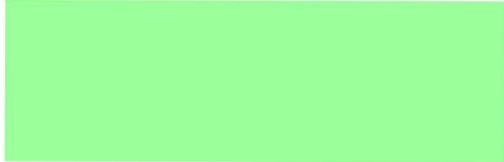


(b)(6)

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



Date: **FEB 05 2013** Office: CALIFORNIA SERVICE CENTER

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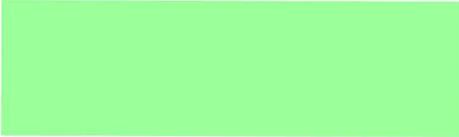


IN RE: Petitioner:
Beneficiary:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 alien with extraordinary ability in the arts under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i). The petitioner breeds and trains horses. It seeks to employ the beneficiary as an assistant horse trainer/rider for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary qualifies as 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), and failed to submit evidence to satisfy any of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which three must be met to establish eligibility. In addition, the director determined that the regulatory language precludes the consideration of comparable evidence under 8 C.F.R. § 214.2(o)(3)(iv)(C) in this case, as there is no indication that eligibility for O-1 classification in the beneficiary's occupation as an assistant horse trainer/rider cannot be established by submitting documentation relevant to at least three of the six criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). In fact, as indicated in the decision, the petitioner submitted evidence relating to three of the six criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). Further, the director found that the petitioner misclassified the beneficiary's claimed area of extraordinary ability as "arts" rather than "athletics."

On appeal, counsel for the petitioner asserts that the petitioner submitted evidence to satisfy at least three of the six evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). Counsel submits a brief and additional evidence in support of the appeal.

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.

Section 101(a)(46) of the Act states that the term "extraordinary ability" means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.

Pursuant to the definition at 8 C.F.R. § 214.2(o)(3)(ii) pertaining to aliens of extraordinary ability in the arts, "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)(iii) 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 (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 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).

A. *The Beneficiary's Eligibility under the Evidentiary Criteria*

In the present matter, the petitioner states that the evidence submitted in support of the petition establishes the beneficiary is renowned, leading and well-known in the arts. In denying the petition, the director determined that the evidence submitted does not meet any of the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). The AAO finds that the petitioner has failed to submit evidence that satisfies three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), and has not established 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 prominent, renowned, leading, or well-known in the field of arts as an assistant horse trainer/rider. 8 C.F.R. § 214.2(o)(3)(ii). Accordingly, for the reasons discussed below, the AAO finds that the director properly denied the petition.

Preliminary, the AAO emphasizes that the statute requires that the beneficiary seek entry into the United States "to continue work in the area of extraordinary ability." Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i) (2007). The director based her determination on a finding that the proffered position involves horse training, not competitive horse riding which is not the same area of expertise.¹ The AAO agrees that the evidence of record supports the director's determination. In this case, the petition lists the proffered position as an "assistant thoroughbred trainer/rider." In addition, the description of duties in the supplement to the petition clarifies that the beneficiary will not be riding horses in competition, but will be riding horses as part of her training duties "to exercise and condition them for competitive races." Further, the beneficiary's curriculum vitae (C.V.) indicates that all her previous employment has been as an exercise rider and not as a competitive horse rider. Therefore, the beneficiary's accomplishments as an assistant trainer/rider are measured by the results of the horses she assists in training.

¹ While acknowledging that the petitioner has filed this petition asserting that the beneficiary's area of extraordinary ability is in the arts (we have more fully discussed below the beneficiary's area of extraordinary ability), the AAO notes that generally competitive athletics and athletics instruction are not the same area of expertise and USCIS will not assume that an alien with extraordinary ability as an athlete has the same level of expertise as a coach or trainer in his or her sport.

As noted above, simply 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 appear to claim that the beneficiary qualifies for O-1 classification on the basis of her nomination for or receipt of such an award. As such, the petitioner has not established that the beneficiary has won a significant national or international award or prize in her field.

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 petitioner claims that the beneficiary meets the following criteria:²

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.

Counsel addresses this criterion on appeal, asserting that the petitioner has submitted evidence that the beneficiary has participated as a lead or starring participant in training the petitioner's racehorses for distinguished events at which the horses currently perform or will perform.

As evidence that the beneficiary has participated as a lead or starring participant, the petitioner lists as examples that the beneficiary "trained [REDACTED] at the Ladies' Classic . . . and performed services internationally at the 2011 Dubai International Racing Carnival, where [the beneficiary] was assistant trainer for [REDACTED]" The petitioner also refers to a March 2, 2012 five-year employment agreement between the petitioner and the beneficiary, previously submitted into the record. The employment agreement lists the beneficiary's duties as an assistant trainer/rider and states that the petitioner and the beneficiary agree that the beneficiary's services "are extraordinary, exceptional and unique." However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although the petitioner has submitted three brief articles regarding, respectively the racehorse [REDACTED] and events including the Ladies' Classic and the Dubai World Cup Carnival, none of the articles specifically mention the beneficiary by name. This

² The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

evidence fails to establish that the beneficiary performed services as a lead or starring participant in any production or event.

As evidence that the beneficiary has performed in productions or events that have a distinguished reputation, the petitioner states that the distinguished events are “the tracks at which the horses perform.” However, the petitioner must establish that the beneficiary has performed services as a lead or starring participant *in productions or events* which have a distinguished reputation. The petitioner has not submitted critical reviews, advertisements, publicity releases, publications or other evidence to establish that the events themselves have a distinguished reputation, as required pursuant to the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). As stated above, the petitioner refers to brief articles regarding the Ladies’ Classic and the Dubai World Cup Carnival. However, the publications do not establish the distinguished reputation of the events.

Further, in order to meet this criterion, the petitioner must establish that the beneficiary *will perform* services as a lead or starring participant in productions or events which have a distinguished reputation upon approval of the petition. The petitioner again refers to the employment agreement between the petitioner and the beneficiary which states the beneficiary shall perform the specified duties “at all racetracks where the racing stable assigned to him performs.” The petitioner also refers to a previously submitted listing of 2012 race dates, containing highlighted information which the petitioner asserts “shows the beneficiary is contracted to work at various locations,” including the racetracks [REDACTED].

[REDACTED]. However, the petitioner has not submitted critical reviews, advertisements, publicity releases, publications or other evidence to establish the identity of any upcoming events at which the beneficiary will perform, or to establish that the events themselves have a distinguished reputation, as required pursuant to the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). Therefore, the petitioner has offered no information regarding the beneficiary performing services as a leading or starring participant in any upcoming events or productions.

In sum, the petitioner has neither identified nor documented, through submission of the evidence prescribed by regulation, the beneficiary's previous or forthcoming lead or starring role in events with a distinguished reputation. The petitioner has not established that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

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 regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3) requires the petitioner to submit evidence that the beneficiary has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials.

Firstly, upon review the evidence submitted fails to demonstrate that the beneficiary performed a lead or critical role. With respect to the beneficiary's previous employment, the petitioner provided the beneficiary's C.V. and four testimonial letters.

[REDACTED] of [REDACTED] in Suffolk, England, states that the beneficiary worked for him from January 2000³ until at least November 23, 2002, the date of the letter, as a stable hand and work rider, and that her duties included “riding, caring for horses and mucking out.” He states that the beneficiary was later appointed pupil assistant and assigned additional responsibilities including feeding the horses in the absence of a head lad or assistant trainer.

[REDACTED] Head Lad to [REDACTED] in Suffolk, England, states that the beneficiary worked for the company from November 2003 until at least November 27, 2004, the date of the letter, as a rider and that the beneficiary is hard-working, reliable and conscientious.

[REDACTED] of [REDACTED] states he employed the beneficiary from December 2002 until April 2003 as a rider.⁴ He states that the beneficiary rides very well, and is polite and hard-working.

The petitioner [REDACTED] submitted a letter stating that the beneficiary has worked for him since 2005 as an assistant trainer. He states that 80% of his stable consists of Ex-European horses, for which he requires a person such as the beneficiary, who he states has “a lot of experience and knowledge of European racing and pedigrees . . . [and] training methods.” He explains that European horses are trained very differently from those in America. He states that European horses are trained for longer periods of time “on a variety of training grounds in a very tranquil setting.” He states that the beneficiary would be an invaluable asset to his business and “it would be impossible to find someone locally with her knowledge and experience.”

The petitioner has submitted additional documentation to establish that the beneficiary performed a lead or critical role. The petitioner submitted press releases from [REDACTED] [REDACTED] respectively, which mention that the beneficiary is the assistant trainer/exercise rider of the racehorses [REDACTED] and [REDACTED], and contain her brief statement regarding [REDACTED] prospects in the Godolphin Mile race in Dubai. The petitioner has also submitted a copy of California Horse Racing Board Rule 896, stating that an assistant trainer “shall be equally responsible with the employing trainer for the condition of the horses in their care.” The petitioner further submitted license statistics from the California Horse Racing Board indicating that there were 310 current assistant trainer licenses issued in 2010 and 2011.

In order to establish that the beneficiary performed a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of the beneficiary’s role within the entire organization or establishment and the reputation of the organization or establishment. The petition states that the petitioner currently employs 16 employees. However, the petitioner does not state whether it employs other assistant trainers/riders. There is no evidence demonstrating how the beneficiary's role as assistant trainer/rider differentiated her from others where she worked. For instance, the petitioner did not submit evidence such as an organizational chart which would demonstrate the beneficiary's position within the organization, or otherwise describe the hierarchy among the training staff.

³ The testimony of the witness is inconsistent with the beneficiary’s C.V. which indicates that the beneficiary worked for [REDACTED] beginning in January 2001.

⁴ The beneficiary’s resume also indicates that [REDACTED] was associated with [REDACTED] in Dubai.

Overall, the documentation submitted by the petitioner does not establish that the beneficiary, as an assistant trainer/rider, was responsible for the success or standing of the racing stables where she worked to a degree consistent with the meaning of "leading, starring or critical." While the AAO does not doubt that the beneficiary provided valuable services to the petitioner and her other previous employers, we concur with the director that the petitioner has failed to support the proposition that the beneficiary has performed a leading or critical role for those establishments.

Secondly, the petitioner has provided no independent evidence to establish that the beneficiary's previous employers, [REDACTED] in Kentucky, [REDACTED] in Florida, [REDACTED] in England, [REDACTED] in England, [REDACTED] stables in Dubai, or [REDACTED] of [REDACTED] in England have distinguished reputations, and the testimonial letters submitted do not sufficiently address the reputation of these organizations.

Thirdly, the petitioner has not provided evidence to establish that it has a distinguished reputation as a horse training stable. The petitioner's distinguished reputation must be evidenced by articles in newspapers, trade journals, publications, or testimonials. 8 C.F.R. § 214.2(o)(3)(iv)(B)(3). The petitioner references published materials from 2011 and 2012 regarding horses that it trains, including [REDACTED] as documentary evidence that would establish that it enjoys a distinguished reputation in the field of horse training. The petitioner also provided a listing from [REDACTED] of the petitioner's Breeders' Cup entries for 2011, [REDACTED] and [REDACTED]. The petitioner has further provided a 2012 biography for [REDACTED] from [REDACTED] indicating that he had seven [REDACTED] starts in the years 1998, 2001, 2002, 2005 and 2009, respectively, with no first, second or third-place wins and total Breeders' Cup earnings of [REDACTED]. The petitioner has provided a trainer-statistics profile page from [REDACTED] listing the beneficiary's 2012 and career (since 1996) thoroughbred racing summary, including the total number of starts, the respective number of first, second and third-place finishes and the petitioner's total earnings. However, the submitted documentation does not specifically address the issue of the petitioner's reputation in the field of horse training. The petitioner has also submitted several testimonial letters which do not the issue of the petitioner's reputation in the field of horse training.

Fourthly, the evidence submitted does not establish how the beneficiary *will perform* in a lead, starring or critical role within the petitioner's horse training company. As stated above, the petition states that the petitioner currently employs 16 employees. However, the petitioner does not state whether it employs other assistant trainers/riders. The petitioner has not articulated nor offered additional evidence that would distinguish the beneficiary's proposed role as leading, starring or critical among those it already employs.

Based on the foregoing, the AAO concurs with the director that the submitted evidence does not satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

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

The petitioner has submitted several testimonial letters in support of this criterion. As stated above, 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.

Upon review of the letters, the AAO finds 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.

[REDACTED] a professional, licensed thoroughbred trainer in Pasadena, California, states that he is familiar with the beneficiary's performance as an assistant trainer in the racetracks in southern California. He states that the beneficiary's international experience, strong work ethic and "the reputation she has built for herself" make her uniquely qualified to work in the United States as an assistant horse trainer.

[REDACTED] of Anaheim, California states that he is the owner of several racehorses which the petitioner is training. He states that the petitioner has previously trained many former English horses for him, and that the petitioner's knowledge of dealing with former English horses "is one of the major reasons that I use him as a trainer." He states, "[the beneficiary] would be a very important asset to [the petitioner's] team, as she has the specialized knowledge and experience to handle this type of horse."

[REDACTED] Chairman of the [REDACTED] states that the beneficiary is an excellent assistant trainer who has an outstanding record in horseracing. He states the beneficiary has worked with the petitioner who he states is a top horse trainer.

However, [REDACTED] do not specifically describe the beneficiary's specialized knowledge and experience in factual terms or set forth the manner in which they acquired such information.

In addition, the petitioner references all of the testimonial letters submitted as evidence under the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

Upon reviewing the evidence from experts in the field of horse training, we note that the majority of the letters submitted are from the beneficiary's former or current employers, and primarily discuss the beneficiary's innate talent, work ethic, and personal traits, rather than her *achievements* as an assistant trainer/rider. 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 Matter of Caron International*, 19 I&N Dec. 791, 795-96 (Comm. 1988); *see also Matter of V-K-*, 24 I&N Dec. at 500, n.2. The content of the experts' statements and how they became aware of the beneficiary's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of a nonimmigrant petition are of less weight than preexisting, independent evidence of recognition for achievements in the field.

Based on the foregoing discussion, the petitioner has not submitted evidence to meet the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5).

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

The sixth and final criterion requires the petitioner to submit evidence that the beneficiary has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence. 8 C.F.R. § 214.2(o)(3)(iv)(B)(6). The petitioner indicated on Form I-129 that the proffered job is a full-time position and that beneficiary will receive an annual salary of approximately \$35,000. The petitioner submitted a contract which did not provide the beneficiary's wages. The petitioner did not submit any evidence to establish that the beneficiary commanded a high salary in any previous employment.

On appeal, and in response to the director's request for additional evidence, counsel states that the beneficiary's annual compensation *plus* "winnings" would give the beneficiary a weekly wage of \$1,000, or an annual salary of \$52,000. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner provided no explanation regarding the change in the terms of employment stated on Form I-129. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

As evidence in comparing the proffered salary to that offered to other assistant trainers/riders in the United State, on appeal the petitioner submitted salary information for Animal Care and Service Workers from the U.S. Bureau of Labor Statistics *Occupational Outlook Handbook, 2012-13 Edition*. According to this information, in May 2010 the highest 10 percent of animal trainers nationwide earned more than \$53,580. The median annual wage of animal trainers was \$26,580 for the same period, and the lowest 10 percent earned less than \$17,240. In addition, the petitioner submitted salary information for two assistant horse trainer positions in Florida, each paying an annual salary of \$37,000.

As noted by the director, the petitioner did not establish through the submission of objective evidence that the beneficiary's offered annual salary of \$35,000 meets the criteria of a "high salary" in her field.

Accordingly, the petitioner has not established that the beneficiary meets the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iv)(B)(6).

B. Comparable Evidence

We further acknowledge that the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C) provides “[i]f the criteria in paragraph (o)(3)(iv) of the section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.” It is clear from the use of the word “must” in 8 C.F.R. § 214.2(o)(3)(iv) that the rule, not the exception, is that the petitioner is required to submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner’s burden to explain why the regulatory criteria are not readily applicable to the beneficiary's occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) through (6).

The petitioner claimed eligibility under the "comparable evidence" regulation in its response to the director's request for evidence, in addition to claiming eligibility under the criteria at 8 C.F.R. §§ 214.2(o)(3)(iv)(B)(3), (5) and (6).⁵

Nonetheless, the regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for O-1 classification in the beneficiary's occupation as an assistant horse trainer/rider cannot be established by submitting documentation relevant to at least three of the six criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). In fact, as indicated in this decision, counsel mentions evidence in his brief that specifically addresses four of the six criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the beneficiary's occupation. Moreover, although the petitioner failed to claim any additional criteria, we find it reasonable to believe that an assistant horse trainer/rider could, for example, have achieved national or international recognition for achievements or have a record of major commercial or critically acclaimed successes.

Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C) does not allow for the submission of comparable evidence.

C. 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 has not established eligibility under any of the eligibility criteria, of which three are required under the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B).

Notwithstanding the above, a final merits determination considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) that the beneficiary has a high level of achievement

⁵The AAO notes that the petitioner did not specifically claim eligibility under the criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) in response to the director's RFE, although as stated above counsel addresses this criterion on appeal, asserting that the petitioner previously submitted evidence to fulfill this evidentiary requirement.

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)(iii). *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 has a high level of achievement in the arts evidenced by recognition substantially above what is ordinary encountered or that the beneficiary is prominent to the extent that she could be considered renowned, leading or well-known in the field of horse training. Therefore, the director denied the petition.

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 documentation relating to the beneficiary's education, employment history, and achievements. The submitted evidence is not indicative of the beneficiary's prominence in the field and there is no indication that her individual achievements have been recognized to the extent that she is leading, renowned or well-known in her field.

This classification focuses on the beneficiary's individual achievements and recognition within her field. The petitioner has provided little evidence of such recognition beyond providing testimonials from the beneficiary's prior employers and colleagues and has failed to establish that the beneficiary has already risen to the level where she is performing lead or critical roles for organizations or productions that have a distinguished reputation.

The AAO notes 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. Therefore, it is significant that the petitioner has not submitted any evidence that the beneficiary's name has ever appeared in any publication based on her reputation or achievements. Absent evidence that the regulatory criteria are not applicable to the beneficiary's occupation, pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(C), the petitioner must submit some published materials about the beneficiary in order to establish her eligibility for this classification. It is impossible to include the beneficiary among the group of fashion designers recognized in the field as leading, renowned or well known if the petitioner does not establish that she has received some publicity based on her reputation or achievements.

Notwithstanding the several opinions in the record, the fact remains that the evidence consists almost entirely of testimonial evidence. Furthermore, it must be emphasized 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.⁶ Unusual in its specificity, section 101(a)(15)(O)(i) of the Act clearly

⁶Letters 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").

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, as noted above, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* Here, all of the persons providing testimonial evidence are personally acquainted with the beneficiary, and have worked as her employers or colleagues. Again, when written by independent experts, testimonials solicited by an alien in support of a nonimmigrant petition are of less weight than preexisting, independent evidence of recognition in the field.

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 horse trainer who has achieved a level of distinction to the extent that she is considered renowned, leading, or well-known in the field. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary relies primarily on the praise of her employers and colleagues. Nothing in the decision of the AAO should be seen as an attempt to minimize the accomplishments or obvious talent of the beneficiary or as a comment on the criteria used by the petitioner to select persons for positions. Indeed, as many of the testimonial letters make clear, the beneficiary shows great promise and potential in the field of horse training and appears to be on a path that could lead her to the type of prominence required for this visa classification.

While the evidence may distinguish the beneficiary from other young horse trainers with less formal training and innate talent, the petitioner must establish that the beneficiary is recognized based on her own reputation as leading, renowned, or well-known compared to other professional assistant horse trainers.

The evidence is not persuasive that the petitioner's achievements set her significantly above almost all others in her field at a national or international level. Accordingly, the appeal will be dismissed.

D. The Beneficiary's Area of Extraordinarily Ability

The petitioner sought to classify the beneficiary as an alien of extraordinary ability in the arts, and the director applied the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv). The petitioner bears the burden of proof with respect to the specific visa classification that they request on the Form I-129 and cannot be required to meet the burden of proof for an alternative classification. USCIS will only consider the visa classification that the petitioner annotates on the petition, and has no authority to consider other classifications in the alternative.⁷

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).

⁷ The Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

However, we agree with the director's statement that, rather than seek to classify an assistant horse trainer/rider as an alien of extraordinary ability in the arts, the petitioner should have sought classification of the beneficiary as an alien of extraordinary ability in athletics.

For purposes of the O-1 classification, the applicable definition of "arts" at 8 C.F.R. § 214.2(o)(3)(ii) is as follows:

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts. Aliens engaged in the field of arts include not only the principal creators and performers but other essential persons such as, but not limited to, directors, set designers, lighting designers, sound designers, choreographers, choreologists, conductors, orchestrators, coaches, arrangers, musical supervisors, costume designers, makeup artists, flight masters, stage technicians and *animal trainers*.

Emphasis added.

The AAO can find no basis for including an assistant trainer/rider of thoroughbred horses for all-stake horse-racing among this group of creative workers, even though we acknowledge that the beneficiary's work requires some degree of creativity. The beneficiary is claimed to be responsible for assisting in training, conditioning and developing thoroughbred racing horses for racing events. The petitioner's employment agreement with the beneficiary lists the beneficiary's responsibilities as requiring such tasks as employing individualized training methods for each horse, instructing jockeys on the proper handling of individual horses, riding the horses for exercising and conditioning, substituting for the trainer when necessary, and other athletics-related matters. We agree with the director that while certain types of animal training, such as animal acts and circuses, are among this group of creative workers, the beneficiary's field is properly classified as "athletics."⁸

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

Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 FR 41818, 41819 (August 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts).

In a policy memorandum, the legacy Immigration and Naturalization Service (INS) emphasized:

⁸ The director also noted that the petitioner had previously successfully petitioned for the beneficiary in the nonimmigrant P-1S classification, as essential support personnel for a P-1 *athlete*.

It must be remembered that the standards for O-1 aliens in the fields of business, education, athletics, and the sciences are extremely high. The O-1 classification should be reserved only for those aliens who have reached the very top of their occupation or profession. The O-1 classification is substantially higher than the old H-1B prominent standard. Officers involved in the adjudication of these petitions should not "water down" the classification by approving O-1 petitions for prominent aliens.

Memorandum, Lawrence Weinig, Acting Asst. Comm'r., INS, "Policy Guidelines for the Adjudication of O and P Petitions" (June 25, 1992).

While the director determined that the beneficiary does not meet the lower standard of "distinction" applicable to aliens of extraordinary ability in the arts, the petitioner has also not submitted evidence that would satisfy the regulatory criteria applicable to aliens of extraordinary ability in athletics at 8 C.F.R. § 214.2(o)(3)(iii)(A) or (B), nor has it established through submission of extensive evidence that the beneficiary has a demonstrated record of sustained national or international acclaim as an assistant horse trainer/rider, or that she is one of the small percentage who have arisen to the very top of her field. 8 C.F.R. § 214.2(3)(ii). For this additional reason, the petition cannot be approved.

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 (9th 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). For this additional reason, the petition cannot be approved.

II. Conclusion

Review of the record does not establish that the beneficiary has distinguished herself to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence is not persuasive that the petitioner's achievements set her significantly above almost all others in her field at a national or international level. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of her field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary's achievements have not yet risen to this level.

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 she shows 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. 2d at 1043.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.