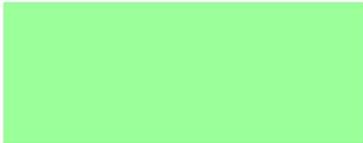


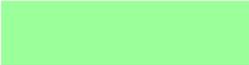


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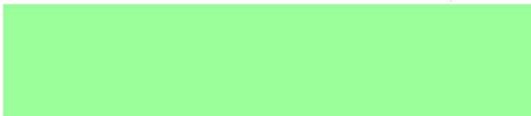
DATE: **FEB 27 2013** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary:

PETITION: 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:



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, Texas Service Center, denied the employment-based immigrant visa petition on April 27, 2012. The petitioner, who is also the beneficiary, appealed the decision to the Administrative Appeals Office (AAO) on May 29, 2012.¹ The appeal will be dismissed.

According to parts 2 and 5 of the petition, filed on May 10, 2011, the petitioner seeks classification as an alien of extraordinary ability, as an art publisher and writer, 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 that the petitioner has not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability as an art publisher and writer.

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; 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)-(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 files an eight-page statement, dated January 22, 2013, and additional supporting documents. Counsel asserts that the petitioner meets the nationally or internationally recognized prizes or awards criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(i), the participation as a judge of the work of others criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(iv), and the original contributions of major significance criterion under the regulation at 8 C.F.R. § 204.5(h)(3)(v). Counsel has not specifically challenged the director's adverse findings as relating to any other criteria.

For the reasons discussed below, the petitioner has not established his eligibility for the exclusive classification sought. Specifically, the petitioner has not submitted qualifying evidence under at least three of the ten regulatory criteria set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x). As such, the petitioner has not demonstrated that he is one of the small percentage who are at the very top in the field of endeavor, and he has not sustained national or international acclaim. See 8 C.F.R. §§ 204.5(h) (2), (3). Accordingly, the AAO must dismiss the petitioner's appeal.

¹ On July 14, 2012, the director adjudicated the petitioner's May 29, 2012, Notice of Appeal and Motion, Form I-290B, which counsel marked as an appeal, as a motion and denied the motion. On November 8, 2012, the director withdrew his July 14, 2012 decision, and forwarded the record to the AAO for consideration of the petitioner's appeal.

I. THE 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.

United States 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. 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, internationally recognized award, or through the submission of qualifying evidence under at least three of the ten categories of evidence listed under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the 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 the evidence submitted to meet a given evidentiary criterion.² 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.” *Kazarian*, 596 F.3d at 1121-22.

² 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 (vi).

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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)." *Kazarian*, 596 F.3d 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 case, the AAO affirms the director's finding that the petitioner has not satisfied the antecedent regulatory requirement of presenting three types of evidence under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x), and has not demonstrated that he is one of the small percentage who are at the very top in the field of endeavor, or has achieved sustained national or international acclaim. See 8 C.F.R. §§ 204.5(h) (2), (3).

II. ANALYSIS

A. Prior O-1 Visa Petitions

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. The regulatory requirements for an immigrant and nonimmigrant alien of extraordinary ability *in the arts* are dramatically different. The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) as simply "distinction," which is further defined as follows:

Distinction means a high level of achievement in the field of 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 relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." While the ten immigrant criteria set forth in the regulation at 8 C.F.R. § 204.5(h)(3) appear in nonimmigrant regulations, 8 C.F.R. § 214.2(o)(3)(iii), they refer only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. Separate criteria for nonimmigrant aliens of extraordinary ability in the arts are set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv). The distinction between these fields and the arts, which appears in the regulation at 8 C.F.R. § 214(o), does not appear in the regulation at 8 C.F.R. § 204.5(h). As such, the petitioner's approval for a nonimmigrant visa under the lesser standard of "distinction" is not evidence of his eligibility for the similarly titled immigrant visa.

Moreover, it must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C.

2003); *IKEA US v. Dep't of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc.*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, No. 03-10832, 99 F. App'x 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, No. Civ. A. 98-2855, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

B. Prior Form I-140A Visa Petition

The record of proceeding does not contain a copy of the petitioner's previous Form I-140A Visa Petition or its supporting documents. The petitioner filed this earlier petition on October 13, 2004 and USCIS approved it on February 27, 2006. The Department of State terminated the petition on April 25, 2009. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In this case, the record of proceeding pertains only to the petition and its supporting documents filed on May 10, 2011 and filed in subsequent related filings. The director's April 27, 2012 decision does not indicate whether he reviewed the prior Form I-140A Visa Petition approval or its subsequent termination. If the previous petition was approved based on the same unsupported and unsubstantiated assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. As noted, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a petition may have previously been approved erroneously. *See Matter of Church Scientology Int'l*, 19 I&N Dec. at 597. Moreover, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved a petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *See Louisiana Philharmonic Orchestra*, 2000 WL 282785 at *3. Finally, contrary to counsel's implication that eligibility for this classification

necessarily increases rather than decreases over time, it is possible that an individual might enjoy national or international acclaim, but not sustain that acclaim several years later.

C. Evidentiary Criteria³

Under the regulation at 8 C.F.R. § 204.5(h)(3), the petitioner can establish sustained national or international acclaim and that his achievements have been recognized in the field of endeavor by presenting evidence of a one-time achievement that is a major, internationally recognized award. In this case, the petitioner has not asserted or shown through his evidence that he is the recipient of a major, internationally recognized award at a level similar to that of the Nobel Prize. As such, the petitioner must present at least three of the ten types of evidence under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x) to meet the basic eligibility requirements.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 204.5(h)(3)(i).

In his April 27, 2012 decision, the director concluded that the petitioner failed to establish he met this criterion. On appeal, pointing only to the petitioner's receipt of a [REDACTED] in 1988, counsel asserts that the director erred. According to counsel, evidence in the record, including letters from [REDACTED] and [REDACTED] establishes that the 1998 fellowship constitutes a lesser nationally or internationally recognized prize or award for excellence.

In support of this criterion, the petitioner has submitted a number of reference letters but not the awards themselves. The regulation at 8 C.F.R. § 103.2(b)(2) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. Affidavits are only acceptable where the petitioner demonstrates that both primary and secondary evidence are either non-existent or unavailable.

According to a December 8, 2011 letter from Ms. [REDACTED], "A/g Director" of the [REDACTED] the petitioner's [REDACTED] "was a very prestigious award, intended to reward excellence in the beneficiary's field. At the time it was one of the nation's highest honors in the discipline of art writing, judged by a panel of senior figures in the [REDACTED] [The petitioner] was chosen from among many applicants of the highest caliber." In response to the director's concerns relating to Ms. [REDACTED] position in the [REDACTED] counsel has submitted a May 17, 2012 email from [REDACTED] Director of Human Resources at the [REDACTED], stating "[REDACTED] was managing the Visual Arts Unit of [REDACTED] for the period of 1 December 2011 to 1 February 2012. [REDACTED] was undertaking higher duties during this time" Mr. [REDACTED] further confirms that the

³ Counsel does not claim that the petitioner meets the regulatory categories of evidence not discussed in this decision.

petitioner “was the recipient of a [REDACTED] in 1988 and was the editor of [REDACTED] which received funding from the [REDACTED] from 1985 – 1999.”⁴

According to a September 20, 2000 letter from [REDACTED], Director of [REDACTED] “[the petitioner] is undoubtedly one of the key critical figures of the international contemporary art scene of the last decade [The petitioner] is a highly respected figure in Australian intellectual life. In 1988 the [REDACTED] Australia’s chief arts funding body, awarded him the prestigious [REDACTED] for his contributions to critical inquiry in the visual arts in Australia.”

Neither the abovementioned referenced letters nor any other evidence in the record establish that the [REDACTED] constitutes a nationally or internationally recognized prize or award for excellence in the field of endeavor. Specifically, although the reference letters refer to the fellowship as a “very prestigious” award that constituted “the nation’s highest honors,” the record lacks specific information relating to the 1998 fellowship, such as criteria the [REDACTED] considered when awarding the fellowship, the individuals who considered the criteria, the number of individuals eligible or who applied for the fellowship, or the number of recipients of the fellowship. In addition, the evidence submitted to show the recognition of the petitioner’s 1988 fellowship is primarily from the entity that issued the fellowship. Such self-promotional evidence has minimal evidentiary value. *See Braga v. Poulos*, No. CV 06-5105 SJO 10 (C.D. Cal. July 6, 2007), *aff’d*, 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine’s status as major media). The petitioner has not supported the self-promotional evidence with more independent evidence relating to the national or international recognition of the 1988 fellowship, such as, but not limited to, independent journalistic coverage relating to the 1988 fellowship in nationally or internationally circulated publications.

Moreover, although according to counsel’s April 18, 2011 letter, initially filed in support of the petition, the petitioner’s [REDACTED] in 1988 also constitutes a lesser nationally or internationally recognized prize or award for excellence, on appeal, counsel has not specifically challenged the director’s adverse finding as relating to this grant. As such, the petitioner has abandoned this issue, as he did not timely raise it on appeal. *Sepulveda v. United States Att’y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, 9 (E.D.N.Y. Sept. 30, 2011) (the United States District Court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal to the AAO). In addition, the 1988 grant is not listed as one of the petitioner’s awards in his curriculum vitae, initially filed in support of the petition.

Finally, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires evidence of qualifying prizes and awards in the plural, consistent with the statutory requirement for extensive

⁴ The record contains evidence referring to the magazine in different names, including [REDACTED] and [REDACTED]. The magazine itself lists its name as [REDACTED].

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documentation. See section 203(b)(1)(A)(i) of the Act. As such, even if the petitioner's [REDACTED] constitutes a single example of a qualifying prize or award, the petitioner has not shown that he has received a second nationally or internationally recognized prize or award for excellence in the field of endeavor.

Accordingly, the petitioner has not presented documentation of his receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. The petitioner has not met this criterion. See 8 C.F.R. § 204.5(h)(3)(i).

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).

In his April 27, 2012 decision, the director concluded that the petitioner failed to establish he met this criterion. On appeal, counsel has not specifically challenged the director's adverse finding. As such, the petitioner has abandoned this issue, as he did not timely raise it on appeal. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885 at *9.

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).

In his April 27, 2012 decision, the director concluded that the petitioner failed to establish he met this criterion. On appeal, counsel has not specifically challenged the director's adverse finding. As such, the petitioner has abandoned this issue, as he did not timely raise it on appeal. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885 at *9.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv).

In his April 27, 2012 decision, the director concluded that the petitioner met this criterion. The record contains evidence that the petitioner is/was the publisher and editor for art magazines, including [REDACTED], which was previously published under the name [REDACTED] and he is an art critic who has authored and published art-related material. Accordingly, the petitioner has presented evidence of his participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought. The petitioner has met this criterion. See 8 C.F.R. § 204.5(h)(3)(iv).

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).

In his April 27, 2012 decision, the director concluded that the petitioner failed to establish he met this criterion. On appeal, relying primarily on reference/expert letters, counsel asserts that the petitioner meets this criterion. The AAO disagrees, because the reference/expert letters, along with other evidence in the record, fail to show that the petitioner's work constitutes original contributions of major significance in the field of endeavor, as required under the plan language of the criterion.

First, although many reference/expert letters praise the petitioner's talents, they fail to provide specific examples of his work that is either original or that constitutes contributions of major significance in the field. For example, according to an April 19, 2003 letter from [REDACTED] an art critic, curator and educator based in [REDACTED], the petitioner "is recognized as among the most important figures in the field of art theory and criticism. [The petitioner] is widely recognized in [the] field as a writer, editor, translator, lecturer and publisher. In each of these roles, he is respected as among the very best."

According to a November 14, 2011 letter from [REDACTED] and Senior Lecturer on History at [REDACTED] "[the petitioner] is one of [the] select, highly accomplished band internationally, and . . . [the United States] is fortunate to benefit from his presence . . . [The petitioner's] contributions to theory and to art criticism [are] canonical in the sense that they are an integral part of the discourse that any other scholar or commentator must take into account when considering the topics he addresses." The petitioner, however, failed to support this statement with any scholarly treatises on art criticism or other art critiques that reference the petitioner's theories. The only citations the petitioner provided are to the work he translated, and those are not his original contributions to art criticism theory.

According to the November 20, 2011 letter from [REDACTED] Head of Museum Development and Programing at the [REDACTED] "[a]part from establishing the highest standards in his own work, whose longevity is unique in the history of art criticism, [the petitioner]'s extensive publications by influential U.S. university presses and his role as translator of the most important late-century European philosophers had a truly global impact In addition to his own singular achievements, [the petitioner] has always been a valued member of the international art community, especially in regard to fostering new ideas and academic research." According to a May 1, 2003 letter from the [REDACTED] – a corporation the petitioner founded and served as its president in 2000 – the petitioner "is an expert in the field, and is renowned for his vast experience and extensive special expertise in Art Publishing, Criticism, and Journalism for and about the art world's leading figures, personnel and projects." According to an April 30, 2011 letter from [REDACTED] Vice-President of [REDACTED] and Professor of Studio Art at [REDACTED] "[a]s the publisher of revered publications [REDACTED] and [REDACTED] [the petitioner] is a major force in art publishing, and regarded throughout the international contemporary art, critical analysis, and art publishing fields as being on the so-called [REDACTED] comprised of only the very finest, best-known and highly sought publishers,

editors writers and critics leading the conversation in art today.” Although these letters discuss the petitioner’s role as a publisher of an art magazine, his involvement with the [REDACTED] and his translation work and writing, the letters fail to specify what the petitioner has done that is either original, such that he is the first person, or one of the first people, to have done it, or that constitutes contributions of major significance in the field. Moreover, the letters are conclusory with little support in the record. USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

Similarly, other reference/expert letters suffer the same deficiencies. According to a September 29, 2000 letter from [REDACTED] Curator of Painting, Sculpture and Graphic Arts at [REDACTED] “[the petitioner] has facilitated major exhibitions and created a forum in publishing that uniquely addresses the visual culture of the Pacific Rim . . . [The petitioner] has built the magazine [REDACTED] into an internationally respected journal of the first rank.” According to a September 20, 2004 letter from [REDACTED] Director of Undergraduate Programs at [REDACTED] School of Education, Department of Art and Art Professions, the petitioner’s “current magazine project, [REDACTED] is one of the most influential art magazine now being published. It has facilitated an important dialogue among artists and critics in urban centers across America In his role as a facilitator of cross-cultural dialogue, [the petitioner] makes an extraordinary contribution in publicizing and promoting the American art scene.” According to an October 2, 2000 letter from [REDACTED] CPA, MBA, [REDACTED] “is the premier global educational journal focusing on contemporary art Everyone involved in contemporary art, particularly [in] L.A., New York and Europe, knows the importance of [REDACTED] magazine, and recognizes the incredible prestige that it has lent to the U.S. through its relocation [to [REDACTED].” Although these letters discuss the petitioner accomplishment as an art magazine publisher and editor, they fail to show that the petitioner’s accomplishment is original, such that he is the first person or one of the first people to have published or edited art magazines, or that his work with the art magazine, which the reference/expert letters claim to be reputable and respected, constitutes evidence of the petitioner’s contributions of major significance in the field. Specifically, although the reference/expert letters state that the petitioner’s art magazine is an “influential art magazine,” “comparable to other outstanding international publications,” and constitutes a “major international forum[] on contemporary art,” the petitioner has failed to show that the magazine’s claimed status establishes that his work with the magazine constitutes contributions of major significance in the field.

Moreover, neither the petitioner nor any of the reference/expert letters point to specific, objective and independent evidence corroborating the claim that the petitioner’s magazine is one of the top art magazines in the United States or in the world. For example, according to a September 29, 2000 letter from [REDACTED] Chair of the History and Theory of Art at [REDACTED] and Director of the Program in Art History and Theoretical Studies at the [REDACTED] the petitioner “established a level of discussion [in his publication [REDACTED] that was sharper and more sophisticated than anything to be found in the United States at that time. When [the petitioner] moved the magazine to [REDACTED], its appearance brought a new standard to arts discussion nationally, and [REDACTED] remains one of the two or three most significant arts publications in the country.” According to a January 22, 2009 letter from [REDACTED]

Professor at [REDACTED] “[the petitioner] is editor of [REDACTED] a highly distinguished journal, which provides unique coverage of the American art world, high quality critical commentary not found in any other publication. [The petitioner] is well known in this country for his distinctive editing; his publication is widely read” According to an undated letter from [REDACTED] a curator at the [REDACTED] is internationally recognized for covering exhibitions all over the world and maintaining an editorial distance from its advertising base: two features directly attributable to its publisher [the petitioner], who travels relentlessly to uncover the artworld’s hidden accomplishments” According to Ms. [REDACTED] second letter, dated November 28, 2011, “[t]here are a handful of influential New York art magazines, for some of which [the petitioner] is a regular contributor, but the high quality of the intellectual work promoted by [REDACTED] on the West Coast is unique in this country.” According to a September 14, 2004 letter from [REDACTED] a New York-based art critic, the petitioner’s “contribution to the understanding of contemporary visual art, and to current culture more broadly speaking, is outstanding. As Editor and Publisher for nearly 20 years of [REDACTED] which was based first in [REDACTED] and then in [REDACTED] he established a crucially important vehicle for independent thinking in the field The publication that has succeeded it, [REDACTED] is even more ambitious in reach, and more urgently needed.” Although these letters discuss the status of the petitioner’s art magazine, they fail to point to specific, objective and independent evidence, such as readership reach or subscription figures, to corroborate the magazine’s alleged status in the art world.

Second, although the record includes evidence that some of what the petitioner has done constitutes original contributions, the record fails to include evidence showing that the original contributions constitute contributions of major significance in the field. For example, according to a September 19, 2000 letter from [REDACTED] Director of [REDACTED] the petitioner “was one of the first people to help organize a semiotics conference in the English-speaking world, which took place in [REDACTED] neither the letter nor any other evidence in the record establishes that the conference constitutes a contribution of major significance in the field.

According to one of two November 13, 2011 letters from [REDACTED] M.A., J.D., of [REDACTED] and [REDACTED] the petitioner’s “experience as a writer, translator, and publisher of [REDACTED] and [REDACTED], both ground-breaking and distinguished journals in the field of art criticism and theory, have made him the most-qualified editor and publisher to lead [REDACTED] [The petitioner’s] contributions to contemporary theory and art criticism are widely respected. His original contributions to the field include books . . . , as well as dozen of essays that are part of a publishing career also recognized for translations of key texts in contemporary philosophy and post-structuralism theory”

According to an undated letter from [REDACTED] Senior Lecturer at [REDACTED] Department of Art History, “it was [the petitioner] who made possible [REDACTED] one of the most important books on aboriginal art; and [the petitioner] has written . . . the foundational text for the ‘appropriation’ art that marked Australian artistic practice in the 1980s and

” This letter, however, is unsigned and, thus, has no probative value.

According to an October 16, 2000 letter from [REDACTED], a curator at [REDACTED] for Contemporary Art, the petitioner “has been a leading contributor to the debate of contemporary art in Australia for many years: as a writer on many areas of art and culture, several of his essays and publications occupying seminal status on University reading lists, and forming the basis of the discussion of contemporary art in Australia; and as an editor and publisher having developed the magazine [REDACTED] from a small independent [REDACTED] into one of the major international forums on contemporary art, the magazine now certainly comparable to other outstanding international publications such as [REDACTED]”

Although the letters discussed in the preceding paragraphs provide some evidence that the petitioner’s work is original, they fail to establish that his work also constitutes contributions of major significance in the field. [REDACTED] solicited letters from colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient.⁵ *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009), *aff’d in part*, 596 F.3d 1115 (9th Cir. 2010). The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int’l*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as this decision has done above, evaluate the content of those letters as to whether they support the alien’s eligibility. *See id.* at 795; *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”). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

The reference/expert letters in the record, including those not specifically mentioned above, primarily contain bare assertions of acclaim and vague claims of contributions without providing specific examples of how those contributions rise to a level consistent with major significance in the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F. 2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, No. 95 Civ. 10729, 1997 WL 188942 at *5 (S.D.N.Y. Apr. 18, 1997). Similarly, USCIS need not accept primarily conclusory assertions. *See 1756, Inc.*, 745 F. Supp. at 15.

⁵ 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.

Significantly, at least seven of the reference/expert letters contain very similar or virtually the same language when discussing the petitioner's accomplishments as an art critic and art magazine publisher and editor, suggesting that the language in the reference/expert letters is not the authors' own. Cf. *Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an immigration judge's adverse credibility determination in asylum proceedings based in part on the similarity of some of the affidavits); *Mei Chai Ye v. United States Dep't of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

[REDACTED], Director of the [REDACTED], stated in his October 7, 2000 letter, the petitioner "has established important links between the art communities in the US, Australia and the rest of the world." [REDACTED], Director of the [REDACTED]

[REDACTED], stated in his September 26, 2000 letter, the petitioner has "established important links between Australian art and the United States art, acting as an intermediary for major museums in the US and in Australia and Europe, facilitating international exhibitions and publishing or writing about these. His continued presence in the United States would ensure that many of these projects come to fruition and be of great benefit to this significant and enduring program of cultural exchange."

[REDACTED] at the [REDACTED] stated in his September 26, 2000 letter, the petitioner "has established important links between Australia and U.S., acting as a go-between for major museums and artists here and in Australia and Europe, facilitating international exhibitions and publishing or writing about them. His continued stay in the U.S. is essential to ensure that these projects come to fruition and extend the significant cultural exchange that he has helped to build over many years of outstanding professional work."

[REDACTED] Curator at the [REDACTED] stated in his September 19, 2000 letter, [REDACTED] has provided an invaluable point of contact between the American, European and Australian [REDACTED] acting as a go-between for major museums in all three regions. [REDACTED] very much hope that [the petitioner] is able to stay in the US, in order to develop these important cultural exchanges."

[REDACTED] an associate professor in at the [REDACTED] Film Studies Program, stated in an undated letter, the petitioner "has established important links between Australian art and US art, acting as a facilitator and go-between for museums here and in Australia and Europe. His continued stay in the US would ensure these important projects continue, aiding cultural exchange and continuing to enrich US culture."

[REDACTED] a professor of fine arts and film at the [REDACTED] stated in his October 2, 2000 letter, the petitioner "has served as an international mentor in the establishment of links for major museums here and in Australia and Europe. His continued stay in the U.S. would ensure that many of these international collaborations would be realized and be a great benefit to this cultural exchange."

[REDACTED] a lecturer in the History of Art at the [REDACTED] College of Fine Arts, stated in an undated letter, the petitioner has "established important links between Australian art and U.S. art, acting as a go-between for major museums here and in Australia and Europe, facilitating international exhibitions and publishing or writing about these. His continued stay in the U.S. would ensure that many of these projects come to

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fruition and be of great benefit to this significant cultural exchange, which he is single-handedly responsible for.” Ms. [REDACTED] stated in her September 20, 2000 letter, “[the petitioner’s] continued stay in the U.S. would ensure that this important work will come to fruition and be of enormous benefit to this significant cultural exchange.” In short, the record contains evidence suggesting the language in the reference/expert letters is not the authors’ own. *See Surinder Singh*, 438 F.3d at 148; *Mei Chai Ye*, 489 F.3d at 519.

Accordingly, for all of the reasons discussed above, the petitioner has not presented sufficiently probative evidence of his original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field of exercise and sport psychology. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(v).

Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media. 8 C.F.R. § 204.5(h)(3)(vi).

In his April 27, 2012 decision, the director concluded that the petitioner failed to establish he met this criterion. On appeal, although counsel points to material that the petitioner has authored or co-authored, counsel has not specifically challenged the director’s adverse finding as relating to this criterion. As such, the petitioner has abandoned this issue, as he did not timely raise it on appeal. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885 at *9.

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).

In his April 27, 2012 decision, the director concluded that the petitioner failed to establish he met this criterion. On appeal, counsel has not specifically challenged the director’s finding. As such, the petitioner has abandoned this issue, as he did not timely raise it on appeal. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885 at *9.

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).

In his April 27, 2012 decision, the director concluded that the petitioner failed to establish he met this criterion. On appeal, counsel has not specifically challenged the director’s finding. As such, the petitioner has abandoned this issue, as he did not timely raise it on appeal. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885 at *9.

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).

In his April 27, 2012 decision, the director concluded that the petitioner failed to establish he met this criterion. On appeal, counsel has not specifically challenged the director’s finding. As such, the

petitioner has abandoned this issue, as he did not timely raise it on appeal. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885 at *9.

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 have 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 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.⁶ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of presenting three types of evidence. *Kazarian*, 596 F.3d 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 burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁶ The AAO maintains *de novo* review of all questions of fact and law. *See Soltane v. United States Dep't of Justice*, 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* INA §§ 103(a)(1), 204(b); 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).