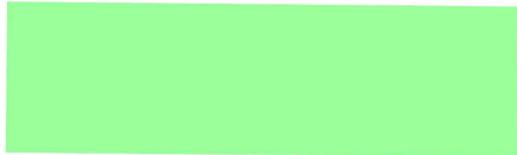
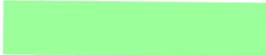


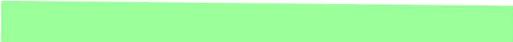


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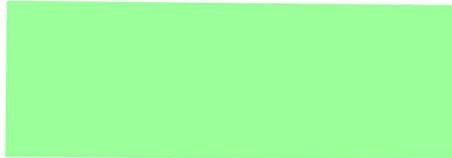


Date: **OCT 02 2013** Office: VERMONT SERVICE CENTER FILE: 

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 (AAO) in your case.

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner subsequently filed a motion to reopen and reconsider, that the director erroneously rejected as untimely filed. The petitioner ultimately filed an untimely appeal that is now before the Administrative Appeals Office (AAO) for review. An appeal which is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). However, as a matter of administrative discretion, the AAO will consider the merits of the appeal on certification.¹

The petitioner, self-described as a marketing, public relations and design services company, 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 with extraordinary ability in the arts. The petitioner seeks to employ the beneficiary in the position of artist/promotions coordinator for a period of three years.²

The director denied the petition, finding that the petitioner had 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), or any of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the beneficiary has extraordinary ability in the arts. Counsel for the petitioner asserts that the evidence submitted meets three of the evidentiary requirements set forth at 8 C.F.R. 214.2(o)(3)(iv)(B). Counsel has submitted a brief and copies of previously submitted evidence.

Upon review, the AAO concurs with the director's decision that the petitioner failed to establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), or any of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B).

¹ Like any U.S. Citizenship and Immigration Services (USCIS) office, the AAO may avail itself of the certification process. See 8 C.F.R. § 103.4(a). As a matter of administrative discretion, the AAO may certify a decision to itself for review. The AAO limits this practice to cases involving exceptional circumstances; it "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations" *Matter of Jean*, 23 I&N Dec. 373, 380 n 9 (AG 2002). The present case, involving the director's erroneous rejection of the motion to reopen and reconsider, warrants such review. The AAO is suspending the 30-day briefing period and will instead substitute the petitioner's brief in support of the motion for the petitioner's appellate brief, which briefed only the director's erroneous rejection of the motion. See 8 C.F.R. § 103.4(a)(3).

² According to the Form I-129, the petitioner indicated that the beneficiary will be employed as an "Artist." On the petitioner's job offer letter to the beneficiary dated May 23, 2012, the petitioner indicated that the beneficiary will be employed as an "Artist/Promotions Coordinator."

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that the beneficiary will be coming to the United States to continue work in the area of extraordinary ability. Section 101(a)(15)(O)(i) of the Act; 8 C.F.R. § 214.2(o)(3)(i).

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).

I. The Law

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

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

- (i) *General.* Extraordinary ability in the sciences, arts, education, business, or athletics, or extraordinary achievement in the case of an alien in the motion pictures or television industry, must be established for an individual alien. An O-1 petition must be accompanied by evidence that the work which the alien is coming to the United States to continue in the area of extraordinary ability, and that the alien meets the criteria in paragraph (o)(3)(iii) or (iv) of this section.

- (ii) *Definitions.* As used in this paragraph, the term:

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

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

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

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

- (A) Evidence that the alien has been nominated for, or the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or
- (B) At least three of the following forms of documentation:
 - (1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;
 - (2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;
 - (3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;
 - (4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;
 - (5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or
 - (6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or
- (C) If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

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

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

- (A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.
- (B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

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

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 580 F.3d 1030 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). Similar to the regulations governing this nonimmigrant classification, the regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. *Cf.* 8 C.F.R. § 204.5(h)(3).

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the *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 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

The court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet two of the criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

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. While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning persuasive to the classification sought in this matter.

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).

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In this matter, the AAO has reviewed the evidence under the plain language requirements of each criterion claimed. As 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), the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence.

II. Discussion

The primary issue to be addressed is whether the petitioner submitted evidence to establish that the beneficiary satisfies the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), or at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B).

The beneficiary, an artist, is a native and citizen of Haiti who was last admitted to the United States on an F-1 non-immigrant student visa. The petitioner, which describes itself as a company that provides “marketing, public relations and design services relating to the art and design community worldwide,” filed the petition on July 23, 2012. The director subsequently issued a request for additional evidence (“RFE”), to which the petitioner responded.

A. *The Evidentiary Criteria*

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

Therefore, 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). Counsel indicates that the beneficiary satisfies the criteria at 8 C.F.R. §§ 214.2(o)(3)(iv)(B)(1), (2), (5). The remaining criteria will not be discussed.

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

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

The director determined, and the AAO agrees, that the petitioner did not provide sufficient evidence to establish that the beneficiary has and will perform services as a lead or starring participant in productions or events which have a distinguished reputation.

Counsel asserts the beneficiary meets this criterion because: the beneficiary has played a major role in the growth and subsequent recognition of the [REDACTED] in Guangzhou, China; the beneficiary had a solo exhibition for [REDACTED] in Brooklyn, New York; and the beneficiary's exceptional work has been featured in numerous shows internationally in Europe, Asia, and America.

The petitioner provided a letter, dated August 8, 2012 from [REDACTED] located in Hong Kong, written and signed by an unidentified person. This letter states:

I'm writing to confirm that [the beneficiary] played a major role in the gallery's acceptance of the trophy of the best gallery from [REDACTED] fair from 9 to 13 December 2010. His unique and excellent style as a young painter helped us achieve the accomplishment. His artworks captivated viewers and made [REDACTED] one of the best galleries in the international art festival. [The beneficiary] was studying in the U.S. during the festival but due to the strong presence of [the beneficiary's] artwork, the gallery was awarded a trophy which I was very proud to accept.

This letter, alone, is insufficient to establish that the beneficiary had a lead or starring role in an event or production with a distinguished reputation. As stated above, the plain language of the criterion requires the petitioner to submit evidence in the form of critical reviews, advertisements, publicity releases, publications, contracts, or endorsements. The petitioner submitted no such evidence to corroborate the claim that the beneficiary had a lead or starring role in the exhibition; to the contrary, other documents the petitioner submitted from [REDACTED] indicate that the beneficiary's work was exhibited among several other artists' work. Moreover, the petitioner submitted no evidence pertaining to the reputation of the "[REDACTED] fair" or "international art festival" referenced in the above letter.

The petitioner submitted evidence that the beneficiary had a solo exhibition at [REDACTED] in New York in the form of the gallery's advertisement and three pictures from the exhibit. While the petitioner's evidence establishes that the beneficiary had the lead or starring role in this production or event, the petitioner submitted no evidence pertaining to the reputation of the exhibition held by [REDACTED]

The petitioner submitted copies of the front pages of brochures/flyers and the accompanying page(s) featuring the beneficiary's work. The petitioner claims that these documents demonstrate "the exceptional work of the Beneficiary in numerous art shows of repute internationally covering Europe, Asia and America." Specifically, the petitioner submitted the front page from the flyer for the exhibition [REDACTED] featuring the beneficiary's work among 8 other artists' work in the Dominican Republic. The petitioner submitted the front pages from two exhibitions held at [REDACTED] showing the beneficiary's work exhibited among several other artists' work. The petitioner submitted the front page from the exhibition flyer "[REDACTED]" showing one of the beneficiary's pieces exhibited among an unknown number of other pieces and artists. The petitioner submitted the front page from the exhibition flyer "2011 Art Shanghai," showing one of the beneficiary's pieces exhibited among an unknown number of other pieces and artists. The petitioner submitted no evidence to establish the beneficiary's actual role within the above exhibitions; to the contrary, most of the documents indicate that the beneficiary's work was exhibited among many other artists' works. Therefore, the evidence submitted does not establish the beneficiary performed

services as a lead or starring participant in the exhibitions. In addition, the petitioner submitted no documentation to establish the reputation of the above events or productions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

In addition, counsel asserts that the beneficiary meets this criterion based upon his academic honors for his talent, specifically his full scholarship to [REDACTED] worth approximately \$80,000. The beneficiary's full scholarship does not constitute evidence that the beneficiary has performed as a lead in an event or production with a distinguished reputation. The petitioner has not identified what event or production it claims the beneficiary has lead in respect to the [REDACTED]. The fact that the [REDACTED] is a distinguished organization, and that the beneficiary is a student there, does not establish that the beneficiary has performed as a lead in an event or production with a distinguished reputation.

Further, in order to satisfy this criterion, the petitioner must also establish that the beneficiary "will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements."

Counsel for the petitioner asserts that the beneficiary meets this criterion because the beneficiary "will be playing a critical role in the growth of the organization representing the Petitioner in art festivals, gallery openings[,] conferences and trade shows."

As evidence of the beneficiary's "employment contract" with the petitioner, the petitioner submitted its "Artist-Agent Agreement" with the beneficiary, in which the petitioner ("agent") agreed to represent the beneficiary ("artist") in marketing the beneficiary's work in exhibit galleries and printed publications and with art collectors and artist residencies. Clause 13 of the agreement states: "Independent Contractor status. Both parties agree that the Agent is acting as an independent contractor. This Agreement is not an employment contract, nor does it constitute a joint venture or partnership between the Artist and Agent." The petitioner failed to explain how this document establishes that the beneficiary will have a leading, critical or starring role in the petitioner's productions or events.

With the initial petition, the petitioner submitted a letter addressed to the USCIS describing the petitioner and the beneficiary's qualifications, and stating that the beneficiary "will be the main artist being promoted by [the petitioner]." This letter is not a contract or other acceptable evidence of the beneficiary's lead or starring role in events or productions as required by the plain language of this criterion.

With the initial petition, the petitioner submitted its job offer letter to the beneficiary, dated May 23, 2012, listing the following duties for the beneficiary: (1) establishing new contacts with young and talented artists and designers to develop work relationships with [the petitioner]; (2) research and provide up to date information on new and upcoming art and design events for publication on the website; and (3) provide general administrative work. Based on the duties described in the job offer letter, the petitioner failed to establish the beneficiary will have a leading, critical or starring role in productions or events on behalf of the petitioner. In particular, the letter states that the beneficiary will be providing "general administrative work," as well as networking and research duties for the petitioner. These job duties are not indicative of or consistent with the petitioner's claim that the

beneficiary will perform services as a lead or starring participant in productions or events on behalf of the petitioner.

In response to the RFE, the petitioner submitted a letter attesting that the beneficiary will have the following duties:

[The beneficiary] will be in charge of promotion, exhibits and developing an international art network for [the petitioner]. He will be responsible for spearheading exhibitions, workshops, networking with artists all over the world and developing new work relationships with the international community. He will be playing an important role in our organization's growth and [sic] advancement by using his excellent skills as a fine artist to promote a unique dialogue with other artists globally.

The petitioner's supplementary letter does not establish that the beneficiary will perform services as a lead or starring participant as an artist. Again, this letter is not a contract or other acceptable evidence of the beneficiary's lead or starring role in events or productions as required by the plain language of this criterion. In addition, it appears that the beneficiary will primarily be carrying out promotional and networking duties on behalf of the petitioner. Nothing in the language of the letter indicates that the artwork being promoted and exhibited by the petitioner will be the beneficiary's. Rather, from the language discussing the beneficiary's duties, "networking with artists all over the world and developing new work relationships with the international community," it appears that the promotional services the beneficiary will provide on behalf of the petitioner will be for other artists' work.

On motion, the petitioner presented a second job offer letter to the beneficiary, also dated May 23, 2012. This second version of the petitioner's job offer letter states that the beneficiary will have the following responsibilities: (1) establishing new contacts with young and talented artists and designers to develop work relationships with [the petitioner]; (2) research and provide up to date information on new and upcoming art and design events for publication on the website; and (3) attend and represent [the petitioner] in art festivals, gallery openings, conferences and trade shows." Of particular significance, the second job offer letter deletes the beneficiary's general administrative duties and replaces them with the duties of attending and representing the petitioner in events. However, this document will not be considered. The petitioner cannot offer a new position to the beneficiary, or materially change the position's associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits eligibility for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).³

Notwithstanding the above, the petitioner submitted no evidence to establish that the beneficiary will perform services as a lead or starring participant as an artist, or that the productions or events for which the beneficiary would perform on behalf of the petitioner have a distinguished reputation. Again, going on record without

³ Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Ibid.*

Based on the foregoing discussion, we concur with the director's conclusion that the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) has not been met.

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.

To qualify under this criterion, the publication should have significant national or international distribution. An alien would not earn recognition for achievements at the national or international level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.⁴

Counsel for the petitioner asserts that the beneficiary meets this criterion because the beneficiary has had “immense success internationally and his works have been featured in prominent art magazines in Haiti, China, Switzerland, New York [and] Dominican Republic. The petitioner submitted the following evidence pertaining to this criterion:

1. The front cover of the magazine [REDACTED] featuring the exhibit [REDACTED] in which the beneficiary’s work was included;
2. The front cover of the magazine [REDACTED] featuring a variety of topics including [REDACTED] and a single page featuring the beneficiary’s work;
3. The front cover of [REDACTED] and an article about the beneficiary and his work;
4. The front cover of the magazine [REDACTED] and an article about the beneficiary and his work;
5. An article about fourteen Dominican and Haitian artists including the beneficiary participating in an art show, published by the Dominican Newspaper [REDACTED];
6. An article about the first [REDACTED] in which the beneficiary’s work was exhibited among approximately 20 other artists’ work, published by the Dominican Newspaper [REDACTED];
7. An article about the beneficiary’s life and his work, published in digital newspapers [REDACTED] and [REDACTED] in the Dominican Republic;
8. An article about the beneficiary’s life and work, published by the magazine [REDACTED] in the Dominican Republic;
9. An online article about a [REDACTED] sponsored by the [REDACTED], featuring the work of several artists from Haiti and Dominican Republic including the beneficiary;

⁴ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

(b)(6)

10. Snapshots of the beneficiary's work on the following three websites: [REDACTED] the petitioner's website, and the beneficiary's personal website;
11. Illustrations the beneficiary made for the Spanish magazine [REDACTED] for the poems of [REDACTED]
12. Selection of the beneficiary as [REDACTED] for the weekly show [REDACTED] and [REDACTED]
13. Screenshot of the website for the [REDACTED] featuring one of the beneficiary's pieces among an unknown number of other pieces and artists;

The petitioner failed to establish that any of the above publications can be considered "a major newspaper, trade journal or magazine," as required by the regulations. The petitioner failed to provide any information as to the circulation or viewership of the above publications, so the AAO cannot discern whether they are major publications, as required by the regulation. The petitioner indicated that [REDACTED] belongs to the "prestigious" Dominican newspaper [REDACTED]. However, the record contains no evidence (such as objective circulation information or internet readership statistics from an independent source) showing the distribution or readership of any of these publications relative to other print or online media to demonstrate that these publications can be considered "major" newspapers or magazines.

In addition, the articles that briefly mention the beneficiary as one of several other artists being exhibited at a particular show do not constitute articles "about" the beneficiary and do not recognize the beneficiary's achievements in the field of art. Rather, these articles are mainly about the particular exhibition or event, of which the beneficiary is a participant. Similarly, the magazines that show the beneficiary's work as illustrations to poems are not publications "about" the beneficiary. These documents do not meet the plain language of the regulations requiring that the published materials be by or "about" the beneficiary.

Based on the foregoing discussion, we concur with the director's conclusion that the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2) has not been met.

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.⁵

The petitioner has submitted evidence in the form of testimonial letters in support of this criterion, from individuals whom the petitioner claims are, "world renowned experts in the field."

The petitioner submitted a letter from [REDACTED], the gallery owner of [REDACTED] which states in pertinent part:

I was introduced to [the beneficiary] through one of my featured artist's [sic] [REDACTED] and was very impressed by his works. I immediately gave him a solo show entitled "[REDACTED]"

⁵ The AAO will withdraw the director's comment that the petitioner does not claim to meet this criterion, found in 8 C.F.R. § 214.2(o)(3)(iv)(B)(5). The petitioner specifically claimed to meet this criterion in its response to the RFE.

on May 25, 2012 that had a magnificent turnout. Over time he had become a very powerful element to this gallery as well as the community, inspiring the youth of this neighborhood to transcend pass there [sic] own abilities through our youth empowerment art workshop entitled [REDACTED]

His enthusiasm, diligence, and overall demeanor make him a valuable asset to the art community.

The petitioner submitted a letter from [REDACTED] President of [REDACTED] which states:

I had the pleasure of meeting [the beneficiary] two years ago as I was interviewing artists for a specific cause. As I reviewed his portfolio I was struck by his extraordinary talent and requested that he work with me on several projects. I found him completely reliable and responsible and a professional artist in every sense of the word. He completed two outstanding oil paintings and his unique gift has significantly enhanced the space it occupies. He has also worked with a dear friend in London, who is a professional artist, and she was overcome with admiration as she had the privilege of seeing his remarkable work.

I recommend without hesitation that he be granted the opportunity to continue his outstanding work here in the United States.

The petitioner submitted a letter from [REDACTED] Provost, [REDACTED], stating:

This is to confirm that [the beneficiary] has been an exceptional student of Illustration Design. Due to his unique artistic style he secured full scholarship at the prestigious [REDACTED]. His uniqueness lies in the combination of tremendous technical skills combined with a unique aesthetic voice and cross cultural artistic perspective.

We are very pleased to have been a part of his extraordinary journey and we wish him all the best.

The petitioner submitted a letter from [REDACTED] an artist in New York City, stating in pertinent part:

I was immediately impressed by [the beneficiary's] extraordinary talent. He has a passionate interest in learning and expanding his knowledge of art and printmaking. His accomplishments already include a prestigious full scholarship from [REDACTED] and several International Art Fairs and commissions in Asia. As his work shows, he is an artist of great sensibility and set for continued growth in the urban environment of New York City.

The petitioner submitted a letter from Christopher Myers, Writer and Artist, who was also the beneficiary's professor in the Illustration Department. Mr. Myers states in pertinent part:

. . . The work of an illustrator is a mixture of initiative and creativity which [the beneficiary] demonstrates exceedingly. While some students are content to simply fulfill assignments, [the

beneficiary] was hard at work selling illustrations to various magazines and publications. His style and the diversity of his influences, both cultural and intellectual, allow him to work in many different artistic fields, and bring to that work a deep rooted sensitivity. He is much more than a very good draughtsman, he is busy braiding together various cultural threads to make a portrait of the Americas in general. [The beneficiary] speaks many languages, and while Spanish, French, and English are the most obvious, he also speaks visual languages such as journalistic, editorial, and documentary. He has a very high ability to process quickly information's [sic] and apply them during his creative process.

I am convinced that [the beneficiary] will make a very significant input into the art field and on the world at large.

While the AAO recognizes that the individuals who provided the testimonial letters hold a very high opinion of the beneficiary's talent as an artist, the submitted testimonials do not satisfy the plain language of the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5). None of the authors of the testimonials clearly attest to their knowledge of whether the beneficiary has received significant recognition for his achievements. Rather, the authors describe their working experience with the beneficiary and opine that the beneficiary is a very talented artist, without specifically addressing his achievements or recognition in the field. Moreover, most of the authors of the testimonials do not clearly indicate their authority and expertise in the field of art. Other than for [REDACTED] the petitioner failed to provide any evidence to corroborate the statement that the above individuals are "world renowned experts in the field." Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the experts' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of an artist whose achievements have received "significant recognition."

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

Summary

In this case, we concur with the director's determination that the petitioner has failed to demonstrate the beneficiary's receipt of a major, internationally recognized award, or that he meets at least three of the six categories of evidence that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability in the arts. 8 C.F.R. §§ 214.2(o)(3)(iv)(A) and (B).

B. Comparable Evidence

Although the petitioner has not explicitly claimed eligibility under the “comparable evidence” regulation, the petitioner asserts that the beneficiary meets the following criterion: “Citations in professional publications, written by others about the individual’s work in the field.” Since this is not one of the six qualifying criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B) the AAO will evaluate this evidence under the “comparable evidence” regulation set forth at 8 C.F.R. § 214.2(o)(3)(iv)(C). Upon review of the record the AAO finds insufficient evidence to establish that the regulatory criteria are not readily applicable to the beneficiary’s occupation.

The regulation at 8 C.F.R. § 214.2(o)(3)(iv) provides that an alien of extraordinary ability in the arts must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of receipt of a major internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(A), or by submitting evidence to satisfy at least three of the six forms of documentation set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). 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 claims that the beneficiary “has had immense success internationally and has received acclaim from renowned art critics about his exceptional talent.” As evidence of this, the petitioner submitted three articles about the beneficiary.

The first article was written by the [REDACTED] which the beneficiary attended from 2009 to 2011, published in [REDACTED]. This publication is self-characterized as a “community internet newspaper.” This article briefly discusses the beneficiary’s life in general, including his upbringing in Haiti, his move to the Dominican Republic, his academic scholarships, his introduction to a French art entrepreneur in China, [REDACTED], and the beneficiary’s commissioned works in [REDACTED]’s Hong Kong and Beijing galleries. This article is mainly about the beneficiary’s life in general, and the talent he possesses. It does not clearly describe the beneficiary’s achievements or recognition in the field. Thus, this document fails to establish the beneficiary’s eligibility.

The petitioner submitted an article published by [REDACTED]. The author of this article describes how he or she immediately fell in love with the beneficiary’s artwork, and then asked the beneficiary to identify the Chinese painting genre that he liked the best. The author then describes the beneficiary’s answer to the question, the author’s disappointment that the beneficiary did not point to a “shan shui” painting, and the author’s reflections on interpersonal communication among different nationalities, race, and cultures through arts. The author states that “we, as Chinese, could also apprehend the intended beauty within painting of [the beneficiary], a foreign painter,” and concludes Chinese “shan shui” paintings are similar to Western impressionist paintings even though they differ in form. This article does not clearly describe the beneficiary’s achievements or recognition in the field. Thus, this document fails to establish the beneficiary’s eligibility.

In addition, the petitioner submitted an article published by [REDACTED] magazine (Switzerland). The author of this article describes the beneficiary's life in general and analogizes his life to the painter in [REDACTED]. The rest of this article is an interview between the author and the beneficiary regarding the beneficiary's personal interests and his artwork in general, such as what his themes are, why the color red is dominant in his paintings, what materials he works with, and the roles of an artist. This article is mainly about the beneficiary's life and artwork in general. It does not clearly describe the beneficiary's achievements or recognition in the field. Thus, this document fails to establish the beneficiary's eligibility.

Upon review we conclude that 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 artist 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, the petitioner specifically indicates that it is submitting evidence relating to three 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. Where an alien is simply unable to meet or submit documentary evidence meeting 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.

Based on the foregoing, the petitioner has not submitted evidence that satisfies the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(C).

III. Continue work in the area of extraordinary ability

This petition, filed on July 23, 2012, seeks to classify the beneficiary as an alien with extraordinary ability in the arts, through his achievements as an artist. The statute and regulations require that the beneficiary seek to continue work in his area of extraordinary ability in the United States. *See* section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i); 8 C.F.R. § 214.2(o)(3)(i). Beyond the decision of the director, the record does not establish that the beneficiary intends to continue to work as an artist in the United States. In particular, the petitioner's initial job offer letter to the beneficiary lists his primary duties as networking, researching, and administrative duties; according to Form I-129, the petitioner indicates that the beneficiary's position will be a full-time position. The petitioner's supplemental letter indicates that the beneficiary will be in charge of promotional duties on behalf of the petitioner. The petitioner submitted no credible evidence to indicate that the beneficiary's primary job duties will be those of an artist, which typically involve creating original works of art for sale and/or exhibition.⁶ The fact that the beneficiary and the petitioner have entered into an "Artist-Agent Agreement" does not establish that the beneficiary will spend the majority of his time creating art. Upon review, the petitioner submitted insufficient evidence to establish that the beneficiary will be coming to the United States to continue working as an artist. This constitutes an additional basis of ineligibility.

IV. Conclusion

⁶ *See* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Craft and Fine Artists. Available at: <http://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm> (accessed August 19, 2013) (stating that fine artists, including painters, sculptors, and illustrators, create original works of art).

The documentation submitted in support of a claim of extraordinary ability in the arts must clearly establish that the beneficiary is prominent to the extent that he could be considered renowned, leading or well-known in his field.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a consideration of the evidence in the context of a final merits determination. However, as discussed above, the petitioner failed to establish eligibility under any of the criteria found under the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B). The AAO will not conduct a final merits determination.

For the above-stated reasons, the petitioner has not established the beneficiary's eligibility pursuant to the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), and the petition may not be approved.⁷

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The decision of the director is affirmed. The petition is denied.

⁷ The AAO maintains *de novo* review. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding on motion or as a result of litigation, the AAO maintains the jurisdiction to conduct a final merits determination as the official who made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* Section 103(a)(1) of the Act; Section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii)(2003); *Matter of Aurelio*, 19 I & N Dec. 458, 460 (BIA 1987)(holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).