



U.S. Citizenship
and Immigration
Services

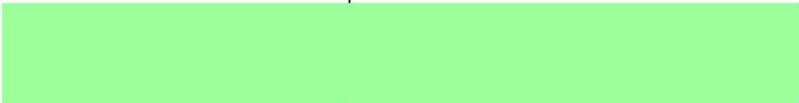
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DATE: **MAR 22 2013** Office: NEBRASKA SERVICE CENTER

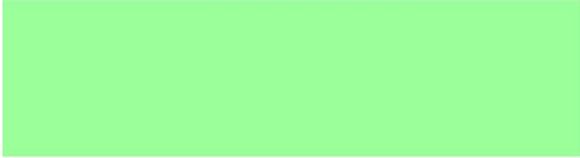


IN RE: Petitioner:
Beneficiary:



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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software developer. It seeks to classify the beneficiary as an "alien of extraordinary ability" in the arts and business, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A) as a three-dimensional (3D) computer graphics developer. The director determined that the petitioner had not established the requisite extraordinary ability for the beneficiary and failed to submit extensive documentation of her sustained national or international acclaim.

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 for the alien under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserts that the beneficiary meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(v) and (vii) – (x). For the reasons discussed below, the AAO will uphold the director's decision.

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).

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*, 580 F.3d 1030 (9th Cir. 2009) *aff'd in part* 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 for the beneficiary 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.*

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

This petition, filed on January 4, 2012, seeks to classify the beneficiary as “an alien of extraordinary ability in the field of 3D computer software, character animation, and cloth simulation.” At the time of filing, the beneficiary was working as [REDACTED]

[REDACTED] The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(h)(3).²

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The director discussed the evidence submitted for this regulatory criterion and found that the petitioner failed to establish the beneficiary’s eligibility. On appeal, the petitioner does not contest the director’s findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. 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 court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not established that the beneficiary meets this regulatory criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

In the director’s decision, he determined that the petitioner failed to establish the beneficiary’s eligibility for this regulatory criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires “[e]vidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of *major significance* in the field.” [Emphasis added.] Here, the evidence must be reviewed to see whether it rises to the level of original artistic or business-related contributions “of major significance in the field.” The phrase “major significance” is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

The petitioner submitted evidence showing that [REDACTED] and the beneficiary coauthored [REDACTED]

[REDACTED] but there is no documentary evidence showing that a U.S. patent was granted for their inventions. Even if the petitioner were to establish that these inventions received a U.S. patent, the grant of a patent demonstrates only that

² On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

an invention is original. A patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. See *Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 n. 7, (Comm'r 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* With regard to the two patent applications coauthored by the beneficiary, the petitioner must demonstrate that her innovations have demonstrably impacted the field as a whole or otherwise equate to original contributions of major significance in the field.

The petitioner submitted a February 1, 2012 article posted at [REDACTED] entitled [REDACTED]

The article discusses three online retailers' use of virtual fitting room technologies developed by [REDACTED]. While the article states that [REDACTED] technology is helping spur denim sales for [REDACTED] and that [REDACTED] "return rate on denim is down about 34%," the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the contributions be "of major significance in the field" rather than limited to [REDACTED] and its customer [REDACTED]. Regardless, the preceding article was published subsequent to the petition's January 4, 2012 filing date. Eligibility must be established at the time of filing the petition. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Accordingly, the AAO will not consider the February 1, 2012 article as evidence to establish that the beneficiary's digital garment technology had significantly impacted the field at the time of filing the petition.

The petitioner submitted an event program from 2011 Conference on Mass Customization, [REDACTED] indicating that [REDACTED] gave a talk in [REDACTED]

Apparel story." Counsel states: [REDACTED] addressed how leading global brands were launching interactive systems built on the platform established by [the beneficiary's] patents." [REDACTED] program schedule indicates that numerous individuals spoke at [REDACTED] including more than ten other "Keynote Session" speakers. The AAO notes that many professional fields regularly hold meetings and symposia to present new work, discuss new findings, and to network with other professionals. These conferences are promoted and sponsored by professional associations, businesses, educational institutions, and government agencies. Participation in such events, however, does not equate to original contributions of major significance in the field. There is no documentary evidence showing that the beneficiary's patent applications have significantly impacted the field as a whole or have otherwise risen to the level of contributions of major significance in the field. While [REDACTED] participation in [REDACTED] demonstrates that [REDACTED] story was shared with others, the AAO is not persuaded that his discussion of the company's interactive apparel system at [REDACTED] is sufficient evidence establishing that the beneficiary's work is of "major significance" to the field as a whole and not limited to the audience at [REDACTED] session. The petitioner has failed to establish, for example, the impact or influence of [REDACTED] presentation beyond those in

attendance so as to establish that his and the beneficiary's garment visualization systems were of major significance to the field at large.

The petitioner submitted a September 24, 2010 Purchase Agreement with [REDACTED] for [REDACTED] to provide "garment customization products and related goods and services." The petitioner also submitted a November 22, 2011 Purchase Order from [REDACTED]. While the evidence submitted at the time of filing the petition indicates that [REDACTED] clients [REDACTED] have utilized the beneficiary's garment digitization and portrayal software systems for their online customers' retail apparel purchases, not every marketable software product or service is a contribution of major significance in the field associated with that innovation. It is inherent to the field of software design to create software that is marketable to one's business clients. The fact that [REDACTED] had two corporate clients for the garment systems co-invented by the beneficiary at the time of filing the petition does not automatically establish that she has made original contributions of "major significance" in the field.

The petitioner submitted an April 2012 Purchase Agreement Amendment with [REDACTED] and Purchase Orders from [REDACTED] dated January 9, 2012; February 23, 2012; March 14, 2012; March 19, 2012; April 19, 2012; May 29, 2012; June 6, 2012; July 25, 2012; and July 30, 2012. The petitioner also submitted a July 24, 2012 "Technical Consulting and Professional Services Agreement" with [REDACTED] for [REDACTED] to provide "garment digitization and digital garment experience systems and software services." In addition, the petitioner submitted a Purchase Order from [REDACTED] dated July 25, 2012; a Purchase Order from [REDACTED] dated August 2, 2012; and a June 13, 2012 product order quote prepared by Embodee for [REDACTED]. The preceding order quote, agreements, and purchase orders post-date the petition's filing date. As previously discussed, eligibility must be established at the time of filing the petition. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider business transactions occurring after January 4, 2012 as evidence to establish the beneficiary's eligibility for this regulatory criterion.

The petitioner also submitted various letters of support discussing the beneficiary's work.

[REDACTED] states:

Since February 2009 when I joined [REDACTED] I have had the pleasure to work closely with [the beneficiary] and have experienced her exceptional talents and knowledge first hand. She has had invaluable contributions to the success of our company via the technical innovations she introduced as part of our patent pending software solutions and processes. At [REDACTED] she not only heads our R&D efforts but is also a cofounder of the company.

Our company, to a large extent due to [the beneficiary's] unique knowledge and expertise, has developed incredible digital garment technologies and won the right to power the digital side of [REDACTED] apparel business. This project was awarded to us based on our company's technical excellence and because of our ability to create photorealistic digital representations of real clothing enabling the visualization of

millions of garment customization options. Since the company's founding we have grown to around 10 employees. This company growth can be directly attributed to [the beneficiary's] technical vision and excellence. The tools and workflows created by her are enabling worldclass businesses like [redacted] to more efficiently serve their customers, in this case team sports uniform dealers and coaches.

[The beneficiary] is a pioneer in the art, technology, and business of Digital Clothing capture and simulation. She has provided the apparel industry and the end consumer with a breakthrough that can impact the lives of so many people. This claim is supported by another application of the technology developed by her at [redacted] - the online try-on of garments for [redacted] - a leading global youth brand. With this application for the first time online shoppers can accurately see how a garment of particular size fits on their body. This solves the biggest problem for online apparel sales - knowing what size to buy and how it will fit. [redacted] solution thanks to [the beneficiary's] technical and entrepreneurial leadership is the first one that actually works and has been proven in the market. Online shoppers love the application and have given us outstandingly positive feedback.

[redacted] comments on the beneficiary's "exceptional talents" and "unique knowledge and expertise." Assuming the beneficiary's skills and knowledge are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 (Comm'r 1998). While the beneficiary has developed digital garment technologies for [redacted] there is no documentary evidence demonstrating that the beneficiary's specific work for the company equates to original contributions of major significance in the field. As previously discussed, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the beneficiary's original contributions be "of major significance in the field" rather than limited to her employer and two of its clients.

[redacted] states:

I first met [the beneficiary] in 1996 at Siggraph, the annual computer graphics conference. We have since then been in contact numerous times.

I met again [the beneficiary] early 2006, when she started a new project for online cloth fitting. My experience with cloth simulation allowed me to apprehend how exceptional her work was: based on physic simulation and real cloth patterns, her software was the first one to allow a real-time animation of a garment directly in a web browser. I immediately understood that her project had the potential to completely redefine the way we buy cloth, and I decided to start a collaboration with her. In 2009, [the beneficiary] co-founded [redacted] where she developed a revolutionary platform that enables online shoppers to dynamically experience, select and personalize clothes. This software is now successfully used by apparel companies like [redacted] dramatically increasing consumer engagement and confidence.

I was struck by the deep knowledge of CG technology [the beneficiary] displayed while working on her project: she needed to tackle by herself many issues, from cloth rasterization to physics modeling and web integration. On top of her technical and artistic capabilities, [the beneficiary] also has an enthusiastic entrepreneurship spirit.

[redacted] states that the beneficiary has “developed a revolutionary platform that enables online shoppers to dynamically experience, select and personalize clothes,” but [redacted] fails to provide specific examples of how the beneficiary’s work has significantly impacted the industry or otherwise constitutes original contributions of major significance in the field. Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires “[e]vidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of *major significance in the field.*” [Emphasis added.] The mere fact that the beneficiary has created garment visualization systems for her company to market to online apparel retailers does not demonstrate that her specific work has had “major significance” in the field. The submitted evidence fails to demonstrate that the beneficiary’s original technologies were of major significance to the online apparel industry at the time of filing rather than limited to [redacted] two clients [redacted]

[redacted] states:

[The beneficiary] worked for [redacted] and it was during this time that she became one of the major contributors in the development of [redacted] modeling and animation technology.

With [redacted] her current employer, [the beneficiary] has developed new technology powering the world’s first realistic online clothing try-on and personalization service. U.S. companies like [redacted] – both leaders in their respective fields – are using this break-through [redacted] technology. [The beneficiary], who is responsible for the body and cloth animation on this project, has achieved outstanding and remarkable computer generated apparel quality on a large scale, i.e. for 100’s and soon 1000’s of garments – something that had never been achieved before.

[redacted] states that the beneficiary has developed a “break-through” technology that supports “the world’s first realistic online clothing try-on and personalization service.” The beneficiary’s development of an original marketable technology, however, is not the only factor to be considered in determining her eligibility for this regulatory criterion. The petitioner must also demonstrate that the beneficiary’s original technology was of major significance to the field at the time of filing the petition rather than limited to only [redacted]. There is no documentary evidence demonstrating that the beneficiary’s garment visualization systems were extensively utilized by a significant number of online apparel companies at the time of filing the petition such that her original technologies constitute contributions of major significance in the field.

The preceding letters from the beneficiary's professional contacts are not without weight and have been considered above. While such letters are important in providing details about the beneficiary's work, they cannot by themselves establish the impact of her work beyond her circle of immediate professional acquaintances. 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). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of reference letters 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 references' statements and how they became aware of the beneficiary's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a 3D computer graphics developer who has made original contributions of major significance in the field. Without additional, specific evidence showing that the beneficiary's original work had been unusually influential, had substantially impacted her field, or had otherwise risen to the level of artistic or business-related contributions of major significance at the time of filing, the AAO cannot conclude that she meets this regulatory criterion.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The AAO withdraws the director's finding that the beneficiary meets this regulatory criterion. The petitioner submitted a screenshot from the Internet Movie Database (IMDb) indicating that the beneficiary provided "Visual Effects" for [REDACTED]

The petitioner also submitted a July 10, 2012 letter from [REDACTED] stating that the beneficiary created "new features of cloth simulation software that was [sic] used in the short film [REDACTED]

The petitioner asserts that the beneficiary's special effects work for the preceding motion pictures meets this regulatory criterion.

The AAO cannot conclude that being among the numerous contributors to a particular film constitutes display of the beneficiary's work in the field at artistic exhibitions or showcases. Neither counsel nor the petitioner has explained how the beneficiary's special effects segments on the film productions were singled out for display "at artistic exhibitions or showcases." The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at artistic exhibitions or showcases." The beneficiary developed visual effects software for the above film productions; she was not "displaying" her work at artistic exhibitions or showcases. Moreover, the beneficiary no longer works in the motion picture field. Instead, the beneficiary is presently [REDACTED] and she manages technology development for creating "photorealistic digital representations of real clothing" for online apparel retailers. *See Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002) (upholding a finding that competitive athletics and coaching are

not within the same area of expertise). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. As the beneficiary has not created tangible pieces of art that were on display at artistic exhibitions or showcases, the petitioner has not submitted qualifying evidence that the beneficiary meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Accordingly, the petitioner has not established that the beneficiary meets this regulatory criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

The petitioner submitted documentation showing that the beneficiary has performed in a leading or critical role as [REDACTED]

[REDACTED] The petitioner also submitted information about [REDACTED] printed from the company's website. USCIS need not, however, rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO, *aff'd* 317 Fed. Appx. 680 (C.A.9) (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). There is no objective documentary evidence showing that [REDACTED] Corporation had a distinguished reputation at the time of filing the petition.

The petitioner submitted documentary evidence showing that [REDACTED] has a distinguished reputation. The petitioner also submitted a July 10, 2012 letter from [REDACTED] stating:

In my capacity, as [REDACTED] I have personal knowledge and unique understanding of the significance played by [the beneficiary] in [REDACTED] enumerated successes. [The beneficiary] was the character animation software development lead at [REDACTED] and therefore she played a leading and critical role for the organization. She was responsible for the development of character animation tools; skeleton kinematics, muscle-based skinning, facial animation and crowd non-linear animation. For example, in the motion picture [REDACTED] the animation performed by a team of 100 animators was conducted by using the software developed by [the beneficiary]. She played a similar role in the production of the motion pictures [REDACTED] and [REDACTED] as well as creating new features of cloth simulation software that was used in the [REDACTED]

I can attest without reservations that [the beneficiary's] role in [REDACTED] was leading and critical to the entire organization and its successes. [REDACTED] would not have received many of the nominations, awards and accolades for the movies listed above in this paragraph had it not been for the critical role played by [the beneficiary].

Similarly, [the beneficiary] contributed to the commercial successes of several motion pictures including [REDACTED]

[REDACTED] As indicated above, she was not one of many 3D artists and technicians, she developed all character animation tools used by the 3D artists and technicians. She had a direct and critical impact on the success of these motion pictures.

states that the beneficiary “contributed to the commercial successes of several motion pictures,” but not every employee working on projects for a distinguished organization meets the elements of this regulatory criterion. also asserts that “[the beneficiary’s] role in was leading and critical to the entire organization and its successes.” Merely repeating the language of the statute or regulations, however, does not satisfy the petitioner’s burden of proof. *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*, 1997 WL 188942 at *5 (S.D.N.Y.). While comments that the beneficiary was the “character animation software development lead at ” and that she played a significant role on the motion picture projects to which she was assigned, the petitioner has not established that the beneficiary performed in a leading or critical role for the company as a whole. In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien is responsible for the success or standing of the organization. The petitioner failed to submit organizational charts or similar documentary evidence to demonstrate where the beneficiary’s position fit within the overall hierarchy of the Company. Further, the letter from fails to explain how the beneficiary’s role was leading or critical relative to that of Company’s other managers, let alone the company’s top executives such as and . In addition, the submitted evidence does not establish that the beneficiary was responsible for the Company’s success or standing to a degree consistent with the meaning of “critical role.”

Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence that the beneficiary has performed in a leading or critical role for distinguished “organizations or establishments” in the plural. The use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of “letter(s).” Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS’ ability to interpret significance from whether the singular or plural is used in a regulation. See *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at *1, *12 (D.C. Cir. March 26, 2008); *Shapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *1, *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for “a” bachelor’s degree or “a” foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials). Therefore, even if the petitioner were to submit documentary evidence showing that the beneficiary’s role for Company meets the elements of this regulatory criterion, which the petitioner has not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence of the beneficiary’s leading or critical role for more than one distinguished organization or establishment.

In light of the above, the petitioner has not established that the beneficiary meets this regulatory criterion.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

Counsel asserts that [REDACTED] has, and is, compensating [the beneficiary] for her services with an annual cash salary of \$80,000.” The record, however, does not include documentary evidence (such as payroll records or income tax forms) of the beneficiary’s \$80,000 salary. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Instead, the petitioner submitted an October 10, 2008 Executive Employment Agreement stating that the beneficiary receives a “base salary at the rate of \$6,000 per month” or \$72,000 per year. The petitioner also submitted documentation showing that the beneficiary has received an aggregate of [REDACTED] shares of company stock from January 2009 to December 2011 ([REDACTED] shares per month). The petitioner, however, offers no basis for comparison demonstrating that the beneficiary’s salary and remuneration were significantly high in relation to others in the field. The petitioner must present evidence of objective earnings data showing that the beneficiary has earned a “high salary” or “significantly high remuneration” in comparison with those performing similar work during the same time period. See *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm’r 1994) (considering professional golfer’s earnings versus other PGA Tour golfers); see also *Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App’x 712, 713-14 (9th Cir. 2011) (finding average salary information for those performing lesser duties is not a comparison to others in the field); *Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer’s salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N.D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). Accordingly, the petitioner has not established that the beneficiary meets this regulatory criterion.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The petitioner submitted a July 10, 2012 letter from [REDACTED] stating:

[The beneficiary] contributed to the commercial successes of several motion pictures including [REDACTED] and [REDACTED]

[REDACTED] As indicated above, she was not one of many 3D artists and technicians, she developed all character animation tools used by the 3D artists and technicians. She had a direct and critical impact on the success of these motion pictures.

The petitioner also submitted information from [REDACTED] stating tha [REDACTED]

In addition, the petitioner submitted a November 11, 2008 article from [REDACTED] who counsel identifies as [REDACTED] on the [REDACTED] production. [REDACTED] states:

(b)(6)

I have supervised the digital visual effects of several major film production [sic], involving high number of shots, large crews, and state of the art technology. With each new movie, new challenges are taken up, and the technology must be pushed a little more forward. While CG artists' talent and creativity are necessary, engineer's contributions are equally critical too. Engineer's ability to develop software for a particular production needs are [sic] absolutely essential to achieve images that are more capable of evoking a director's vision for the film.

I enrolled [the beneficiary] in my teams for several productions such as

In response, she solved many significant technical problems thanks to her outstanding skills and experience in the field of Computer Graphics (CG) software development.

For example, on we had to render large

This was a real technical challenge, both in terms of animation and rendering. Hundreds of characters had to be animated, and they all had to look different from each other. To render the images for each, the number of polygons and animations exceeded our current system's limits. To solve this problem, [the beneficiary] developed tools to automatically generate varied, distinct animations from libraries, and do it within our system's resource constraints. This was the first time we accomplished crowd animation on such a massive scale.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) indicates that this criterion applies to "the performing arts," not computer graphics software development. The beneficiary is not a performing artist.

Regardless, even if applicable, the petitioner has not established that the commercial success of the above motion pictures was primarily attributable to the film segments for which the beneficiary developed computer graphics software. While the beneficiary worked on the films' visual effects teams and was among the hundreds of contributors to the films (including the actors, directors, producers, writers, cinematographers, sound mixers, production designers, editors, and numerous other production staff positions), the AAO cannot conclude that her specific work on the productions drew large audiences in the same manner as the performances of their lead actors, for example.

In light of the above, the petitioner has not established that the beneficiary meets this regulatory criterion.

B. Summary

The petitioner has failed to submit evidence for the beneficiary satisfying the antecedent regulatory requirement of three categories of evidence.

C. Prior O-1 Nonimmigrant Visa Status

The record reflects that the alien is the beneficiary of an approved O-1 nonimmigrant visa petition for an alien of extraordinary ability in the arts. Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, “The term ‘extraordinary ability’ means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(o)(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines extraordinary ability 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.” 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the beneficiary’s receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Further, the AAO does not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each petition must be decided on a case-by-case basis upon review of the evidence of record.

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. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers 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. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of the alien’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 International*, 19 I&N Dec. 593, 597 (Comm’r 1988). USCIS need not treat acknowledged errors as binding precedent. *Sussex Eng’g 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 has approved a nonimmigrant petition on behalf of the alien, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, *1, *3 (E.D. La.), *aff’d*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

(b)(6)

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.

Even if the petitioner had submitted the requisite evidence for the beneficiary 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.³ Rather, the proper conclusion is that the petitioner has failed submit evidence for the beneficiary satisfying the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122.

The petitioner has not established the beneficiary’s eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The AAO may deny an application or petition that fails to comply with the technical requirements of the law 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*, at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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.

³ 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 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).