer." In this regard, the petitioner submitted a letter from lighting designer/producer Randy Newman who worked with the beneficiary on four of the above-referenced Hallmark Channel made-for-television movies.

[REDACTED] stated that he personally headed the grip department as the Key Grip, while the beneficiary was his "second in command as the Best Boy grip." He indicates that the beneficiary had a team of up to ten grips and was in charge of staffing the department and pre-rigging and lighting upcoming sets. [REDACTED] further stated:

For the pre-rig and lighting, [the beneficiary] would work off [the director of photography's] lighting style template incorporating any specific camera or technical rigs that were necessary. [The beneficiary] had significant creative control and used his team of up to 7 grips to effectively bring his plan to fruition. . . .

Another one of [the beneficiary's] responsibilities was the requisition and maintenance of specialized filmmaking equipment that included cranes, dollies, job arms and other camera support equipment while staying under budget. The tools, machinery and equipment required for rigging also came under his overview.

Time spent as a Best Boy Grip enhances one's abilities as a Cinematographer. [The beneficiary] has a unique ability to visualize a scene's visual style while taking into consideration the feasibility and technicalities that would be necessary to bring his visualization to screen. . . .

In my opinion the Best Boy Grip plays a critical role in the production of any film, and in particular the films that [the beneficiary] and I worked on together. And his experience as a Best Boy Grip is directly related to the skills and knowledge that a successful Cinematographer must have.

The director determined that the submitted evidence does not satisfy this criterion. The director noted that the petitioner submitted evidence that the beneficiary served as a cinematographer/director of photography for the films [REDACTED] and observed that the only supporting evidence provided with respect to [REDACTED] was in the form of screen shots, which clearly cannot establish the distinguished reputation of the film. The director further found that, while the petitioner provided evidence that the film [REDACTED] had enjoyed some success, the evidence of record fell short of establishing that the film has a distinguished reputation.

The director acknowledged that the beneficiary had served in the roles of grip, best boy grip, boom operator and other crew roles for other film and television projects, but emphasized that such roles "do not establish the beneficiary's success as a Cinematographer/Director of Photography."

On appeal, counsel asserts that the director erred by concluding that crew positions such as grip and best boy do not establish the beneficiary's ability as a cinematographer. The petitioner submits a letter from [REDACTED], cinematographer and instructor [REDACTED] who further explains how crew positions such as grip and rigger are directly related to the position of Director of Photography. [REDACTED] states:

A good [Director of Photography (DP)] is a master of all of the sub-skills under his control. This includes the skills of the Grip, Electric and Camera departments.

It is in that vein of thought that I feel that the amount of time that a cinematographer spends working in the Grip and Electric Departments is directly related to that person's abilities as a cinematographer. It is here that the bulk of the DP's trade is plied. A DP who does not light is but a Cameraman, and thus the lighting is the most important aspect of a DP's skill set. The art of creatively molding, adding and subtracting light is what sets a good DP apart from others. This is exactly the job scope of the Grips and Electrics.

On set the Electrics are responsible for the placement and providing power to the lights needed and the Grips are responsible for the creative molding of the lights to achieve the look specified by the Director of Photography as well as the rigging of lights, cameras and other production-centric equipment.

On most productions, the Grip and Electric departments work independent of the Director of Photography, based on the visual style of the film set forth by the DP. Though the ultimate responsibility for the visual style lies with the DP, the grips and electrics are his right and left hands on set.

Upon review, the AAO concurs with the director's determination that the petitioner failed to establish that the beneficiary performed services as a lead or starring participant in productions or events which have a distinguished reputation.

Much of the beneficiary's film and television experience to date has been in the production crew positions of grip and best boy grip. The director perhaps erred in stating that such positions are not "related to" the beneficiary's intended work as a director of photography/cinematographer in the United States. However, the critical factor that must be established is whether the crew positions the beneficiary held for the allegedly distinguished Hallmark Channel movies (which were unaired at the time of filing) and the NBC miniseries '██████████' were as a "lead or starring participant." The petitioner has not presented persuasive evidence to establish that a role as a grip or best boy grip can be considered a "lead" role among the production crew of a film or television show. While grips undoubtedly perform essential duties and best boy grips may supervise other grips, grips clearly do not receive the level of recognition attributed to a director, director of photography, or other prominent technical or artistic positions on a film or television crew such that they are considered leading participants in the production. Furthermore, the plain language of this criterion requires the petitioner to submit critical reviews, advertisements, publicity releases, publications, contracts, or endorsements in support of this criterion. The petitioner has not submitted such evidence with respect to the beneficiary's past projects, with the exception of a review and a rating report for "The Storm." 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner has established that the beneficiary, as cinematographer/director of photography, was a lead or starring participant in the production of the short films ██████████. As noted by the director, the only supporting documentary evidence submitted regarding ██████████ are screen shots from the film, and therefore, the petitioner has not submitted evidence to establish the film's distinguished reputation. The petitioner provided evidence that ██████████ has been screened at two film festivals and evidence that the film's director has signed a distribution agreement. Counsel asserts that the film has received critical acclaim and "earned several awards at film festivals," but the record contains no evidence of such awards, no published critical reviews of the film, and no other published evidence regarding the film, its distinguished reputation, or the reputation and selection criteria of the two festivals that have screened the movie. Again, 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. at 165. While its selection for screening at film festivals is an indicator of some measure of success, the evidence submitted falls significantly short of establishing that ██████████ has enjoyed a distinguished reputation as of the date of filing.

Based on the foregoing, the petitioner has not submitted evidence that the beneficiary has served as a lead or starring participant in productions that have a distinguished reputation and therefore cannot meet the plain language of this criterion, which requires evidence of both past and upcoming leading or starring participation in

distinguished productions. Nevertheless, the director also considered whether the beneficiary *will perform* services as a lead or starring participant in events or productions with a distinguished reputation.

At the time of filing, the petitioner submitted contracts establishing that the beneficiary will work as Director of Photography for seven feature-length films including, *The World View*, *The Hoffards*, *The Kade Factor*, *The Bone Zone*, *Catatonic*, *Male Rising*, and *The Disorganized*, during the requested three-year term of employment. The petitioner did not specifically claim or submit evidence to establish the distinguished reputation of these upcoming productions.

In response to the RFE, the petitioner submitted evidence that the beneficiary has been selected to work as the [REDACTED] on '[REDACTED]' a miniseries about John F. Kennedy and his family that is scheduled to air on The History Channel in 2011. The beneficiary signed a contract for this project on February 10, 2010. The petitioner did not submit any additional evidence related to the above-referenced projects for which the beneficiary was under contract at the time of filing.

The director, citing *Matter of Bardouille* 18 I&N Dec. 114 (BIA 1981), stated that USCIS cannot consider facts that have come into being only subsequent to the filing of the petition. The director therefore declined to consider evidence related to "The Kennedys."

On appeal, counsel asserts that *Matter of Bardouille* is inapplicable in this matter, and emphasizes that the regulations at 8 C.F.R. §§ 214.2(o)(3)(v)(B)(1) and (3) require the petitioner to provide evidence of future performances or services, events that come into being after the petition has been filed. Accordingly, counsel asserts that the beneficiary's upcoming position as [REDACTED] should have been considered. In addition, the petitioner submits new evidence on appeal to establish that the beneficiary has been offered the position of [REDACTED] for the feature film [REDACTED] which is scheduled to begin shooting in the fall of 2010 and will be distributed by DreamWorks SKG.

The AAO notes that a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). A petition shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the petition was filed. 8 C.F.R. § 103.2(b)(12).

In order to meet this criterion, the petitioner must establish that the beneficiary, as of the date the petition was filed, has provided and will provide services as a lead or starring participant in productions or events with a distinguished reputation. Here, for the reasons discussed above, the petitioner failed to establish that the beneficiary has served in such a role in the past. The petitioner also failed to submit evidence that the film projects on the beneficiary's proposed itinerary as of the date of filing have a distinguished reputation. Instead the petitioner claims that the projects offered to the beneficiary while the petition has been pending adjudication and appeal, specifically '[REDACTED]' are qualifying under this criteria. Therefore, the petitioner did not establish that the beneficiary's eligibility under this criteria as of the date of filing of the petition.

The AAO notes for the record that both [REDACTED] have been shown to be productions with a distinguished reputation and the beneficiary's offered position as '[REDACTED]' could be considered providing services as a leading participant. However, even if such roles had been offered to the

beneficiary prior to filing the petition, the plain language of this evidentiary criterion clearly requires evidence of past qualifying lead or starring participation in productions with a distinguished reputation, a requirement that has not been met. Accordingly, the AAO concurs with the director that the petitioner has not submitted evidence to satisfy the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(1).

2. *Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials*

To meet the criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(3), the petitioner initially relied on the beneficiary's "critical crew positions" on several [REDACTED], including [REDACTED]. [REDACTED] Counsel noted that [REDACTED] has produced more than 100 films and shows for television, including but not limited to original Hallmark Channel "Movie of the Week." The petitioner further relied on the beneficiary's position as [REDACTED] for the Insomnia Media Group film [REDACTED]. Counsel noted that Insomnia has produced the HBO Television series [REDACTED] and is scheduled to produce [REDACTED] an original screenplay by [REDACTED]. The petitioner provided filmographies for both [REDACTED]s and [REDACTED] to establish the distinguished reputation of these organizations. As noted above, the beneficiary served as a [REDACTED] on the [REDACTED] for NBC and the Hallmark Channel, and as a best boy grip for [REDACTED].

The petitioner submitted testimonial evidence from [REDACTED] who worked with the beneficiary on the Larry Levinson Productions projects.

[The beneficiary] and I have worked together as part of a team in the Grip and Electric department with Larry Levinson Productions. As Department Head, [the beneficiary's] direction is vital to the success of the group. Recently, we have collaborated on such big budget projects as [REDACTED] an NBC produced mini-series, and multiple Hallmark Channel feature films. [The beneficiary] is a key contributor and an invaluable asset to the crew he works with and the success of the projects.

At the time of filing, counsel did not claim or submit evidence to establish the distinguished reputation of the persons or organizations that have offered the beneficiary employment for the requested period of O-1 classification. These employers, according to the beneficiary's contracts, include [REDACTED] Camera Set Pictures, [REDACTED]. The petitioner submitted reference letters from [REDACTED], but none of them discussed the upcoming projects.

In the RFE issued on January 4, 2010, the director requested that the beneficiary "submit evidence to establish that the beneficiary has performed and will perform in a lead, starring or critical role rather than performing supporting roles," along with "evidence of the organizations' or establishments' distinguished reputation." The director further requested articles in newspapers, trade journals, publications or testimonials to corroborate the beneficiary's claim that he has performed and will perform in a lead or starring role.

In response, the petitioner submitted a second letter from [REDACTED] to address the beneficiary's role in the Larry Levinson Productions projects. The contents of this letter were quoted extensively in the preceding section and will not be repeated here. The petitioner also submitted evidence related to the beneficiary's newly signed

contract to serve as [REDACTED] production of "The Kennedys" in support of this criterion.

The director determined that the petitioner's evidence failed to satisfy this criterion. The director, while acknowledging the distinguished reputation of Larry Levinson Productions and Insomnia Media Group, determined that positions such as grip and best boy grip do not establish the beneficiary's success as a cinematographer or director of photography. The director once again declined to consider evidence related to the beneficiary's contract to serve as Director of Photography for The History Channel's "The Kennedys" miniseries, emphasizing that USCIS cannot consider facts that have come into being only subsequent to the filing of the petition.

On appeal, counsel asserts that the director erred by not considering the beneficiary's newly signed contract to serve as [REDACTED] and erroneously concluded that the beneficiary's roles as grip and best boy grip are not related to the proffered position of [REDACTED]. The petitioner again relies on the letter from [REDACTED] and submits new evidence related to the beneficiary's newly offered employment as director of photography for the feature film [REDACTED].

Upon review, the AAO concurs with the director's determination that the submitted evidence fails to satisfy the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(3).

As discussed above, the petitioner must establish the beneficiary's eligibility as of the date of filing the petition. The petitioner has not submitted evidence to establish that the beneficiary's prospective employers in the United States, based on the contracts he had signed as of the date of filing, are organizations or establishments that have a distinguished reputation. The limited documentary evidence submitted merely confirms that the beneficiary will be serving as director of photography for seven films for employers of unknown reputation over a period of three years. 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. at 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

While the AAO acknowledges that the beneficiary will have a leading or critical role in the filming of [REDACTED] and that the organizations producing these films have a distinguished reputation, the petitioner cannot meet this criteria based solely on projects that came into being after the petition was filed.

Furthermore, as discussed above, the petitioner has not established that the beneficiary's previous roles of best boy grip or grip, while related to the position of director of photography and requiring some of the same knowledge, can be considered to be lead, starring, or critical to the success of a film or television production. The petitioner has submitted two letters from [REDACTED] who served as the beneficiary's colleague and direct supervisor for the [REDACTED] movies and the NBC production "The Storm." Although [REDACTED] states that "the Best Boy Grip plays a critical role in the production of any film," the AAO finds such statement insufficient to support a finding that this type of work is widely recognized in the industry to be a critical role within a movie production crew. Based on [REDACTED] statement, a best boy grip reports to a higher-level "key grip," while all grips are responsible to follow a lighting template and artistic vision designed by the director of photography. Clearly, the technical and artistic production of a film requires the contributions of many highly skilled workers, any of whom could be said to perform "critical" duties. While it appears that a best boy grip is able to function with some autonomy, it is also evident that the position is not in the upper echelon of

the crew hierarchy such that, for example, the person is recognized in a movie's or television show's opening credits.

Based on the foregoing, the petitioner has not submitted evidence that the beneficiary has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation, evidenced by articles in newspapers, trade journals, publications, or testimonials. 8 C.F.R. § 214.2(o)(3)(v)(B)(3).

3. *Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements*

In order to meet the fifth regulatory criterion, the petitioner may submit evidence that the beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements. 8 C.F.R. § 214.2(o)(3)(v)(B)(5).

Further, the regulation at 8 C.F.R. § 214.2(o)(2)(iii)(D) provides that affidavits written by present or former employers or recognized experts certifying to the alien's recognition and extraordinary ability shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

The petition was accompanied by extensive testimonial evidence from persons who have worked with the beneficiary on film or television projects. The petitioner submitted a letter from [REDACTED] of Entertainment Post, a company that provides post-production services to film studios. [REDACTED] indicates that the beneficiary used his company's services to provide visual post-production services for the film [REDACTED]. He states:

Throughout the whole post-production process, [the beneficiary] was well-prepared and professional. He demonstrated a methodical and well-planned approach, rarely seen in veteran filmmakers. Having captured high quality images and sound, it made it easy for us to deliver a well-polished final product. . . .

. . . . [The beneficiary is an extremely talented individual, and his continued ability to work in the US will have a beneficial impact on the American Film Industry for years to come.

Randy Newman, who worked with the beneficiary on the above-referenced [REDACTED] and the NBC miniseries [REDACTED] states:

Having worked with countless others in the industry, I can state with conviction that [the beneficiary's] talents surpass those of his peers, and that he is among the top few percent of people working in the field. I highly recommend [the beneficiary's] application for working status be accepted and support all efforts on his behalf. The Entertainment industry is a very

challenging and extremely work intensive one. [The beneficiary's] future contribution to the business will be an asset to all involved professionally and personally.

The petitioner also provided a letter from [REDACTED] at the New York Film Academy. [REDACTED] states:

I have screened [the beneficiary's] work as a [REDACTED] of Photography and a Cinematographer, and can attest that he has delivered exceptional results on every project he has worked on. For example, [REDACTED] is a glowing example of [the beneficiary's] ability to realize the director's vision onto the screen. He has a keen eye and a unique visual style, underscored by a strong work ethic. There is no doubt in my mind that he is an extraordinary talent, and that he will contribute to the success of every project he touches. His contribution will shape many talented writers, actors and filmmaker's careers. I look forward to seeing his future endeavors that will bring pride to our filmmaking industry.

[REDACTED] states that he has collaborated with the beneficiary on multiple film projects and has personally worked on the production team for films such as [REDACTED]. [REDACTED] states that the beneficiary's "combination of technical expertise and creative ability is unmatched in the field."

The petitioner provided a letter from [REDACTED] another faculty member of New York Film Academy. Mr. Calderon states:

I had the pleasure of serving as [the beneficiary's] mentor as he wrote the screenplay for the feature film [REDACTED]. I was extremely impressed with the maturity, intelligence and sensitivity of his work and his clear sense of purpose and dedication to his goals. His insight and execution surpassed that of most of his peers.

I also observed the product of [the beneficiary's] work as a cinematographer, when he served as cinematographer for the film [REDACTED]. His unique combination of technical skill, artistic sensibilities and work ethic is recognizable in the final product. Someone with less talent would not be able to create a film that is as accomplished as [REDACTED].

[REDACTED] further states that the beneficiary "has earned the respect of his instructors and colleagues" and "will be an invaluable asset to the American and global film industries."

[REDACTED] worked with the beneficiary on [REDACTED] and has offered him a director of photography position in the United States. He states that the beneficiary is "an extremely talented cinematographer whose artistic ability matches his technical expertise." [REDACTED] speaks highly of the beneficiary's "attitude and work ethic" and states that the beneficiary is "always an irreplaceable member of my crew."

[REDACTED] an actress who states that she worked with the beneficiary on a short film, states that the beneficiary "was one of the most accomplished people" she's worked with and "will be an asset to any crew he works with."

The petitioner also submitted a letter from [REDACTED] who states that he has worked with the beneficiary on three commercials. [REDACTED] compliments the beneficiary's "expert knowledge of cameras and light," his work ethic, attitude, communication skills, his "affinity for his fellow man" and his "firm grasp on reality." He states that the beneficiary "has a hunger for the business," "wants to succeed and will do what it takes to keep his career on track," and "is good for business."

[REDACTED] who states that he has worked as a key grip on more than 20 feature films, refers to the beneficiary as a "reliable co-worker/employee." He indicates that he has noticed the beneficiary's "eye for detail and artistic flair," and his "rare talent for lighting and cinematography," and as such has hired him to work on numerous commercials, music videos and features.

The petitioner also submitted a letter from [REDACTED] who states that he collaborated with the beneficiary on the film [REDACTED] and "was impressed with his technical skills including his advanced knowledge of lighting techniques, his artistic eye, and his knowledge of the practicalities of gripping." [REDACTED] states that he "instantly recognized that his talent and ability went beyond that of his peers," and as such has hired him to work on seven films and televisions shows in the grip department.

[REDACTED] a sound editor/mixer who worked on the film [REDACTED], states that he was impressed with the beneficiary's "use of light and shadows" in the film. He describes the beneficiary as "talented, driven and a pleasure to work with."

In addition, the petitioner submitted a letter from [REDACTED] who states that he is a freelance cinematographer who has worked on three feature films and 14 short films. [REDACTED] compliments the beneficiary's work as a key grip and gaffer on two of his short films, and his "eye for lighting." He states that the beneficiary "has an incredible work ethic" and is "a person of extraordinary ability in the industry."

[REDACTED] the lead actor in [REDACTED] states that the beneficiary has "a great eye and an amazing knowledge of color temperature and filters." He indicates that the beneficiary's "technical expertise, combined with the artistic sensibilities, far exceeds the standard in the industry" and is "extraordinary in the field."

Finally, the petitioner provided a letter from [REDACTED] who works as a chief lighting technician and key grip in the motion picture and television industry. With respect to the beneficiary, [REDACTED] states:

His practical set knowledge coupled with his highly creative eye makes him a huge asset to my team. As a Cinematographer himself, he is able to be pre-emptive with what the Director of Photography will need. His ability to see the script visually is one which sets him apart from many others in his field.

[The beneficiary] is on my "First Call" list and will continue to be a main component of my team. I have seen what he can do and am confident that he will be one of the main contenders to shoot the next film I am going to produce. . . . His career has just started but I foresee him attaining great heights in the Film Industry.

In the RFE issued on January 4, 2010, the director observed "the significance of the beneficiary's accomplishments has not been established." The director noted that the testimonials provided attest to the

beneficiary's talents and abilities, and that many of the testimonials related to the beneficiary's skills as a best boy/grip or his work as a cinematographer on [REDACTED]. The director advised that the petitioner should provide testimonials from recognized experts that discuss the beneficiary's record of achievements as a Cinematographer / Director of Photography.

In response to the RFE, counsel asserted that the director's request was not supported by the regulations, noting that 8 C.F.R. § 214.2(o)(3)(v)(B)(5) requests "evidence that the alien has achieved significant recognition for achievements." Counsel emphasized that the petitioner "is not required to demonstrate that the beneficiary's accomplishments are 'significant' or that the beneficiary has a 'record' of achievements." Counsel contended that the petitioner must only demonstrate that the beneficiary has received "significant recognition" for his work in the field from "other recognized experts."

Counsel noted that the petitioner submitted advisory opinions from the [REDACTED] Employees (IATSE) and the Alliance of Motion Picture and Television Producers (AMPTP), the union and management organizations that oversee cinematographers in the film and television industries, and that such organizations are clearly "recognized experts" in the field. Counsel further emphasized that the beneficiary received significant acclaim and recognition from other experts in the field such as [REDACTED] and [REDACTED].

The petitioner's response to the RFE also included a letter from [REDACTED] Emmy-winning director of the FOX television series [REDACTED]. [REDACTED] states that he met the beneficiary at a film festival screening of [REDACTED] in 2009. He further states:

I know that [the beneficiary] is a strong, dynamic and much desired Artist. He brings to all his work a sense of magic and dramatic purpose filled with tension and suspense. He now needs to challenge himself against the best the world has to offer in the American Film and Television Community. American Directors, Producers and now major Studios will certainly become aware of his brilliance. This February he will work with me to take the History Channel in a whole new direction with there [sic] first introduction of Scripted Television in the series [REDACTED] centered around American royal family. [The beneficiary] and myself are in regular contact and we will be going into pre-production at the end of this month. . . .

It is without hesitation that I say that [the beneficiary] is one of the most extraordinary young talents in cinematography today. I myself am incredibly excited to start work with [the beneficiary] and help him develop his career here in the United States. . . .

[REDACTED] states that the beneficiary "has successfully started to build a career in the United States" and "will continue to make strong contributions to the film and television industries."

The director determined that the evidence submitted meets this criterion. The AAO disagrees. The plain language of this regulatory criterion requires the petitioner to submit evidence that the beneficiary has received significant recognition *for achievements*. As noted by the director in the RFE, the testimonial letters submitted to satisfy this criterion indicate that the beneficiary is recognized by his colleagues for his work ethic, attitude, technical and artistic skills, and innate talent in the cinematography field. All of these attributes have clearly made the

beneficiary increasingly in demand as a cinematographer and production crew member. However, it is unclear what, exactly, constitute the beneficiary's recognized achievements in the field.

The regulation at 8 C.F.R. § 214.2(o)(2)(iii)(C) provides that affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information. Here, it would be accurate to state that the beneficiary has received significant recognition for his talent and for his great potential, rather than for any existing achievements in the field. Several of the persons who provided testimonials acknowledge that the beneficiary is just beginning his career in the industry.

The AAO notes that the letters submitted are from the beneficiary's own current and former employers, instructors or co-workers and discuss his talents and work ethic rather than his achievements in the motion picture and television field. While some of the letters could be considered to be from experts in the field, the letters do not discuss the beneficiary's achievements beyond confirming that he performed his work admirably in prior projects.

The favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary achievement claim.¹ While such letters are important in providing details about the beneficiary's role in various projects, they cannot by themselves establish his recognition beyond his immediate circle of professional contacts. 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 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts 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. Thus, the content of the writers' 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 of achievements that one would expect of a director of photography who is outstanding, notable or leading in the field.

¹ Letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. *Black's Law Dictionary* 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about whether something occurred or did not occur, based on the witness' direct personal knowledge. *Id.* (defining "written testimony"); *see also id.* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, or credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

Accordingly, the petitioner has not established that the beneficiary meets this criterion.

4. *Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence*

The sixth and final criterion requires the petitioner to submit evidence that the beneficiary has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence. 8 C.F.R. § 214.2(o)(3)(v)(B)(6). The director determined that the beneficiary meets this criterion based on contracts indicating that he will earn more than \$365,000 during the requested term of employment. The AAO agrees that this criterion has been met.

III. Final Merits Determination

Kazarian sets forth a two-part approach where the evidence is first counted and then, if qualifying under three criteria, considered in the context of a final merits determination. As discussed above, the petitioner established eligibility for one of the six criteria, of which three are required under the regulation at 8 C.F.R. § 214.2(o)(3)(v)(B).

Notwithstanding the above, a final merits determination considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) that the beneficiary has achieved a very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that he is recognized as outstanding, notable, or leading in the motion picture or television field, pursuant to 8 C.F.R. § 214.2(o)(3)(ii); and (2) that the beneficiary is recognized as having a demonstrated record of extraordinary achievement, pursuant to 8 C.F.R. § 214.2(o)(3)(v). *See Kazarian*, 2010 WL 725317 at *3.

Upon review, the AAO finds that the petitioner has not established that the beneficiary has a demonstrated record of extraordinary achievement in the motion picture industry or that he is recognized in the field as outstanding, notable or leading.

The specific deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(v)(B). The petitioner submitted extensive evidence relating to the beneficiary's work experience. Although the evidence establishes that the beneficiary has been employed consistently in the field, there is no evidence that the beneficiary is recognized as having a demonstrated record of extraordinary achievement in motion picture or television production, or that he is leading or notable within the industry as a cinematographer or director of photography.

The beneficiary is clearly a talented artist who has gained the admiration and respect of those with whom he has worked directly. However, the beneficiary is also a recent film school graduate who simply has not yet established "a demonstrated record" of extraordinary achievement. Based on the high-profile projects that the beneficiary was offered while the petition was pending, it appears that he is increasingly in demand as a director of photography. However, as noted above, the petitioner must establish that the beneficiary was eligible for the classification at the time of filing the petition, and based on his existing record of achievement. The petitioner failed to establish that the beneficiary's past employment has included lead, starring or critical roles for

productions or organizations that have a distinguished reputation or that he had been offered such roles as of the date the petition was filed.

Unusual in its specificity, section 101(a)(15)(O)(i) of the Act clearly requires "extensive documentation" of the alien's achievements. The AAO emphasizes that four out of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B) require the petitioner to submit various types of published materials to establish the beneficiary's recognition for achievements, such as critical reviews, advertisements, publicity releases, and newspaper, magazine or trade journal articles. Therefore, it is significant that the petitioner has not submitted any evidence that the beneficiary's name has ever appeared in any publication. Absent evidence that the regulatory criteria are not applicable to the beneficiary's occupation, pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(C), the petitioner must submit some published materials about the beneficiary in order to establish his eligibility for this classification. It is not reasonable to include the beneficiary among the group of cinematographers recognized in the field as leading, renowned or well-known if the petitioner does not establish that he has received some form of independent recognition in the industry, beyond the praise of his co-workers and supervisors, based on his reputation or achievements.

Therefore, the conclusion we reach by considering each evidentiary criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the beneficiary as a cinematographer who has achieved a level of distinction to the extent that he can be deemed to be renowned, leading, or well-known in the motion picture and television field. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary relies on the praise of his employers and co-workers and the reputation of the productions with which he has worked. While the evidence may distinguish the beneficiary from other aspiring cinematographers, the petitioner must establish that the beneficiary is recognized based on his own reputation as leading, renowned or well-known in comparison with all cinematographers. The documentation submitted in support of a claim of extraordinary achievement must clearly demonstrate that the beneficiary has achieved a very high level of accomplishment in the motion picture industry. The beneficiary does not have a demonstrated record of extraordinary achievement nor have his achievements been recognized in the field through extensive documentation. Accordingly, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.