

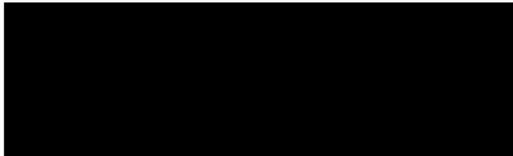
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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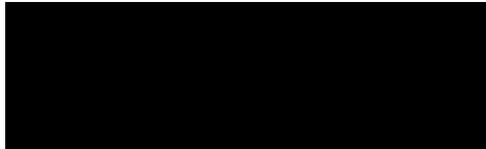
D8

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAR 23 2011**

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, 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, a talent management agency, 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), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien of extraordinary achievement in the motion picture or television industry. The beneficiary was previously granted O-1 status in April 2008 based on a petition filed by an unrelated agent or employer. The petitioner requests that the beneficiary be granted an extension of his O-1 status through December 12, 2012 so that he may work as an actor in the feature film [REDACTED]

The director denied the petition, concluding that the petitioner failed to provide written consultations from an appropriate union representing the beneficiary's occupational peers and a management organization in the area of the beneficiary's extraordinary achievement, as required by section 214(c)(3)(A) of the Act and the regulations at 8 C.F.R. §§ 214.2(o)(2)(ii)(D) and 214.2(o)(5)(iii).

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 initially stated that "USCIS erred in failing to apply the provisions of 8 CFR 214.2(o)(5)(requiring in certain instances for USCIS to request a consultation directly from the required labor organizations) and by not notifying the petitioner of why it chose not to apply these regulatory requirements." Counsel further asserts that "Legacy INS has clearly stated that a request for an extension does not require the submission of a new consultation from a labor organization." Counsel has since supplemented the record with written consultations from the Alliance for Motion Picture and Television Producers (AMPTP) and the Screen Actors Guild (SAG). Counsel asserts that the petitioner was not aware of USCIS' request for the consultations and relied on its former counsel to properly prepare the O-1 extension.

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 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.

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 any itinerary; and a written advisory opinion(s) from the appropriate consulting entity or entities.

Pursuant to section 214(c)(3)(A), an O-1 petition with respect to aliens seeking entry for a motion picture or television production shall be approved only after consultation with the appropriate union representing the alien's occupational peers and a management organization in the area of the alien's ability.

The regulations at 8 C.F.R. 214.2(o)(5) further explain the applicable consultation requirements:

(i) General

- (A) Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for an O-1 or O-2 classification can be approved.
- (B) Except as provided in paragraph (o)(5)(i)(E) of this section, evidence of consultation shall be in the form of a written advisory opinion from a peer group (which could include a person or persons with expertise in the field), labor, and/or management organization with expertise in the specific field involved.
- (C) Except as provided in paragraph (o)(5)(i)(E) of this section, the petitioner shall obtain a written advisory opinion from a peer group (which could include a person or persons with expertise in the specific field), labor, and/or management organization with expertise in the field involved. The Advisory opinion shall be submitted along with the petition when the petition is filed. . . .

* * *

- (D) Except as provided paragraph (o)(5)(i)(E) and (G) of this section, written evidence of consultation shall be included in every approved O petition. Consultations are advisory and are not binding on the service.

Specific consultation requirements for an O-1 alien of extraordinary achievement are set forth at 8 C.F.R. § 214.2(o)(5)(iii):

In the case of an alien working on a motion picture or television production, consultation shall be made with the appropriate union representing the alien's occupational peers and a management organization in the area of the alien's ability. If an advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. If the advisory opinion is favorable to

the petitioner, the written advisory opinion from the labor and management organizations should describe the alien's achievements in the motion picture or television field and state whether the position requires the services of an alien of extraordinary achievement. If a consulting organization has no objection to the approval of the petition, the organization may submit a letter of no objection in lieu of the above.

The regulation at 8 C.F.R. § 214.2(o)(2)(iv)(c) provides that if an O-1 or O-2 alien in the United States seeks to change employers, the new employer must file a petition and a request to extend the alien's stay with the Service Center having jurisdiction over the new place of employment.

II. Required Consultations

The sole issue addressed by the director is whether the petitioner submitted the required written consultations from a labor union and a management organization with expertise in the beneficiary's field.

The beneficiary is an Australian actor who held O-1 status at the time of filing pursuant to an approved petition filed by [REDACTED] and valid from April 9, 2008 until August 7, 2010. The instant petitioner, a talent management agency which entered into a personal management contract with the beneficiary on May 25, 2010, filed the Form I-129, Petition for a Nonimmigrant Worker, on July 26, 2010, and initially requested a three-year period of extension, through August 7, 2013. The petitioner marked on the Form I-129 that the instant petition represents a "change in previously approved employment."

The petitioner submitted an actor employment agreement between the beneficiary and [REDACTED], signed on June 1, 2010, which indicates that the beneficiary's services would be required for a motion picture tentatively titled [REDACTED], from November 1, 2010 until December 20, 2012.

In support of the petition, the petitioner submitted a "no objection" advisory opinion dated March 14, 2008 from the Alliance of Motion Pictures & Television Producers (AMPTP), a management organization in the beneficiary's field. The opinion states:

We have reviewed the documents that Infinity Management is submitting to your office in order to obtain an O-1 visa on behalf of [the beneficiary] to enable him to serve as a performer in the feature length motion pictures, [REDACTED] and [REDACTED].

The director issued a request for additional evidence ("RFE") on August 13, 2010, in which she requested, *inter alia*, a consultation from a labor union and a consultation from a management organization. The director acknowledged receipt of the 2008 no objection consultation from [REDACTED] but noted that the petitioner indicated that the beneficiary will be playing the lead role in [REDACTED], rather than working on [REDACTED] or [REDACTED]. The director instructed the petitioner to obtain a new consultation from [REDACTED] as well as a consultation from the national office of an appropriate labor organization such as the [REDACTED].

In a response dated September 22, 2010, counsel for the petitioner stated that "as of this date, [REDACTED] has not provided the consultation as promised." Counsel did not provide evidence of the petitioner's request for the consultation, or address the director's request for a consultation from an appropriate labor organization, such as [REDACTED]

Counsel further stated:

Also, please note that we are requesting only an extension of stay, and no documentation is needed for extension of petition. For extension of stay need only provide a statement explaining reason for stay request, and no new consultation is needed. See 8 CFR § 214.2(o)(12). Also see Letter, Bednarz (Sept. 29, 1992) and *Interpreter Releases* 149, 160, 180-84, (Jan. 17, 2005). Also, an O petition and extension of status by a new employer or for a new position by the same employer is a new "event" under 8 CFR § 214.2(o)(3) and may be approved for 3 years. (Summary of Oct. 3 2002 ISD Teleconference published on AILA InfoNet at Doc. No 02110470).

The director denied the petition on October 12, 2010, based on the petitioner's failure to provide consultations from an appropriate labor union and management organization. The director acknowledged counsel's assertion that [REDACTED] has not provided the consultation as promised," but emphasized that the petitioner failed to submit evidence that it had actually submitted the request for a consultation to [REDACTED]. The director further noted that the petitioner did not indicate that it had requested a consultation from a labor organization.

The director acknowledged the petitioner's reference to O-1 extension procedures pursuant to 8 C.F.R. § 214.2(o)(12). The director observed that the cited regulation does not state that new consultations are not required. The director further stated:

[A]lthough the petition is indeed requesting an extension of stay, the terms and conditions such as the events have changed. As admitted by the petitioner's own claim, the beneficiary is eligible for a three (3) year extension since the beneficiary will be engaged in a new event. An extension of stay, as read in the aforementioned citation, is to continue or complete the same event or activity. In the present matter, the event is [REDACTED] which is dissimilar to the events for which the beneficiary was previously approved for (i.e. "[REDACTED] [REDACTED]' and [REDACTED])

The director determined that, because the beneficiary will be engaged in a new event, new consultations are required from the labor organization and the management organization.

On the Form I-290B, Notice of Appeal or Motion, current counsel for the petitioner asserts that "USCIS erred in failing to apply the provisions of 8 CFR 214.2(o)(5)(requiring in certain instances for USCIS to request a consultation directly from the required labor organizations), and by not notifying the Petitioner of why it chose not to apply these regulatory requirements."

Counsel further asserts that "Legacy INS has clearly stated that a request for an extension does not require the submission of a new consultation from a labor organization. Counsel submits an article titled "INS Discusses More O and P Nonimmigrant Issues," published in 59 No. 44 *Interpreter Releases* 1460. The article discusses correspondence between two attorneys and ██████████ in the INS Office of Adjudications. ██████████ opined that "written consultations are not required for extensions of stay for O and P nonimmigrants."

Counsel asserts that "previous counsel reasonably relied on the published interpretation of USCIS of the extension of stay regulations contained in 8 CFR 214.2(o)(11)-(12)." Counsel submitted a copy of a no objection advisory opinion issued on behalf of the beneficiary by the ██████████ on January 15, 2008, along with evidence that counsel requested new consultation letters from the ██████████ P and ██████████ on November 11, 2010.

On November 23, 2010 counsel submitted newly-issued advisory opinions from ██████████ indicating that these organizations have no objection to the granting of an O-1 visa to the beneficiary to enable him to serve as a performer in ██████████. In her latest correspondence, counsel states that "[u]nfortunately, neither [the petitioner] or [the beneficiary] was not made aware to USCIS' request for these consultations the first time," and notes that the petitioner's previous attorney "took no steps to obtain these consultations." Counsel requested that the director treat the appeal as a motion to reopen and approve the petition "in light of the fact that the consultations have been provided and that the consultations were not previously submitted through no fault of the Petitioner or Beneficiary."

The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. Upon review, the AAO will dismiss the appeal.

The instant petition, which involves a new O-1 petitioner and a new motion picture project, is not a simple extension of visa petition validity as contemplated by the regulation at 8 C.F.R. § 214.2(o)(11), which pertains to a request to allow an alien "to continue or complete the same activities or events specified in the original petition." The petition involves "new employment" rather than a "change in previously approved employment." Prior counsel correctly observed that "an O petition and extension of status by a new employer or for a new position by the same employer is a new 'event'" under 8 C.F.R. § 214.2(o)(3).

Further, the regulations clearly indicate that written evidence of consultation shall be included in the record in every approved O petition. 8 C.F.R. § 214.2(o)(5)(i)(D). The plain language of this regulation requires submission of the appropriate consultations in support of every O petition. The only exceptions to this requirement are set forth at 8 C.F.R. §§ 214.2(o)(5)(i)(E) - (G) and 8 C.F.R. § 214.2(o)(5)(ii)(B).

The regulation at 8 C.F.R. § 214.2(o)(5)(i)(E) provides that, in a case where the alien will be employed in the field of arts, entertainment, or athletics, and the Service has determined that a petition merits expeditious handling, the Service shall contact the appropriate labor and/or management organization and request an advisory opinion if one is not submitted by the petitioner. Counsel asserts that USCIS erred by failing to request a consultation directly from the required organizations and by "not notifying the Petitioner of why it

chose not to apply these regulatory requirements." The AAO observes that counsel points to no statutory or regulatory provision that requires USCIS to notify the petitioner of its reasons for applying or not applying the procedures applicable to petitions meriting "expeditious handling." The instant petition was filed on July 26, 2010, and the beneficiary was scheduled to begin work on his sole scheduled film project, [REDACTED] on November 1, 2010. The petitioner waited almost two months to file the petition from the time the beneficiary committed to the project on June 1, 2010. Under the circumstances, there was no reasonable basis for the director to determine that this petition merited expeditious handling. Counsel's assertions in this regard are unpersuasive.

The regulation at 8 C.F.R. § 214.2(o)(5)(i)(F) provides that, in a routine processing case where the petition is accompanied by a written opinion from a peer group, but the peer group is not a labor organization, the Director will forward a copy of the petition and all supporting documentation to the national office of the appropriate labor organization within 5 days of receipt of the petition. The petitioner did not submit a written opinion from a peer group in support of the petition. Furthermore, this provision makes no reference to consultations from management organizations. Even if the AAO determined that the director should have requested a consultation from an appropriate labor organization, the petitioner would still be required to submit an updated management consultation.

If the petitioner establishes that an appropriate peer group, including a labor organization does not exist, UCSIS will render a decision on the evidence of record. *See* 8 C.F.R. § 214.2(o)(5)(i)(G). The petitioner has not established that there is no appropriate labor or management organization in the field of film and television acting.

The fourth and final exception to the written consultation requirement is under 8 C.F.R. § 214.2(o)(5)(ii)(B), which provides a waiver of the consultation requirement for certain aliens of extraordinary ability in the field of arts. Specifically, consultation for an alien shall be waived by the Director in those instances where the alien seeks readmission to the United States to perform similar services within two years of the date of a previous consultation. This provision is inapplicable here, as the beneficiary was previously admitted as an alien of extraordinary achievement in the motion picture and television industry, rather than as an alien of extraordinary ability in the arts. Moreover, more than two years had passed since the issuance of the previous [REDACTED] consultations, in January 2008 and May 2008, respectively.

As none of the above-referenced exceptions applied in this matter, the petitioner was in fact required to submit written consultations from both a labor organization and a management organization in support of the petition. Counsel's and former counsel's arguments to the contrary are unpersuasive.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Here, the director clearly advised the petitioner why the [REDACTED] consultation issued in March 2008 did not satisfy the petitioner's burden to submit a consultation from a management organization. The director also clearly advised the petitioner that it would need to obtain the

required labor union consultation. The director granted the petitioner six weeks in which to prepare its response, which provided ample time for it to request and obtain the consultations. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

On appeal, counsel requests that USCIS accept the newly-issued consultation letters, which were requested and obtained one month after the petition was denied and approximately three months after the director issued the RFE. Counsel maintains that the petitioner and beneficiary "relied on their attorney to properly prepare the O-1 extension, and for a reason unknown to the Petitioner or the Beneficiary, attorney failed to provide the consultations requested by USCIS." Upon review, the petitioner has failed to fulfill the prerequisites for allegations of ineffective assistance of counsel. *See Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The AAO notes that any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. at 637. The petitioner's submission on appeal meets none of these requirements. Furthermore, absent actual evidence, the assertions of the petitioner's new counsel do not establish the truth of the matter asserted. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the foregoing, we conclude that the petitioner was required to submit a labor consultation and a management consultation, and that the petitioner had ample opportunity to provide the appropriate consultations prior to the adjudication of the petition. Accordingly, the AAO will not accept the consultations submitted on appeal, and the appeal will be dismissed.

B. Extraordinary Achievement in the Motion Picture or Television Industry

Beyond the decision of the director, the petitioner has not established that the beneficiary meets the criteria for an alien of extraordinary achievement in the motion picture and television industry as set forth at 8 C.F.R. § 214.2(o)(3)(v). Pursuant to 8 C.F.R. § 214.2(o)(3)(ii), 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.

In determining the beneficiary's eligibility under the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(v)(B), 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 ability" as "one of that small percentage who have risen to the very top of the field of endeavor."

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).

If the petitioner establishes through the submission of documentary evidence that the beneficiary has been nominated for or received a significant national or international award or prize in his or her 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 petitioner does not claim that the beneficiary meets this criterion.

As the evidence of record does not demonstrate 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).

In order to meet the first criterion, 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)(I).

The petitioner has submitted contracts or offer letters pertaining to three of the beneficiary's acting roles. The beneficiary signed a contract with [REDACTED] on September 15, 2009, in which he agreed to perform in one episode of the daytime series [REDACTED] " in the role of [REDACTED]." The contract does not establish that the beneficiary performed services as a lead or starring participant in this production.

The petitioner also submitted a memorandum of intent dated March 14, 2007 from [REDACTED], the producer of the film [REDACTED] which indicates that the beneficiary would "play one of the lead roles in the film." The film was to begin pre-production in 2008, and would require the beneficiary's services for at least 13 weeks starting no later than March 2008. The memorandum indicates that the beneficiary would be paid "under the Screen Actors Guild Low Budget Agreement" at the "scale rate of \$1,752." [REDACTED] advised the beneficiary that his "deal memo will be forthcoming upon final approval of the script." The petitioner submitted no additional evidence pertaining to the film [REDACTED]. Based on the evidence of record, the AAO is unable to determine whether the beneficiary ultimately appeared in this movie, much less whether he held a leading or starring role, or whether the production itself had a distinguished reputation.

Finally, the petitioner submitted a copy of the beneficiary's contract with [REDACTED] for the lead role of [REDACTED] in the upcoming motion picture production titled [REDACTED]. Counsel noted that "the production is new and ongoing" and therefore "no further evidence is available at this time." Upon review, the AAO finds the contract alone to be insufficient to satisfy the plain language of this criterion, which requires evidence of the beneficiary's lead or starring role in a production with a distinguished reputation. It is not unusual for a distinguished motion picture or television production to generate press within the industry during pre-production, such as when it casts lead roles or hires a director. The petitioner has not provided any documentary evidence relating to the producer [REDACTED] or his production company Triple R Entertainment to establish that either party has been associated with distinguished productions in the past.

While some of the beneficiary's other previous acting roles are mentioned in the testimonial evidence submitted, the plain language of this criterion requires the submission of evidence in the form of critical reviews, advertisements, publicity releases, publications, contracts, or endorsements. Based on the foregoing, the petitioner has not submitted evidence to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(1).

In order to establish that the beneficiary meets the second criterion, the petitioner must submit 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. 8 C.F.R. § 214.2(o)(3)(iv)(B)(2).

With reference to this criterion, counsel indicated that the petitioner was submitting the above-referenced memorandum referencing the beneficiary's role in [REDACTED], as well as a reference letter from casting director [REDACTED] and information regarding the Australian television series [REDACTED] from an unidentified source. We note that this evidence does not satisfy the plain language of this regulatory criterion, which requires the petitioner to submit critical reviews or other published materials about the beneficiary in major newspapers, trade journals, magazines or other publications.

The petitioner submitted a total of two articles about the beneficiary from Australian newspapers. The first appeared in the [REDACTED] on January 12, 2007 and consists of a small picture of the beneficiary and an article that is four sentences in length. The petitioner also submitted evidence that the [REDACTED] article appeared on the newspaper's website. The article indicates that the beneficiary is [REDACTED] who recently auditioned for the U.S. daytime drama [REDACTED] and that he was asked to return for additional talks with the show after obtaining a U.S. work visa. The article notes that "until then [the beneficiary] is sleeping on a friend's floor." We note that a banner on the newspaper's website indicates that the [REDACTED] is "Australia's biggest selling daily newspaper." However, we need not accept the promotional materials of a media outlet as to whether it constitutes a major newspaper or other major media.¹ The record does not contain the circulation data for the [REDACTED] or other evidence that the publication could be considered major media. Even if the AAO determined that the [REDACTED] is a major newspaper, we cannot conclude that this brief article is evidence of the beneficiary's receipt of national recognition for his achievements in the field of acting. The article reflects that he had an audition and is currently sleeping on a friend's floor. It is unclear what "achievements" have been recognized.

The second article appeared in the January 8, 2007 edition of the [REDACTED] and also recounts the beneficiary's audition for [REDACTED]. The article mentions the beneficiary's prior roles on episodes of the Australian television shows [REDACTED] and [REDACTED], discusses his decision to relocate to Los Angeles to pursue acting, and notes that he "is sleeping on a friend's floor until he gets his big break." The petitioner has not established that the [REDACTED] is a "major newspaper" in Australia,

¹ See, e.g., *Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media).

rather than a local or regional newspaper. Further, the article indicates that the beneficiary is an actor waiting for a "big break" rather than an actor who is already nationally recognized for his achievements in the field.

Based on the foregoing, the petitioner has not submitted evidence to satisfy the plain language of the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(2).

In order to establish that the beneficiary meets the third criterion, the petitioner must submit 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. 8 C.F.R. § 214.2(o)(3)(v)(B)(3). The petitioner has submitted several testimonial letters, but no published materials, addressing the beneficiary's prior acting roles. The regulation at 8 C.F.R. § 214.2(o)(2)(iii)(B) provides that affidavits from present or former employers or recognized experts certifying to the recognition and extraordinary ability of the alien 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 petitioner submitted a letter from [REDACTED], who stated that she worked as the casting director during the last four seasons of the Australian television series "[REDACTED]" [REDACTED] states:

[The beneficiary] was cast on our program as co-lead for an episode. He auditioned well and we called him back to fit him into one of our episodes with a major plot twist. [The beneficiary] played the co-lead role of "[REDACTED]" a kidnapper in episode [REDACTED] (May 18, 2005). In this episode, the main character's son was kidnapped by [REDACTED]." [The beneficiary] was cast alongside [REDACTED] and [REDACTED] two of Australia's finest actors. Due to the high caliber of the episode we cast [the beneficiary] primarily upon our faith in his ability. [The beneficiary] proved to be star quality acting alongside these professional actors, [the beneficiary] still managed to shine through.

The petitioner submitted evidence that the series [REDACTED]' was Australia's longest-running police show, airing from 1994 until 2005 and that it received multiple nominations for [REDACTED] during its run. The petitioner has provided sufficient evidence to establish that this television series enjoys a distinguished reputation in Australia. However, the AAO cannot conclude that the beneficiary's guest-starring role on a single episode establishes that he performed a lead, starring or critical role for the establishment or organization that produces the show.

The petitioner submitted a letter attributed to [REDACTED], casting director for the Australian television series [REDACTED]. The letter is not on letterhead providing contact information for [REDACTED], is not dated, and, most importantly, does not bear [REDACTED] signature. The letter indicates that the beneficiary had a co-lead guest-starring role on episode 4706 of this series. Based on the evidence submitted, "[REDACTED]" appears to be a leading Australian television series with a distinguished reputation, however, the petitioner has not provided evidence to show how the beneficiary's guest role on a single episode rises to the level of a lead, starring or critical role for the organization or establishment that produces the show. Such evidence might

include evidence that the beneficiary received media attention as a result of his guest role, or an award nomination for a guest appearance. A letter bearing no signature is insufficient to meet the petitioner's burden of proof.

The petitioner submitted a letter from [REDACTED], an Australian filmmaker who indicates that he has written, produced and directed 17 independent short films since 2002. [REDACTED] states that his work "has been very well received" and that he has "an ever-growing collection of great reviews." He confirms that he cast the beneficiary in the lead role in his short film [REDACTED]. While [REDACTED] is highly complimentary of the beneficiary's acting abilities, and confirms his leading role in his film, the evidence of record does not establish the distinguished reputation of the short film in which he starred or of the organization or establishment that produced the film. [REDACTED] statements that he has received "great reviews" for his work in general are insufficient. He also provided his filmography, which reflects that some of his short films have garnered some attention in various film festivals. However, no distinctions have been attributed to the 2002 film [REDACTED].

Finally, the AAO notes that none of the evidence submitted establishes the distinguished reputation of [REDACTED], the production company that has signed the beneficiary to star in the upcoming film [REDACTED]. The plain language of the regulation requires that the petitioner submit evidence to establish 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. Overall, the testimonial evidence submitted is insufficient to establish that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(3).

To establish that the beneficiary meets the fourth criterion, the petitioner must establish that the beneficiary 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. 8 C.F.R. § 214.2(o)(3)(v)(B)(4). Counsel asserted that the above-referenced letter from [REDACTED], along with a letter from [REDACTED], an acting teacher and casting director, satisfy this regulatory criterion. However, testimonials clearly do not satisfy the plain language of this evidentiary criterion. The petitioner has not submitted evidence in the form of box office receipts, motion picture or television ratings or other reports of occupational achievements reported in trade journals, major newspapers or other publications.

In order to meet the fifth regulatory criterion, the petitioner must 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)(iv)(B)(5). As discussed, the petitioner has submitted a number of testimonial letters from casting directors and producers who have worked with the beneficiary in the past.

[REDACTED] noted that she has "complete faith that [the beneficiary] will be a success in front of the camera." She notes that the beneficiary's "ability to command leading roles is unquestioned as is his young

distinguished reputation." Finally, she describes the beneficiary as "*the* rising star in Australia." The unsigned letter attributed to [REDACTED] states that the beneficiary "has what it takes to be a leading man," and has talent and "the right work ethic" to succeed in the field. [REDACTED] expresses her approval of the beneficiary's performance in her movie, noting that he "stood out and had the presence and talent necessary to portray the nuances and subtleties of a complicated role."

The fourth and final letter is from [REDACTED] who states that he met the beneficiary in a series of workshops he taught. He indicates that he had the beneficiary audition for him before deciding to issue him a recommendation letter. [REDACTED] states:

[The beneficiary's] audition for me was, to say the least, brilliant. He performed a total of 3 scenes all displaying different emotions, motives and character arcs. [H]e had an extraordinary ability to interpret and command each performance making all the characters his own. [The beneficiary] is a unique actor that combines his own instinct with the methods that he has been taught over the years to perform some truly impressive results.

[The beneficiary] has made the very brave decision to relocate to L.A. and I have no doubt that this decision will pay dividends for his career as a professional actor. He is in the right place and posses [sic] the necessary requirements to build a very successful career.

While the AAO recognizes that the individuals who provided letters hold a very high opinion of the beneficiary's talent and potential, the submitted testimonials do not satisfy the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(5). None of the persons providing testimonials have clearly indicated their knowledge of the beneficiary's achievements in the field of acting. Rather, the majority of them opine that the beneficiary is a talented actor, without specifically addressing his achievements or significant recognition in the field.

With regard to the reference letters provided, we concede that reference letters can provide useful information about an alien's qualifications or help in assigning weight to certain evidence. In this case, the letters of recommendation submitted by the petitioner are not sufficient to meet this regulatory criterion. These letters, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. USCIS may, in its discretion, use as advisory opinion 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 of support from the petitioner's personal contacts 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. Thus, the content of the writers' 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 from an actor who is recognized as having a demonstrated record of achievement in the motion picture and television field. Such letters are not a substitute for objective evidence of the alien's achievements and recognition as required by the statute and regulations. The nonexistence of required evidence creates a presumption of

ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Primary evidence of achievements and recognition is of far greater probative value than the opinions of one's professional contacts and acquaintances.

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 petitioner has not claimed that the beneficiary meets this criterion, nor did it establish through the submission of reliable evidence that the beneficiary's past or proffered salaries as set forth in the submitted contracts meet the criteria of a "high salary" for a film or television actor. Such evidence could include statistical comparisons of salaries in the field of endeavor.

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. However, as discussed above, the petitioner established eligibility under none 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) 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 beneficiary is recognized as outstanding, notable, or leading in the motion picture or television fields, pursuant to 8 C.F.R. § 214.2(o)(3)(ii); and (2) 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 achieved distinction as an actor to the extent that he is recognized as outstanding, notable or leading in the industry. The record does not establish that the beneficiary is recognized as having a demonstrated record of extraordinary achievement.

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). The petitioner submitted some documentation relating to the beneficiary's work experience. The evidence of record establishes that the beneficiary has made two appearances on Australian episodic television, has performed on one episode of [REDACTED] performed a leading role in an Australian short film, and has been offered two roles in American feature length movies. The minimal evidence submitted does not significantly distinguish the beneficiary from other working television and film actors and is insufficient to establish that he is recognized as leading or well-known in the field.

The favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim.² Unusual in its specificity, section 101(a)(15)(O)(i) of the Act clearly

² 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

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 AAO emphasizes that four out of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(v)(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 little published evidence regarding the beneficiary with the exception of two brief mentions in newspapers. Absent evidence that the regulatory criteria are not applicable to the beneficiary's occupation, pursuant to 8 C.F.R. § 214.2(o)(3)(v)(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 actors recognized in the field as leading, renowned or well-known if the petitioner does not establish that he has received significant independent recognition based on his reputation or achievements.

Therefore, the conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the minimal evidence does not distinguish the beneficiary as an actor who is recognized as having a demonstrated record of achievement in the motion picture and television industry. The documentation submitted in support of a claim of extraordinary achievement in this industry must clearly demonstrate that the beneficiary has a high level of achievement evidenced by a degree of skill and recognition substantially above that ordinarily encountered. The petitioner has not met this burden. For this additional reason, the petition cannot be approved.

IV. Conclusion

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683

direct knowledge of the facts at issue. *Blacks 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).

(9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

We acknowledge that USCIS previously approved a petition for O-1 status filed on behalf of the beneficiary by a different employer for a different event. As discussed above, the instant petition is treated as a new petition for O-1 classification, rather than an extension of the previous petition. Regardless, each nonimmigrant petition filing is a separate proceeding with a separate record 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 properly concluded that the petitioner failed to submit the required consultations from labor and management organizations. 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.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. at 1043, *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.