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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: APR 0 2 2014 Office: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

APPLICATION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A).

ON BEHALF OF PETITIONER:

[redacted]

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, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in the arts, specifically as an actor, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserts that the evidence of the petitioner's achievements establishes him as an alien of extraordinary ability. Counsel contends that the director's interpretation and application of the relevant statutes and regulations was inappropriately stringent.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals

seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

On appeal, counsel relies on two district court decisions for the general premises that the extraordinary ability classification does not require "superstar" status and that USCIS should not apply too stringent a standard. *See Muni v. INS,* 891 F. Supp. 440, 446 (N.D. Ill. 1995); *Buletini v. INS,* 869 F. Supp. 1222 (E.D Mich. 1994).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

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

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.* The cases counsel cites on appeal are consistent with this approach. *See Muni v. INS,* 891 F. Supp. at 445-46 (holding in a separate totality of the evidence section that the satisfaction of the three-category production requirement does not mandate a finding that the petitioner is eligible); *Buletini*, 860 F. Supp. at 1234 (holding that meeting three criteria is sufficient to establish eligibility unless the agency sets forth specific and substantiated reasons otherwise).

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[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

II. ANALYSIS

A. Evidentiary Criteria[2]

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields. 8 C.F.R. § 204.5(h)(3)(ii).

The director determined that the petitioner's enrollment and subsequent graduation from does not meet the requirements of this criterion. A school of the arts is an institution for training and educating artists, not an association comprised of members. Head of the Theater Faculty of attests to the selectivity for gaining admission into and for graduating from the school:

> There are hundreds of actors who participate in our auditions yearly, striving to be accepted. The auditions are taking place in 3 rounds for 2 weeks. Out of hundreds we only accept a select few (maximum of 15) to be part of the acting education.
>
> The Faculty's program is a 4 year course and at the end of the first year the selected students are being evaluated again to see who is capable to continue for the next 3 years. At the end of the 4th year, the student is evaluated by the board of the Faculty and an industry professional before being able to graduate.

The admission process, although stringent, relies upon auditions to assess potential talent and does not consider outstanding achievement in the petitioner's field as a criterion for selection. Upon graduation from the program, issues a certificate which affirms the petitioner's successful completion of the school's educational curriculum and does not confer a separate membership to graduates. Admission to and graduation from a school, even a competitive one, is not a qualifying membership. *See Kazarian,* 596 F.3d at 1221 (citing *Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir. 2008) for the proposition that USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5). Notably, a degree is a criterion for aliens of exceptional ability, a lesser classification pursuant to section 203(b)(2) of the Act, which also includes a separate criterion for memberships. *Compare* 8 C.F.R. § 204.6(k)(3)(ii)(A); (E).

Furthermore, as the director concluded, the record does not include sufficient evidence establishing that the members of the faculty who select the students for admission and approve them for graduation are nationally or internationally recognized experts in the field.

Accordingly, the petitioner has not met the plain language requirements of 8 C.F.R. § 204.5(h)(3)(ii).

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[2] The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii).

The director determined that the petitioner's evidence did not establish that he met this criterion. The director considered and mentioned the following published material in making his determination:

(1) a printout from *Wikipedia* discussing '
(2) a review of "
(3) a review of '
(4) an article titled, '
(5) an article discussing the film, "

Items (1)-(4) and (6)-(7) from the above list are in Dutch. The regulation at 8 C.F.R. § 103.2(b)(3) states: "Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Items (1)-(4) and (6)-(7) required translations and needed to comply with the requirements at 8 C.F.R. § 103.2(b)(3). While not addressed by the director in his decision, the petitioner submitted translations that do not comport with the regulation. The translations are not accompanied by a translator's certification that he or she is competent to translate from Dutch to English. Because these translations do not comply with 8 C.F.R. § 103.2(b)(3), they have no probative value and the petitioner cannot establish the evidentiary requirements as required by the regulation.

In addition to the translation deficiency, with respect to the information from *Wikipedia,* there are no assurances about the reliability of the content from this open, user-edited internet site.[3] *See Lamilem Badasa v. Michael Mukasey,* 540 F.3d 909 (8th Cir. 2008). As for the remaining items referenced in

[3] Online content from *Wikipedia* is subject to the following general disclaimer:

> WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . *Wikipedia* cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on March 31, 2014, a copy of which is incorporated into the record of proceeding.

the previous paragraph, the director properly determined that the record does not establish that the publications are professional or major trade publications, or other major media.

Item (4) in the list is an article that appears in the because it is a publication with a national readership, constitutes major media. However, a review of the article reveals that the article is about The article does not discuss or mention the petitioner by name in the article. Counsel highlights that the petitioner was in one of the video that the article mentions, but the article does not mention the petitioner and, as such, is not about the petitioner. Similarly, the remaining articles the petitioner submitted are not about him. Rather, as counsel states on appeal, the petitioner's achievements include "being mentioned" in published material. The plain language at 8 C.F.R. § 204.5(h)(3)(iii), however, requires that the material be "about" the petitioner and the regulation does not state that material that mentions the petitioner is sufficient. Articles that are not about the petitioner do not meet this regulatory criterion. *See, e.g., Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor).

For all of the foregoing reasons, the petitioner did not meet this criterion.

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.* 8 C.F.R. § 204.5(h)(3)(v).

The director determined that the petitioner did not establish his eligibility for this criterion. Along with the Form I-140 application, the petitioner initially submitted for consideration letters from the following individuals: (1)

While the above group of letters praise the petitioner's talents as an actor and discuss specific productions and projects, they do not articulate how the petitioner made significant contributions that impacted the field as a whole. For example, writes:

> In The Netherlands, [the petitioner] is revered as arguably one of the top actors in the country and he was often tapped to perform in the most challenging and heralded projects available. It was both a pleasure and a[n] honor for me to work with this outstanding, professional, kind actor and I hope to work with him again.

The petitioner's talent and educational credentials as an actor are not in dispute. However, the letters generally praise the petitioner and do not discuss how the petitioner has impacted the field as a whole. solicited letters from local colleagues that do not specifically identify contributions or

provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS,* 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010).[4]

The petitioner submitted additional support letters in response to the director's Request for Evidence (RFE). Along with the RFE response, the evidence included letters from the following individuals: (1)

The letters in the second group either highlight an additional aspect of the petitioner's talent as an actor or describe how the petitioner's involvement with a specific project or production helped make it successful. For example, writes:

> In addition to his portfolio of ground breaking performances, there were several other reasons for our selection [of the petitioner for the lead role in a film]; firstly, because of his great capability to create a believable Iranian student character with a humorous, but also deeply emotional power; secondly, because of his unparalleled versatility as a performer where he can play huge diversities in different takes[, and] thirdly, because of his rare skill to switch between the English language and the languages of the east, an ability which was extremely essential for this part.

discusses the petitioner's versatility in technique and his language skills. Regardless of the fact that those attributes would likely help the petitioner be successful in the field, they do not constitute significant contributions in the field.

discuss how the petitioner's involvement with various television projects made them a success. However, the letters do not provide any information on whether or not the television projects had an impact on the field as a whole. *See Visinscaia v. Beers*, --- F. Supp. 2d ---, 2013 WL 6571822, at *6, 8 (D.D.C. Dec. 16, 2013) (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole).

Finally, the petitioner specifically requests USCIS to consider his contributions to under this criterion. In his second letter of support, , states that:

> Indeed [the petitioner] has applied his unique education and his artistic insight to help create the technique – an advanced form of movement

[4] In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122.

> improvisation that is taking hold globally. He INVENTED this cutting-edge performance method, which produces as yet unseen modes of entertainment. It is essentially an adaption of animated film logic for the stage with groundbreaking results. Because of [the petitioner's] collaboration with me to create '[redacted]," our company training was rated in the [redacted] – not a small feat in this town.

The record includes an article that discusses the "[redacted] as one of the top 10 [redacted] fitness workouts." However, the fitness industry is not the petitioner's claimed field of expertise. In response to the director's RFE, the petitioner identified himself as an actor in the performing arts for purposes of the Form I-140 petition. The fitness technique's potential for wide impact in the petitioner's field of expertise is insufficient to meet the requirements of this criterion. Furthermore, while [redacted] states that the improvisation method is "taking hold globally," there is no substantiating evidence in the record that supports such a claim. USCIS need not rely on an entity's own vague claims of prestige. *Cf. Braga v. Poulos*, No. CV 06 5105 SJO (C.D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (finding that USCIS need not rely on the promotional material of a publisher). As stated above, the article in [redacted] suggests that the fitness technique is unique to Los Angeles. Thus, there is insufficient documentation to establish that the petitioner's development of a new [redacted] technique is a significant contribution in the field.

Accordingly, the petitioner did not establish his eligibility for this criterion.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.* 8 C.F.R. § 204.5(h)(3)(vii).

The director determined in the decision that the petitioner met this regulatory criterion and mentioned the names of several plays in which the petitioner played a role. However, the interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *See Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at *7 (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). Acting in plays constitutes performance art instead of visual art. As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

The director considered the petitioner's evidence regarding the critical role for developing a new technique for [redacted] the petitioner's role in the production of [redacted] and the petitioner's contributions to the play [redacted]. The director concluded that none of the submitted evidence established the petitioner's eligibility under this criterion. On appeal, counsel asserts that the director was inexplicably dismissive about petitioner's development and creation of the [redacted] Animation technique and, as discussed above, requests USCIS to consider this accomplishment as an original artistic contribution of major significance if the development of the technique does not satisfy

the requirements of 8 C.F.R. § 204.5(h)(3)(viii). A passing reference without substantive arguments is insufficient to raise that ground on appeal. *Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. 433, 435 (11th Cir. 2009). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998). USCIS, therefore, considers this issue to be abandoned.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales. 8 C.F.R. § 204.5(h)(3)(x).

The petitioner previously submitted evidence under this criterion. The director's decision concluded that the petitioner did not meet this criterion and the petitioner does not identify any factual or legal error relating to this criterion on appeal. Consequently, the petitioner abandoned this claim. *See Sepulveda v. U.S. Att'y Gen.,* 401 F.3d 1226, 1228 n.2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

B. Summary

The petitioner has failed to submit sufficient relevant, probative evidence to satisfy the regulatory requirement of three types of evidence.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

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 final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) 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" and (2) "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)(2) and (3); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.[5] Rather, the proper conclusion is that the petitioner has failed to satisfy the

[5] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that 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

regulatory requirement of three types of evidence. *Id.* at 1122. The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. 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.

ORDER: The appeal is dismissed.

1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).