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



U.S. Citizenship  
and Immigration  
Services

88

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER

Date:

FEB 03 2011

IN RE: [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, with a fee of \$630. 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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien with extraordinary ability in the arts. The petitioner states that it is engaged in artist representation, digital publications, and media consultation. It seeks to extend the beneficiary's O-1 status as an Artist (painter) for one year. The beneficiary was initially granted O-1 classification in 1999 and her status has been extended annually since that time.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary is an alien of extraordinary ability in the arts. The director determined that the petitioner failed to establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), or at least three of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(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 "requiring petitioner to prove again all requirements for O-1 classification when there is no material change in the underlying facts and the regulations state that no documentation is needed for an extension of the O-1 visa petition." Counsel specifically refers to a 2004 USCIS memorandum to support her assertion that it is USCIS policy that prior approvals should be given deference. *See* Memorandum of William R. Yates, Associate Director for Operations, USCIS: *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity* (April 23, 2004) ("Yates Memorandum"). The memorandum provides that exceptions to this policy should be made where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. *Id.* Counsel further contends that the petitioner submitted evidence to satisfy all six criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which only three are required to establish the beneficiary's eligibility.

Counsel submits a brief and additional evidence in support of the appeal. For reasons that will be discussed below, the AAO upholds the director's ultimate conclusion that the petitioner has not established that the beneficiary meets the eligibility requirements for an alien of extraordinary ability in the arts.

## **I. The Law**

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, 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 ability.

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

*Arts* includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts.

*Extraordinary ability in the field of arts* means distinction. Distinction means a high level of achievement in the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

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

*Evidentiary criteria for an O-1 alien of extraordinary ability in the arts.* To qualify as an alien of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

- (A) Evidence that the alien has been nominated for, or 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; or
- (C) If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

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.

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 (9<sup>th</sup> 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).

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). 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 1119-1120.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. 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 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 Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

## II. Analysis

### A. Evidentiary Criteria

The petitioner seeks to extend the beneficiary’s O-1 status for a period of one year. The beneficiary was initially granted O-1 classification as an alien of extraordinary ability as an artist in 1999 and had been in the United States continuously since November 13, 2000 at the time the instant petition was filed.

The petitioner claims that the evidence submitted in support of the petition satisfies all six of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B) and establishes that the beneficiary is an alien of extraordinary ability in the arts. In denying the petition, the director determined that the evidence submitted meets none of these criteria. After careful review of the record, it must be concluded that the petitioner has failed to overcome the grounds for denial.

The AAO emphasizes that submitting evidence to satisfy the evidentiary criteria will not automatically establish eligibility for this visa classification. 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 41818, 41820 (August 15, 1994).

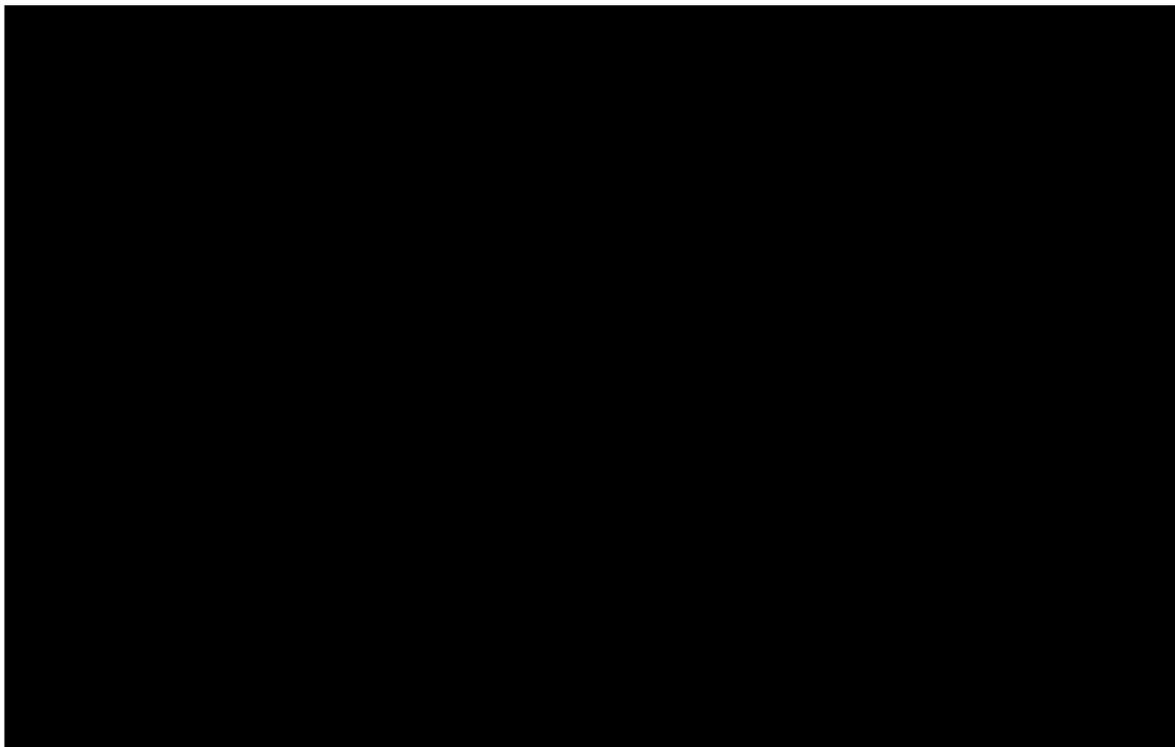
If the petitioner establishes through the submission of documentary evidence that the beneficiary has been nominated for or has been the recipient of, significant national or international awards or prizes in the particular field pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(A), then it will meet its burden of proof with respect to the beneficiary’s eligibility for O-1 classification. The regulation lists an Academy Award, an Emmy, a Grammy, or a Director’s Guild award as examples of qualifying significant awards or prizes. The petitioner does not claim that the beneficiary has received or been nominated for a significant national or international award or prize in the fine arts.

Accordingly, 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)(iv)(B). The AAO will address each of these criteria below.

*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.*

The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) requires that the petitioner identify with specificity the *productions or events* in which the beneficiary performed services in a lead or starring capacity, document the distinguished reputation of such productions or events, and provide evidence of the beneficiary's role in such events in the form of critical reviews, advertisements, publicity releases, publications, contracts, or endorsements.

In a letter dated November 19, 2008, counsel for the petitioner asserted the beneficiary "has performed as a starring participant in single and group art exhibitions which have a distinguished reputation." Counsel notes that the beneficiary's roles in these events "have been well-documented in critical reviews and publicity releases." The petitioner provided a list of 34 solo exhibitions and 20 group exhibitions spanning the beneficiary's career of nearly 40 years. While the AAO notes that such exhibitions could qualify as events in which the beneficiary performed services in a lead or starring participant, the plain language of this regulation requires the petitioner to submit documentary evidence to establish that the beneficiary's exhibitions have been and will be "events which have a distinguished reputation." The petitioner has submitted such documentation with respect to only a small fraction of the beneficiary's 54 past solo and group exhibitions. Specifically, the petitioner has submitted the following published reviews and articles regarding the beneficiary's exhibitions:



Counsel also indicated that the beneficiary meets this criterion based on her "long-standing relationship with the MIRO Galerie, an international art gallery in Europe, which was selected in the 2001 Gallup Poll as 'the most popular commercial gallery in Prague.'" Counsel emphasized that MIRO Galerie "presents the work of contemporary world class artists [REDACTED]"

Counsel stated that the MIRO Galerie has been the beneficiary's sole representative in Europe since 1999. The petitioner has submitted a total of three letters from gallery owner [REDACTED] in support of the petition. However, the petitioner has not submitted evidence in the form of "critical reviews, advertisements, publicity releases, publications, contracts, or endorsements" to establish that the beneficiary has provided or will provide services in a lead or starring role in an event or production with a distinguished reputation at this gallery. Notwithstanding the beneficiary's claimed longstanding relationship with the MIRO Galerie, her resume lists a single 1992 exhibition at the MIRO Galerie in Berlin. Although [REDACTED] letters do not satisfy the plain language of this regulatory criterion, we will be discuss the letters below under the third criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

Counsel also mentioned that the beneficiary has been and will be interviewed on the syndicated radio talk show, "Miracles Happen. [REDACTED] has appeared several times on MCTV Channel 15 in Siskiyou County, California, and was interviewed at the "Vegan Radio Show of the Valley Free Radio in Massachusetts." The interviews are claimed to have taken place in 2007 and 2008. We cannot conclude that the beneficiary's participation in local radio and television interviews rises to the level of providing services in a lead or starring role in events or productions that have a distinguished reputation. Further, the evidence does not support a finding that the interviews themselves served as publicity for specific events with a distinguished reputation in which the beneficiary provided services in a lead or starring role.

The director determined that the evidence submitted does not meet the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). The director acknowledged that, while some of the articles mention the beneficiary's talent and mention the beneficiary playing a lead role in some of the events, "none of the articles attest to the distinguished reputation of any of the productions or events."

On appeal, counsel revisits her argument that the beneficiary's exhibitions at the MIRO Galerie have a distinguished reputation because of the gallery's "high stature in Europe." Again, the AAO notes that the petitioner has not submitted evidence in the form of critical reviews, advertisements, publicity releases,

publications, contracts or endorsements evidencing the beneficiary's lead or starring role in specific productions or events at the MIRO Galerie, but rather depends upon testimonial evidence from the gallery's owner. Accordingly, the evidence submitted does not meet the plain language of this evidentiary criterion.

Counsel also emphasizes that several articles and reviews regarding the beneficiary's exhibitions were published in major German and Irish newspapers, including *Rheinische Post*, *Neue Ruhr Zeitung*, and *The Irish Times*. The petitioner submits circulation figures for each of these publications in support of its claim that they are major publications that have a national impact. Counsel acknowledges that some of the submitted articles and reviews appeared in local newspapers.

Upon review, the AAO finds that the petitioner has provided evidence to support a finding that the beneficiary's 1981 group exhibition at the German gallery "Art Gable" meets the plain language of this criterion. The beneficiary was one of only three artists included in the exhibition, and the exhibition was covered by at least three German newspapers, including a major national paper, *Rheinische Post*, and a major regional paper, *Neue Ruhr Zeitung*.

However, in order to satisfy this criterion, the petitioner must also establish that the beneficiary "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."

At the time of filing, the petitioner described the beneficiary's upcoming exhibitions and activities as follows:

For 2008, [the beneficiary] has scheduled exhibits at The Brown Trout Café & Gallery and the Art Walk, both in Dunsmuir, California.

[The petitioner] will be visiting and negotiating with galleries in Massachusetts, New York, California and Oregon for exhibitions for 2009.

[The beneficiary] has a planned radio interview [REDACTED] San Francisco, California from September 2008 to September 2009.

From February 2007 to July 2008, [the beneficiary] worked on her 300-page autobiography. The manuscript is being sent to publishers for consideration.

The petitioner submitted the following updated itinerary in response to the RFE:

September 11, 2008 – [REDACTED]  
September 13, 2008 – [REDACTED]  
November 22, 2008 – [REDACTED]  
October 2009 – [REDACTED]

February 2009 – [REDACTED] Syndicated radio talk show in San Francisco, CA, [REDACTED]  
[REDACTED]

March 2009 – MCTV Channel 15, Siskiyou County

The petitioner indicated that additional exhibitions may be added as a result of its negotiations with galleries, and noted that the beneficiary would continue to work with her editor on her autobiography.

The petitioner submitted an advertisement for the ArtWalk event from the website of "Window Box Bonsai Accents & Art Gallery." The advertisement indicates that the beneficiary is one of ten artists included in the one-day event. The submitted evidence does not establish that inclusion in this local arts event qualifies as performing in a lead or starring role in an event or production with a distinguished reputation. The petitioner did not submit critical reviews, advertisements, publicity releases, publications, contracts, or endorsements pertaining to the beneficiary's upcoming exhibitions at the Brown Trout Café and Gallery or Turn of the Century Fine Arts Gallery, and thus also failed to establish that these exhibitions would meet this criterion.

We note that the beneficiary's planned exhibition at the MIRO Galerie in Prague, which was confirmed through a letter from the owner of the gallery, was scheduled to take place in October 2009, which would place the event outside of the requested one-year validity period for the extended petition. We presume that the regulatory language "will perform services" refers to future events that will occur during the validity of the petition.

Finally, as noted above, television and radio interviews, while perhaps indicative of the beneficiary's level of recognition for her achievements, cannot be used to satisfy this criterion and will be considered further below.

Based on the foregoing, the petitioner has failed to submit evidence that satisfies each component of the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

*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*

The director determined that the petitioner did not submit evidence to meet the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2), noting that "the significance of the German articles on record is unknown." Specifically, the director noted that "it is unclear whether the publications in which the beneficiary is mentioned are publications which have a national or international impact."

On appeal, counsel asserts that the beneficiary "established her national and international recognition through the articles about her that were published in German and Irish newspapers." As noted above, the petitioner has established that *The Irish Times* and *Rheinische Post*, which published reviews of two of the beneficiary's group exhibitions in 1981, are major national newspapers in their respective countries.

*The Irish Times* article "Two Artists at Metropole Hotel, Cork" states the following with respect to the beneficiary and her work:

[The beneficiary's] small works are gentle and contemplative and oriental in idiom. Reeds and a sky of soft colour provide the vehicle for what are essays in mood: for though she says she contemplates before embarking on a work, she shows herself open to the atmospheric conditions around her.

The use of gold brushed on in circular strokes over the tempera and oil, often on a silk ground, adds an element of fantasy, which has a folkloric quality in works such as the compact and concise "Skywriting," "Sun Dance" alone has a note of harshness, while not deviating from the balanced rhythm of the other small paintings."

The *Rheinische Post* article, [REDACTED] " discusses the beneficiary's [REDACTED] as follows:

The 33-year-old [beneficiary], currently living in Ireland, with her pictures, whose main accent is in tempera and pigment oil techniques, tried to draw landscapes out of their real relationship and using color and shadowing compositions, to place them on a mystical level.

Like gold dust, elements are drawn through many of her pictures. Themes such as "Vietnam" and "1914-1918," while they fit easily into the other works, often overload the observer with an incomplete symbolism. [REDACTED] pointed out, in her introductory speech, that [the beneficiary] immersed herself in meditation long before the beginning of her works. She had to feel completely free and entirely empty. This bodily emptiness will be comprehensible to the observer only in a very few cases.

The article refers to the artist [REDACTED]

While both of these reviews appeared in "national" newspapers, the AAO cannot conclude that a routine exhibition review constitutes "national recognition for achievements" for a fine artist. As discussed above, we determined that one of the beneficiary's group exhibitions received a level of media coverage, including coverage in a major national newspaper, sufficient to establish that the exhibition itself could be considered to have a "distinguished reputation" under the first evidentiary criterion. The petitioner attempts to rely on the same evidence to meet the separate criterion that the beneficiary has received "national recognition for achievements." The above-referenced reviews briefly mention the beneficiary's technique and subject matter and are neutral to positive in assessing the beneficiary's work. The petitioner has not indicated how such reviews rise to the level of "recognition for achievements."

None of the other media coverage of the beneficiary, including newspaper articles and occasional radio and television interviews, has been shown to be national or international in scope. For example, [REDACTED] at MCTV15 in Siskiyou County, California, states that the beneficiary is "a noteworthy television personality in our area." While it appears that [REDACTED] of the radio show "Miracles Happen, Dreams do Come True," has a syndicated talk show, there is no evidence that the show is nationally syndicated or that the beneficiary's appearance on the show served as national recognition of her achievements as an artist.

Accordingly, we concur with the director's ultimate conclusion that this criterion has not been met.

*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.*

The petitioner initially claimed that the beneficiary meets this criterion based on her more than 50 group and solo exhibitions in Europe and the United States, her long-standing relationship with MIRO Galerie, her roles in founding [redacted] Germany's national art association, her role [redacted] for an international arts festival in Germany, and based on her support of various arts organizations in Northern California. In addition to the newspaper articles already mentioned above, the record contains approximately 20 testimonial letters.

The director determined that the submitted reviews regarding the beneficiary's exhibitions failed to "attest to the distinguished reputation of the organizations or establishments" that hosted the exhibitions." The director acknowledged that the petitioner submitted a letter from the owner of MIRO Galerie asserting that the beneficiary has been featured at the gallery for many years. The director concluded, however, that "this testimonial does not state whether the beneficiary has played a lead or starring role."

On appeal, counsel asserts that "the service erred in failed to consider the articles from major publications and testimonials from art experts that beneficiary played a lead or critical role in the development of German modern art and has exhibited her work in a lead or critical role in organizations and establishments that have a distinguished reputation."

Counsel states that the petitioner submitted in support of the beneficiary's initial O-1 petition evidence that the beneficiary was one [redacted]

The petitioner submits a letter dated February 6, 2006 from [redacted] who states:

[The beneficiary] was one of the founders in [redacted] with branches in all regions of the country. [The beneficiary's] leading role in the creation of the [redacted] makes her one of the important figures in the history of the modern German art scene.

The [redacted] . . . is the largest professional fine arts association in Germany. It represents 15 Land (states) associations with their district co-operative association on a federal level.

The [redacted] protects artists' interests towards the federal government which has a voice in determining the basic conditions for artistic professionals with its home, financial and foreign policies, and administrates works of art connected to federal building projects.

The petitioner also submits a letter from [redacted] states:

Early in her career, [the beneficiary] and three fellow artists created [redacted] which is Germany's first and now largest union for artists. Her leading role in this effort led to a great promotion of the fine arts in Germany, and a security for artists that only a professional association can provide.

[The beneficiary] has been a leading figure in German abstract art, but her efforts in helping other artists, through the creation of [REDACTED] as well as her sage advice and selfless support for artists, has given her a reputation of being a central player in the German art scene.

The AAO concurs with counsel that, as a founding member of [REDACTED] the beneficiary played a critical role for an organization that has a distinguished reputation as German's largest union for artists. There is no evidence that the beneficiary currently performs in a critical role for this organization.

Some of the beneficiary's other claimed qualifying organizational roles have not been adequately documented. For example, counsel indicates that the beneficiary co-founded [REDACTED] collective in Berlin in 1988, and served as [REDACTED] festival held in honor of the fall of the Berlin Wall. These roles have not been documented through the submission of "articles in newspapers, trade journals, publications, or testimonials" as required by the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3). 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. Comm'r 1972)). Furthermore, while the AAO acknowledges counsel's claim on appeal that the beneficiary played a critical role in "development of German modern art," we cannot find "German modern art" to be an "organization or establishment" within the meaning of this regulatory criterion. Such claims will be addressed under the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5) below.

Several of the testimonial letters in the record corroborate counsel's assertion that the beneficiary "is a very dedicated supporter of the art community in Northern California." For example, [REDACTED] confirms that the beneficiary is a member of the council, and the beneficiary is a member of the Siskiyou Artists Association. While the beneficiary is perhaps a recognized figure in her local arts community in the United States, the petitioner has not established that the beneficiary currently performs in a critical role with an arts organization or establishment that has a distinguished reputation.

The petitioner has also not submitted evidence to establish that the beneficiary's upcoming exhibitions are in a lead, starring or critical role for organizations or establishments that have a distinguished reputation. As discussed above, the beneficiary's planned exhibitions for the intended period of employment include [REDACTED] and [REDACTED] and [REDACTED] California. The petitioner has not claimed that these particular establishments enjoy a distinguished reputation in the beneficiary's field.

Finally, the AAO will address the beneficiary's claimed long-standing relationship with MIRO Galerie which is claimed to be the beneficiary's exclusive agent in Europe. The record contains three letters from the gallery's owner and general director, [REDACTED] in a letter dated June 24, 1999, [REDACTED] stated:

The MIRO Gallery made first contacts to the artist [REDACTED] Since then [REDACTED] has been represented in all the expositions of the MIRO Gallery held in Berlin (Germany), Prague (Czech Republic) and Bratislava (Slovak Republic). Because of the fact that the work of [REDACTED] is noted for her uniquely expressive hand in art, [REDACTED] belongs to the most

highly regarded group of personalities in the European art scene, and represents an immense enrichment of the MIRO Gallery's presentations.

\* \* \*

The international MIRO Gallery values its cooperation with the artist Ma as extraordinarily useful in every aspect.

In a letter dated October 4, 2008, [REDACTED] stated:

The international MIRO Gallery has been honored to be [the beneficiary's] European representative since 1988. All of our artists have suffered from unfortunate world economic downturns in the last years, but some exceptional artists, like [the beneficiary] have retained a continued high reputation even while experiencing fewer sales. We are very pleased to have her scheduled once again after many years for an exhibition in our main gallery in Prague, Czech Republic, in October of 2009.

On appeal, the petitioner submits a third letter from [REDACTED] dated February 6, 2009. In this latest letter, he states:

As director of the MIRO Galerie- exhibitions of major representatives in the field of abstract paintings- I am honored to attest to the placement of [the beneficiary] as a leading figure not only in our museum's archive, but as a leading figure in the genre of modern abstract art.

Upon review of the submitted evidence, while it appears that the MIRO Galerie enjoys a distinguished reputation, the petitioner has failed to establish that the beneficiary has performed, and will perform, in a lead, starring, or critical role for this establishment.

The beneficiary identifies herself as an "Artist of the Galerie Miro, Berlin and Prague" in her self-prepared list of exhibitions, but is unclear to what extent her work is displayed at the gallery or how she rises to the level of a lead, starring or critical figure within that establishment. For example, the beneficiary's list of 54 solo and group exhibitions identifies only one group exhibition at the "Miro Galerie, Berlin" in 1992. [REDACTED] states in his most recent letter that the beneficiary is "a leading figure . . . in our museum's archive," however, in October 2008, his letter suggested that the beneficiary's work had not been exhibited in the gallery for "many years." Without clarification regarding the exact nature and extent of the beneficiary's relationship with the MIRO Galerie, these statements appear to be inconsistent. The petitioner has not submitted any corroborating evidence, such as brochures, publicity materials or other information regarding the gallery, to establish that the beneficiary has been and will be a featured lead, starring or critical artist within the gallery's collection. None of the submitted published materials about the beneficiary reference the MIRO Galerie or the beneficiary's exhibitions there. Further, while [REDACTED] states that the beneficiary will have an exhibition at the MIRO Galerie commencing in October 2009, we note that such date is subsequent to the expiration of the requested period of employment and cannot establish that the beneficiary "will perform" qualifying services under the extended petition.

Accordingly, while we acknowledge that the petitioner provided evidence that the beneficiary "has performed" in a critical role for organizations and establishments that have a distinguished reputation in the past, specifically as a co-founder of [REDACTED], the evidence of record does not establish that she "will perform" such services under the extended petition. Thus, we concur with the director's conclusion that this evidentiary criterion has not been met.

*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.*

The director determined that the petitioner failed to submit evidence that satisfies this criterion. The director observed that the articles and publications submitted are "either local in nature or of unknown significance and therefore do not reflect critically acclaimed successes."

On appeal, counsel once again refers to the above-referenced reviews of the beneficiary's work in the *Irish Times* and the *Rheinische Post*, and asserts that the director ignored both these major newspaper articles and "the evidence of beneficiary's major commercial or critically acclaimed successes as evidenced by testimonials attesting to her standing in the field."

Upon review, the AAO upholds the director's finding that the petitioner has not submitted evidence to meet this criterion. Counsel's reliance on testimonial evidence is misplaced as the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) requires that the beneficiary's commercial or critically-acclaimed successes be "reported in trade journals, major newspapers or other publications." While we have recognized *The Irish Times* and *Rheinische Post* as "major newspapers" we cannot conclude that two newspaper reviews of the beneficiary's exhibitions published 28 years prior to the filing of the petition are sufficient to establish that the beneficiary has "a record of major commercial or critically acclaimed successes." Based on the evidence submitted, we must conclude that it has been nearly three decades since the beneficiary's work has been mentioned in any major publication.

Further, we are not persuaded that a newspaper review of a gallery exhibition rises to the level of an "occupational achievement" as contemplated by the regulation. As discussed above, we found that coverage of the beneficiary's exhibitions in major newspapers was sufficient to establish that such exhibitions meet the criterion of "events with a distinguished reputation," pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). The petitioner is attempting to rely on the same two 28-year-old newspaper articles to meet three or more criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), which is contrary to the statutory requirement that the alien's achievements "have been recognized in the field through extensive documentation." See section 101(a)(15)(O)(i) of the Act. Again, we emphasize that the regulatory criteria are separate and distinct from one another. To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a beneficiary meet at least three separate criteria.

*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.*

The director acknowledged that the petitioner submitted various testimonial letters from arts professionals stating that the beneficiary has extraordinary skills in the field of arts. The director determined that the testimonial letters attest to the beneficiary's talent, rather than her achievements, and as such, do not constitute "significant recognition of the beneficiary's achievements in the field of arts."

On appeal, counsel asserts that "experts in the field of arts have provided testimonials of beneficiary's achievements in her field." The testimonial evidence will be summarized below. The regulation at 8 C.F.R. 214.2(o)(2)(iii)(B) 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.

#### *The Letters*

states in his letter dated October 4, 2008 that the beneficiary has "retained a continued high reputation even while experiencing fewer sales." In an earlier letter, dated June 24, 1999, stated that "commercial success of [the beneficiary's] paintings (especially in Germany and Czech Republic) lifts this artist to the sphere of prestigious representatives of contemporary culture." He also stated that the beneficiary "belongs to the most highly regarded group of personalities in the European art scene." Finally, in his letter dated February 6, 2009, states that the beneficiary is "a leading figure, not only in our museum's archive, but as a leading figure in the genre of modern abstract art," who has "furthered the field in a unique personal ground-breaking manner." He also notes that, in recent years, "the beneficiary has still sold individual paintings for ten percent of their past value when most lesser known artists are unsuccessful in holding any sales."

who states that he is an art historian, collector and exhibitor of contemporary art, provided a letter dated July 21, 1999. He states that he has "deeply appreciated the poetic force" of the beneficiary's art for over 20 years, and noted that "both of my shows with [the beneficiary's] work in Berlin and in Hamburg were extremely successful and widely positive review [sic]." further states:

Her art has a distinctive female voice. It is at the same time both sensitive and confident, imparting a deep spirituality. This strong female expression will no doubt encourage a new generation of woman to create their own spiritual expressions in art.

In a wonderful transcending of any intellectual commentary, the breathtaking use of colour and material in [the beneficiary's] work has attracted enormous respect from the art community.

an Australian writer and filmmaker provided a letter dated June 21, 1999, in which she stated:

[The beneficiary's] accomplishments attest to her extraordinary abilities as an artist and a painter, specifically in the area of modern art. I am aware that [the beneficiary's] remarkable style is acknowledged worldwide in galleries, in the homes of private collectors and in the cyberspace gallery on the Internet. This fact alone indicates [the beneficiary's] incredible vision and foresight as a digital art pioneer.

[The beneficiary's] art breaks away from all political and social content and reveals an abstract quasi impressionistic style which awakens the senses, soothing the mind and soul. . . . Exquisite fabrics, gold and silver leaf and a collection of offerings and findings from sacred adventures are amongst the range of objects used by [the beneficiary] in her work.

This is an art that transcends time and space as it speaks on behalf of the spirit of the earth's ancestors. It is an art that beckons one to live in harmonious relationships. [The beneficiary's] art speaks a forgotten universal language.

██████████ an independent music magazine publisher based in Massachusetts, states that he is qualified to comment on the beneficiary's work as he is a professional multimedia artist who is "exposed to a wide variety of art everyday." He states that he has "searched the world for artforms which speak directly to the spirit" and describes the beneficiary's work as "quite rare in this regard" and a "powerful resource for inspiration." Regarding the beneficiary, he further states:

[The beneficiary's] accomplishments attest to her extraordinary abilities as an artist and a painter, specifically in the area of modern art. Her abstract impressionistic style is acknowledged worldwide as groundbreaking and visionary. Her synergistic use of elements and mixed media is breathtaking and thought provoking in a purely aesthetic manner – a rare feat for art that does not draw upon literal or metaphorical political or social content. In a world filled with vapid, senseless and sensationalist art how often does one encounter a work that elicits gasps, "ooh"s and "wow"s simply from a graceful synergy of abstract patterns? [The beneficiary's] work triggers such responses without relying on hate, violence, anger or offensive imagery. Her work simultaneously stimulates the mind and calms the soul. . . .

Based on my experience as a frequenter of galleries and museums in New York, Los Angeles, London, and San Francisco, [the beneficiary's] work will command extremely substantial remuneration [*sic*] and in turn will likely generate hundreds of thousands of dollars in tax revenue for both the Federal and State government.

██████████ president and chief executive officer ██████████ also provided a letter in support of the petition. ██████████ states that he is the "sole disseminator of the entire film archive of the former East Germany under special arrangement of the German government," and as such is "uniquely qualified to comment on the art and influence of one of Germany's finest artists." ██████████ states:

The work of [the beneficiary] stands solidly in our national treasury of art. I have traveled widely and had the chance to enrich my interest in art throughout Germany and abroad. I recently had the ironic opportunity of meeting this fellow German, [the beneficiary], while

we were both in the United States. I was quite pleased to meet her as I am familiar with her work that has been on exhibition in Berlin. . . .

[The beneficiary] has a deep understanding of not only the history, genres, and techniques in the traditional study of art, but she has that special quality of being able to transcend the levels of the current state of the art, and present on her canvases and in her conversations an entirely new and engaging art that blends color and form with philosophy and a remarkable process of (what I am surprised to see myself) a kind of soothing, calming presence. In her paintings, this is expressed in the way the wild forms come together in a flow of textures that are more than pleasing. They actually seem to massage one's wandering thoughts.

states that the beneficiary "has a reputation in Europe that allows her to command high prices for her paintings, but this stature was achieved only after years of hard work."

The petitioner provided a letter dated November 8, 2008 from host of the syndicated talk radio show describes the beneficiary as a "champion of the environment, human and animal rights, and a fine example of living her dreams," but does not discuss the beneficiary's achievements as an artist.

producer of states in a letter dated November 3, 2008 that the beneficiary "has been featured several times on our television broadcasts," where "her outstanding art and fascinating discussions on art have been very popular in our interview formats." He states that the beneficiary is "truly a noteworthy television personality in our area," presumably referring to Siskiyou County, California, where the local television station is based.

The petitioner provided a letter from California. states:

[The beneficiary] has been activating minds through her exceptional paintings. [The beneficiary] takes the viewer to a higher level of awareness, awareness from within oneself to a more joyous unformed vision of whatever the viewer wants to see or has to see.

\* \* \*

[The beneficiary] has excelled in opening minds and hearts in our community through her artwork, she has been exhibiting her in the city of Weed and is also a member of our Weed Arts Council. [The beneficiary] will also be having another opening here in Weed at the Turn of the Centuries Fine Art Gallery November 22, 2008. I just attended one of [the beneficiary's] openings for this exhibit was so well attended that the viewers had to stand in line to see the artwork.

described as a non-profit, public-benefit project in Yreka, California, provided a letter dated November 3, 2008. stated:

[The beneficiary] has shown her art at our gallery twice since our opening exhibition in May 2008. Currently, she is exhibiting a conceptual piece featured in the center space of our gallery. Working with the theme of ancestral acknowledgment, the sculpture relates to the human origins of simple life forms. [The beneficiary] has presented viewers with a plane of authentic blue-green algae, manipulated with a "creative design" to pose the challenge of creation. In addition to the piece, [the beneficiary] has produced a companion explanation of evolving life forms and ancillary information on the origins of her materials. The presence of conceptual art in our rural setting is, in itself, an education for our community.

. . . . Her work is conceptually compelling, and the quality of her craftsmanship and attention to detail result in finish pieces that set a bar for excellence and rival those of any cosmopolitan area.

\* \* \*

[The beneficiary] offers a unique presence in our community. Fellow artists, gallery owners and local arts associations regard her as not only an artist of the highest ability, but also a compassionate and dedicated supporter of the arts, other artists and aspiring artists.

[REDACTED] provided a letter dated November 2, 2008. He indicates that the beneficiary has an exhibition scheduled to begin at his gallery on November 22, 2008, and notes that "we are privileged to have the opportunity of exhibiting the art of such a prestigious artist such as [the beneficiary]." [REDACTED] opines that the beneficiary is "the most recognized and respected artist in this part of California."

The petitioner submitted a letter from [REDACTED] California. [REDACTED] states:

We are proud to have the art of [the beneficiary] in our community. [The beneficiary] produces highly original abstract, non-representational art – without doubt the most difficult art to market, but [the beneficiary] has shown a talent that continues to astound us. As evidenced by her sales record, collectors recognize her gifts and have been willing to pay the highest prices for art in any category in our area. This alone sets her apart from the vast majority of artists. Most abstract as well as non-abstract artists have a difficult time selling individual pieces over the \$200 range. Individual pieces from [the beneficiary] have sold in our area for thousands of dollars. With a depressed economy, most profoundly felt in our rural part of California, this success is truly remarkable.

Beyond the market aspect of art, [the beneficiary] offers a unique presence in our community. She is regarded by fellow artists, gallery owners and local art associations as not only an artist of the highest ability, but also a compassionate and dedicated supporter of the art community, other artists and aspiring artists.

Artist [REDACTED], provided a letter dated November 2, 2008 in which he stated:

In the eight years of my acquaintance with [the beneficiary] I am frequently reminded of what an extraordinary artist, teacher, role model and pillar of the art community she is in Northern California. Her artwork rings of spirituality and beauty and "speaks" in a language that even the uninitiated in art can grasp and get great value from. This area of the state is not noted for its artistic creativity, and has no well known artists who are native to the region. [The beneficiary] with years of exhibitions and educational talks help[s] "ground" and guide the arts here. Her talent is extraordinary and her generosity is boundless.

[redacted] further states that the beneficiary's "artwork and her value as an artist is truly remarkable."

[redacted] states in a letter dated May 8, 1999 that he is a collector of the beneficiary's art and owns six of her abstract pieces, which he describes as "extraordinary explorations of form and color." He states that in his opinion, the beneficiary's "work is so satisfying and engaging precisely because it embodies . . . classical canons of harmony and proportion."

[redacted], states that she is working with the beneficiary as editor of the beneficiary's autobiography. She describes the beneficiary as a "talented writer" who "is making a significant contribution to the literature of the United States."

[redacted] states that the beneficiary "has contributed her artistic expertise on various television shows produced at MCTV-15, the community television station housed at the Weed Campus of College of the Siskiyous," and "has exhibited her work at various venues in the county." She describes the beneficiary as a "cultural treasure."

The petitioner submitted a letter dated November 8, 2008 from [redacted] who states that he has known and admired the beneficiary's art and work in the community for several years. He states that he "finds her art a unique expression of the divine spirit," and feels "that her artwork will soon find greater acceptance in the art world at large." He describes the beneficiary as "very pro American," an active participant in religious activities, and "an upstanding and very generous member of the local community."

[redacted] of the [redacted] in [redacted], California states that she has known the beneficiary as "a friend, parishioner and active member of the community for seven years." She describes the beneficiary as "a treasured member of the community of [redacted] as well as being a celebrated artist nationwide."

The petitioner provided a letter dated November 8, 2008 from [redacted] owner and artistic director of [redacted] multimedia presentation center in [redacted] California. [redacted] states that the beneficiary has become widely known [redacted] for her "unique abstract art" and "for her amazing compassion and support" for all members of the community.

[redacted] states that he has seven of the beneficiary's paintings in his private collection and finds her to be "an artist of extraordinary talent."

Finally, the petitioner submitted a letter from [REDACTED] who states that she first saw the beneficiary's art in a local gallery six year ago and now owns several of her paintings. [REDACTED] states that she is "not an art aficionado," but believes that the beneficiary "can be likened to an 'Einstein' in the field of art, forging into new and unexplored territory with her art in a way that benefits humanity." She indicates that she has attended the beneficiary's art openings in the cities of Dunsmuir, Mount Shasta, Weed and Yreka, each of which were "well attended." [REDACTED] opines that the beneficiary's paintings "seem to reflect and help us to understand emerging themes in our culture," and "speak to human evolution, our origins, the unity of humanity, and our individual as well as collective path to greatness."

The petitioner submits several additional letters on appeal, including the above-referenced letter from [REDACTED] [REDACTED] who states that the beneficiary's "leading role in the creation of the [REDACTED] makes her one of the important figures in the history of the modern German art scene." The petitioner also submitted a new letter from [REDACTED] who states that the beneficiary "has been a leading figure in German abstract art."

#### *Analysis*

Upon review of the letters, the AAO concurs with the director's determination that the petitioner failed to establish that the beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field.

The majority of the letters submitted were not provided by recognized experts in the field of fine art. It is evident that the beneficiary's talent and contributions to the community are greatly respected and appreciated. The beneficiary has earned the praise and respect of local art galleries and organizations in Siskiyou County, California, local television and radio outlets, her church, her book editor, and private collectors of her work. However, we must conclude that [REDACTED]

[REDACTED] have not clearly indicated their authority and expertise in the field of fine arts and are simply not "recognized experts" in the field, and as such, their testimonial evidence, individually and collectively, does not rise to the level of "significant recognition." We note that, on appeal, counsel does not refer to these individuals as experts whose testimonial evidence is qualifying under this criterion.

On appeal, counsel emphasizes that [REDACTED] are "experts in the field of arts" and that they "clearly state how art experts recognize the beneficiary's achievements in the field of arts."

In his letter dated July 21, 1999, [REDACTED] discussed the beneficiary's body of work generally from an artistic perspective, noting the "exceptional delicate power" of her paintings, her techniques, her materials and her subject matter. While [REDACTED] clearly appreciates the beneficiary's artistic talents, such testimony does not amount to "recognition for achievements." [REDACTED] notes that "both of my shows with [the beneficiary's] work in Berlin and in Hamburg were extremely successful and widely positive review [*sic*]." He does not identify specifically when or where the shows took place, what made them "extremely successful," or elaborate with respect to the positive reviews the beneficiary purportedly received. The record contains no documentary evidence, such as articles or reviews, regarding exhibitions of the beneficiary's work

in Berlin or Hamburg. Thus, we find [REDACTED] vague reference to two well-received art exhibitions to be insufficient evidence of the beneficiary's "achievements." [REDACTED] also stated that the beneficiary's work "has attracted enormous respect from the art community," As noted above, the regulation at 8 C.F.R. § 214.2(o)(2)(iii)(D) provides that affidavits written by 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. Broad claims indicating that the beneficiary is respected in the "art community" provide insufficient recognition of the beneficiary's specific achievements as they do not describe the beneficiary's achievements in factual terms.

We acknowledge that [REDACTED] has stated that the beneficiary is "a leading figure in German abstract art" and [REDACTED] also indicates that the beneficiary is "a leading figure in the genre of modern abstract art." [REDACTED] states that the beneficiary's work "stands solidly in our national treasury of art." [REDACTED] states that the beneficiary is "one of the important figures in the history of the modern German art scene."

Recognition as being a leading figure within an entire genre of art could be considered a notable achievement; however, the AAO finds that this testimony is simply not consistent with the other evidence in the record. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. Where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r. 1988). An artist who is in fact widely recognized as a leading figure in the fine arts should not have to rely almost solely on testimonial evidence to establish this reputation. Rather it is reasonable to believe that such an artist could readily produce a plethora of evidence from art critics, art historians, art publications, and other sources clearly recognizing her among the leading or most important modern or abstract artists in Germany. Here, the petitioner has produced several 30-year-old newspaper clippings reviewing a few exhibitions of the beneficiary's work. While this evidence shows that the beneficiary enjoyed a degree of recognition for her work in the early 1980s, the evidence of record simply does not support the testimony that the beneficiary is recognized as "a leading figure" in German modern or abstract art.

[REDACTED] also stated that the "commercial success of [the beneficiary's] paintings . . . lifts this artist to the sphere of prestigious representatives of contemporary culture." He failed to state the beneficiary's commercial achievements in factual terms. We cannot conclude that vague references to commercial achievements are sufficient to meet this criterion.

The petitioner relies on the testimony of [REDACTED] who is a writer, filmmaker and commercial assistant, rather than a recognized expert in the field of fine arts. She claims to be qualified to render her opinion because her documentary work is focused on "revival of ancient spiritual traditions" and she has been attracted to the beneficiary's art for this reason. The AAO cannot conclude that this statement adequately sets forth [REDACTED] expertise in the fine art of painting. She indicates that she is "aware that [the beneficiary's] remarkable style is acknowledged worldwide in galleries," and notes that the fact that the beneficiary has a "cyberspace gallery on the Internet" makes her a "digital art pioneer." The remainder of her letter describes [REDACTED] personal reaction to the beneficiary's work as "art that beckons one to live in harmonious relationships." Other than confirming that the beneficiary's work appears in galleries and on the Internet, [REDACTED] has not described the beneficiary's achievements in factual terms.

Similarly, the petitioner's reliance on [REDACTED] testimonial evidence is misplaced. First, [REDACTED] indicates that he is an independent publisher of music magazines. His only basis for establishing his authority as an expert in the beneficiary's field is that he is "exposed to a wide variety of art everyday" and is attracted to "artforms which speak directly to the spirit." The AAO cannot conclude that he is a recognized expert in the beneficiary's field. He provides no factual basis for his conclusion that the beneficiary's "abstract impressionistic style is acknowledged worldwide as groundbreaking and visionary," and mentions no other achievements. As discussed above, unsupported references to the beneficiary's reputation in her field do not provide significant recognition for achievements within the meaning of the regulations. The remainder of [REDACTED] letter describes his personal response to the beneficiary's art work and his opinion that the beneficiary's work "will generate hundreds of thousands of dollars of tax revenue."

We cannot conclude that the reference letters, considered in the context of the totality of the evidence submitted, are sufficient to meet this criterion. The preceding letters, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). 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; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the experts' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of an artist whose achievements have received "significant recognition."

Therefore, the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5) has been met.

*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*

At the time of filing, the petitioner stated that the beneficiary "experienced commercial recognition of her talents through the sale of numerous paintings in the last year." The petitioner indicates that from 2007 through 2008, the beneficiary sold five paintings for \$380, \$480, \$900, \$1,400 and \$1,500. The petitioner stated that the beneficiary also donated a \$14,000 painting and two paintings with a combined value of \$1,500, during this same time period.

In response to the RFE, counsel reiterated the figures quoted above and stated that "it is rare for a living artist to earn a substantial and steady income from the sale of her work." Counsel stated that "[the beneficiary] has commanded, and will command substantial remuneration for her work" as "evidenced by her record of past sales, submitted with the past applications for extension of the petition and stay." It is worth emphasizing that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests additional evidence that the petitioner may

have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the records of the nonimmigrant proceedings are not combined.

The petitioner's response to the RFE also included testimonial evidence from [REDACTED] and [REDACTED] attesting to the beneficiary's relative commercial success in a difficult economy.

The director determined that the petitioner failed to submit evidence to meet this criterion. The director acknowledged counsel's assertion that it is extremely difficult for an abstract artist to achieve commercial success in the current economic situation. The director nevertheless noted that the beneficiary's works sold in the year preceding the filing of the petition totaled less than \$5,000 and no evidence of comparison to other artists' salaries was submitted.

On appeal, counsel asserts that "the fact that beneficiary has commanded a high salary in the past was established in the initial petition and in the subsequent renewals of the petition." Counsel emphasizes that [REDACTED] attested to the fact that the beneficiary "has a reputation in Europe that allows her to command high prices for her paintings," and [REDACTED] noted the beneficiary's "commercial success." Counsel asserts that the director ignored evidence that the beneficiary commanded a high salary in the past and instead concentrates on the beneficiary's current record of sales.

Upon review, counsel's assertions are not persuasive. While it is true that the director based his determination on the beneficiary's recent record of sales, no other "reliable evidence" of the beneficiary's sales has been provided. Given that the plain language of the regulation requires evidence that the beneficiary "has commanded a high salary or will command a high salary" we would accept reliable evidence of the beneficiary's claimed past commercial success. The fact that the beneficiary earns less now than she has in the past, for whatever reason, would not prohibit a finding that she meets this criterion.

However, testimonial evidence containing vague claims of past commercial success is insufficient to satisfy this regulatory criterion, which requires that the petitioner's claims be supported by "contracts or other reliable evidence." 8 C.F.R. § 214.2(o)(3)(iv)(B)(6). 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

Given that the petitioner is the beneficiary's U.S. agent and [REDACTED] claims to be the beneficiary's exclusive agent in Europe since 1988, it is unclear why neither party was able to produce a record of the beneficiary's past sales as evidence that she has commanded a high salary. As noted above, claiming that such evidence was submitted with a prior petition is insufficient to meet the petitioner's burden of proof in the current proceeding. The AAO concurs with the director's conclusion that the petitioner did not submit evidence to meet this criterion.

#### ***B. Final Merits Determination***

*Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. However, as discussed above, the petitioner established eligibility under none of the six criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which at least three must be met to establish eligibility.

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 a high level of achievement in the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that she is renowned, leading, or well-known in the field of arts, pursuant to 8 C.F.R. § 214.2(o)(3)(ii); and (2) that the beneficiary is recognized as being prominent in her field, pursuant to 8 C.F.R. § 214.2(o)(3)(iv). *See Kazarian*, 2010 WL 725317 at \*3.

In this case, we concur with the director's finding that the petitioner has not established that the beneficiary is prominent to the extent that she could be considered renowned, leading or well-known in the field of fine arts.

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)(iv)(B). Although the petitioner's evidence shows that the beneficiary enjoyed a degree of national recognition as an artist early in her career, the evidence in the aggregate does not establish that the beneficiary is currently recognized as a leading or well-known artist outside of her local community in California.

As discussed above, the petitioner's claims that the beneficiary qualifies for the requested classification are based, in large part, on testimonial evidence, including statements indicating that the beneficiary is "a leading figure" in German modern or abstract art. Again, we emphasize that the favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim.<sup>1</sup> Unusual in its specificity, section 101(a)(15)(O)(i) of the Act clearly requires "extensive documentation" of the alien's achievements. Again, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. 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; *see also Matter of V-K-*, 24 I&N Dec. at 500, n.2.

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<sup>1</sup> 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).

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, such as critical reviews, advertisements, publicity releases, newspaper, magazine or trade journal articles. Therefore, it is significant that the petitioner has submitted relatively little published evidence regarding the beneficiary, notwithstanding the fact that her career as an artist began in the early 1970s. Further, almost all of the published materials submitted are reviews of art exhibitions held in 1981. It is not reasonable to include the beneficiary among the group of visual artists recognized in the field as leading, renowned or well-known if the petitioner does not establish that she has received some form of significant independent recognition based on her reputation or achievements in the last twenty-five years.

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 painter who has achieved a level of distinction to the extent that she can be deemed to be renowned, leading, or well-known in the field of visual or fine arts. 8 C.F.R. § 214.2(o)(3)(ii). Based on the evidence submitted, it can be concluded that the beneficiary was active in artist union efforts in Germany in the 1970s and had some notice from the national press in Europe in the early 1980s. The beneficiary's career and level of recognition since that time have been poorly documented.

Nothing in the decision of the AAO should be seen as an attempt to minimize the accomplishments or obvious talent of the beneficiary. Many of the petitioner's claims simply failed on an evidentiary basis, as the petitioner chose to rely, in part, on evidence that it claims was submitted in support of a prior nonimmigrant petition. As noted above, such evidence is not available for review in subsequent nonimmigrant proceedings.

### **III. Prior Approval and Conclusion**

The record does show that USCIS has approved several prior O-1 classification petitions filed by the petitioner on behalf of the instant beneficiary. Counsel specifically refers to a 2004 USCIS memorandum to support her assertion that it is USCIS policy that prior approvals of petitions involving the same parties should be given deference. *See* Memorandum of William R. Yates, Associate Director for Operations, USCIS: *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity* (April 23, 2004) ("Yates Memorandum"). The memorandum provides that exceptions to this policy should be made where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. *Id.* It is noted that the Yates Memorandum is addressed to service center and regional directors and not to the chief of the AAO.

The AAO notes that prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm'r. 1988).

Each nonimmigrant petition filing is a separate proceeding with a separate record of proceeding and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the director reviewed the record of proceeding and concluded that the petitioner was ineligible for an extension of the nonimmigrant visa petition's validity based on the petitioner's failure to submit evidence that satisfies the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv). In both the request for evidence and the final denial, the director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

USCIS records confirm that most or all of the petitioner's prior O-1 petitions on behalf of the beneficiary were favorably adjudicated with no requests for additional evidence. Much of the evidence in the current record consists of letters dated in 1999 and newspaper clippings from the 1980s, which we presume were submitted in support of the beneficiary's initial petition filed in 1999. Unless the initial filing included substantial evidence that has not been provided for review in this matter, it is likely that the initial petition and subsequent extensions were approved without sufficient evidence of eligibility in the record. Such approvals would constitute material and gross error on the part of the director. Neither the director nor the AAO is required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r. 1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director approves the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous petition approvals by denying the instant petition.

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.