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



**U.S. Citizenship
and Immigration
Services**

D8

DATE: **APR 15 2011**

Office: [REDACTED]

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, [REDACTED] Service Center, denied the nonimmigrant visa petition and dismissed the petitioner's subsequent motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien of extraordinary ability in the field of business. The petitioner states that it operates exclusive retail stores in the United States and [REDACTED]. It seeks to employ the beneficiary in the position of Director of Branding for a period of one year.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary has received "sustained national or international acclaim" or to demonstrate that he is one of the small percentage who has risen to the very top of his field of endeavor. Specifically, the director determined that the evidence submitted did not satisfy the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A) or at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). The director dismissed the petitioner's subsequent motion to reopen on March 18, 2010, concluding that the motion did not meet the requirements at 8 C.F.R. § 103.5(a)(2).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the petitioner's motion was wrongly denied, and that a review of the evidence in its entirety will establish that the beneficiary meets three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). Counsel asserts that the director undervalued the testimonial evidence in the record. Specifically, counsel emphasizes that the letters submitted conform to the "form of documentation" requirements set forth at 8 C.F.R. § 214.2(o)(2)(iii)(B), and should have been given full weight.

For the reasons discussed below, the AAO will uphold the director's decision and dismiss the appeal.

I. The Law

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), provides for the classification of a qualified alien who:

has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim . . . and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability

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

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

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

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

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

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

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

Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business, or athletics. An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

- (A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or
- (B) At least three of the following forms of documentation:
 - (1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - (2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized or international experts in their disciplines or fields;
 - (3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

- (4) Evidence of the alien's participation on a panel, or individually as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
 - (5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
 - (6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
 - (7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
 - (8) Evidence that alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.
- (C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

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

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

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

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

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 2010). Similar to the regulations governing this nonimmigrant classification, the

regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. *Cf.* 8 C.F.R. § 204.5(h)(3).

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)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at *3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination. The AAO finds the *Kazarian* court's two part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). Therefore, in reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

In the present matter, the petitioner has submitted evidence pertaining to several of the evidentiary criteria, but has not established that the beneficiary has risen to the very top of his field or that he has achieved sustained national or international acclaim. 8 C.F.R. §§ 214.2(o)(3)(ii) and (iii).

II. Discussion

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 11, 2009. The petitioner describes its business activities and the beneficiary's proposed position as "Director of Branding" as follows:

[The petitioner] operates exclusive retail stores in the United States and [The petitioner] is now in the process of introducing and developing the [redacted] brand in the United States and expanding it to offer a total lifestyle concept including fine art, modern luxury furnishings and appointments, and life-style consulting. [redacted] is one of the

world's finest luxury/couture men's apparel brands, and retailers of high-fashion clothing and accessories.

* * *

In the position of Director of Brand for [REDACTED] [the beneficiary] will utilize his vast skills and knowledge of the art and retail world to assess viable markets; develop business plans and contacts; coordinate distribution, marketing and advertising resources; and to provide overall brand management during the start up and initial growth phases of this aspect of our business. He will also be instrumental in identifying business partners who will be able to be reliable suppliers to sustain the growth of the brand. Finally, [the beneficiary] will coordinate brand management operations with other senior level management of [the petitioning company].

The petitioner stated that the beneficiary "has extensive experience in high end retail design, development and operations throughout the world, with a particular focus on art galleries and upscale boutiques."

The record consists of: the Form I-129 petition and supporting evidence, the director's request for evidence dated December 16, 2009 and the petitioner's response; the director's decision dated February 4, 2010; the petitioner's motion to reopen and supporting evidence; the director's decision dismissing the motion dated March 18, 2010; and the petitioner's appeal. The AAO has reviewed the evidence of record in its entirety in reaching its decision.

A. The Beneficiary's Eligibility under the Regulatory Criteria

If the petitioner establishes through the submission of documentary evidence that the beneficiary has received a major, internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The regulations cite to the Nobel Prize as an example of a major award. *Id.* The petitioner does not claim that the beneficiary can meet this criterion.

As there is no evidence that the beneficiary has received a major, internationally recognized award, the petitioner must establish the beneficiary's eligibility under at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). The petitioner has submitted evidence relating to the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B)(2), (3), (7), and (8). The petitioner also requests that USCIS consider testimonial evidence that "addresses the beneficiary's standing in the industry and his worldwide reputation." The AAO will consider this evidence under 8 C.F.R. § 214.2(o)(3)(iii)(B)(5). The petitioner has not submitted any evidence relating to the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1), (4), and (6), and raises no objection to the director's determination that these criteria have not been met. The remaining five criteria will be discussed below.

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.

In order to demonstrate that membership in an association meets the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(2), a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

In a letter submitted in support of the petition, the petitioner noted that the beneficiary has been admitted "to the prestigious [REDACTED] and emphasized that "membership in this organization is limited to recognized experts in their field and establishes the individual as an expert on which art gallery owners, customers of high end art, appraisers and insurance companies around the world rely." The petitioner submitted a copy of the beneficiary's [REDACTED] (or [REDACTED]) membership credentials.

The petitioner also submitted a letter dated October 12, 2009 from [REDACTED] an owner of a contemporary art gallery in [REDACTED] [REDACTED] noted that the beneficiary was admitted to the [REDACTED] as a result of his "recognized level of expertise and extraordinary ability." She noted that "[m]embership in [REDACTED] is only available to recognized experts in specific fields of art and recognized the career achievements of an individual, and their standing among their peers."

In the request for evidence issued on December 16, 2009, the director acknowledged the petitioner's contention that the beneficiary's [REDACTED] membership meets the requirement at 8 C.F.R. § 214.2(o)(3)(iii)(B)(2), but noted that "the record lacks documentary evidence that such association is limited to those individuals who possess outstanding achievements, as judged by recognized national or international experts." The director instructed the petitioner to provide: (1) evidence of the minimum requirements and criteria used to apply for membership in the association, along with any other conditions or requirements of membership; and (2) evidence establishing the existence of national or international experts who make determinations regarding membership in the [REDACTED]

In response to the RFE, the petitioner submitted an English translation of the beneficiary's [REDACTED] credentials indicating that the beneficiary holds "expert membership" with a specialization in modern paintings. The petitioner also provided general information about the organization from its website, including an explanation of the organization's goals and ethics guidelines. In a letter dated January 26, 2010, counsel stated:

[T]he enclosed documents establish that the purpose of the [REDACTED] is precisely to serve as a board of recognized experts in the field. As such, membership is limited to individuals who possess outstanding achievements.

Counsel indicated that the petitioner was awaiting a letter of explanation from the director of the [REDACTED] that had yet to arrive. The supporting evidence did not include specific information describing the membership application process for [REDACTED]. Counsel's assertion that "membership in this organization is limited to recognized experts in their field" is insufficient to meet the plain language of the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(2). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Similarly, [REDACTED] has not established that she possesses the knowledge and authority to address the [REDACTED] membership requirements, thus her unsupported statement that membership is limited to recognized experts with outstanding achievements is insufficient to meet the petitioner's burden under this regulatory criterion.

We note that the petitioner did not contest the director's finding on motion or appeal, nor has it submitted the above-referenced letter from the director of the [REDACTED]. Therefore, we concur with the director's determination that the petitioner failed to submit evidence to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(2).

Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation

In general, in order for published material to meet the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(3), it must be primarily "about" the beneficiary and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.¹

The petitioner did not submit evidence relating to this evidentiary criterion at the time of filing the petition. In response to the request for evidence, the petitioner submitted two articles. The first was an article from the website [REDACTED] published on February 6, 2005. The article [REDACTED] is about the preview opening of the [REDACTED] where the beneficiary was previously employed as the gallery director. The beneficiary is briefly mentioned in the article, and appears in a photograph that accompanies the article.

The second article submitted as from the June 2005 issue of [REDACTED]. The article [REDACTED] mentions the recent opening of the [REDACTED] Art Gallery in Washington, DC. The short article identifies the beneficiary as the gallery owner, mentions his relocation from [REDACTED] to [REDACTED] and notes that the gallery features original contemporary works from all over the world, as well as master works.

¹ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

The director determined that the above-referenced evidence was insufficient to meet the plain language of the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(3). Specifically, the director observed that “[w]hile the beneficiary’s name has appeared in print, the petitioner must also establish that such publications [that] write about the beneficiary are professional or major trade publications or major media.” The director noted that the petitioner failed to provide evidence that [REDACTED] or [REDACTED] qualify as “major media.”

The petitioner has not contested the director’s finding with respect to this criterion in its subsequent motion or appeal. Thus, it appears that the petitioner concedes that it has not provided and cannot provide evidence of published material in major media about the beneficiary. We concur with the director’s determination that, based on the evidence submitted, neither *Planete Quebec* nor *The West End Guide* qualifies as “major media.” The petitioner has not submitted evidence that meets the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(3).

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

The petitioner has not specifically claimed that it was submitting evidence to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5), but it does seek to rely on testimonial evidence that “addresses the beneficiary’s standing in the industry and his worldwide reputation.”

The petitioner submitted several letters of support from the beneficiary’s professional contacts. We cite representative examples here.

At the time of filing, the petitioner submitted a letter dated November 3, 2009 from [REDACTED] an independent sales representative for American of [REDACTED] [REDACTED] states:

I have known [the beneficiary] for over ten years in the professional art community and have had the opportunity to work with [the beneficiary] on numerous art purchases. [The beneficiary] has been instrumental in negotiating art purchases for me from the [REDACTED] [REDACTED] and [I] rely on his extensive professional experience and knowledge. I find [the beneficiary] to be professional, responsible, a devoted family man who takes his professional seriously.

I have been requested to provide an assessment of the qualifications of [the beneficiary]. In addition to my own involvement in the international art world, my professional background is in the commercial furniture business, having worked with hotels around the world for the past twenty-five years. . . .

Given my background and knowledge, I can attest to the fact that [the beneficiary] is an individual of extraordinary ability well known for his accomplishments and expertise in the international art community. From my background in the commercial furniture industry, I also can attest that [the beneficiary is] recognized for his ability to combine the world of fine art with high end retail stores in the lifestyle market. This is proven by the fact that [the

[redacted] beneficiary] has extraordinary expertise all over the world with such well established names as [redacted] and with exclusive art galleries in [redacted] [The beneficiary] has been responsible for establishing art galleries, organizing international exhibitions, and representing both buyers and sellers in the exclusive art world. I personally have experienced and witnessed the knowledge and experience of [the beneficiary], and benefitted from his standing in the industry.

The petitioner also submitted the above-referenced letter from [redacted] owner of [redacted] [redacted] states that the beneficiary “is an individual of extraordinary ability who is recognized in the international art community for this accomplishments and expertise,” and “well known for his ability to combine the world of fine art with high end retail stores in lifestyle market.” As discussed above, [redacted] noted the significance of the beneficiary’s membership in [redacted] She further states

[The beneficiary] has well over twenty years of high level professional experience in boutique quality retail such as with [redacted] the [redacted] and with exclusive art galleries in [redacted] [redacted] In his positions with the art galleries, [the beneficiary] has been responsible for establishing the galleries, organizing and developing relationships with artists of international renown, organizing and developing relationships with artists of international renown, organizing and overseeing international exhibitions, and directing business negotiations [*sic*] with artists and clientele. As a result of this international experience, [the beneficiary] is recognized throughout the international art world for his extraordinary level of expertise and skill.

The other letters submitted at the time of filing were experience letters from the beneficiary’s prior employers and more appropriately considered under the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7).

In the request for evidence, the director noted that the petitioner’s evidence failed to establish that the beneficiary has made an original business-related contribution of major significance in this field. The petitioner’s response to the RFE did not address this criterion, and the director determined that the evidence submitted was insufficient to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5).

In support of its subsequent motion, the petitioner submitted four additional testimonials which are claimed to meet the requirements at “8 C.F.R. § 214.2(o)[2](iii)” in that they “specifically describe the alien’s recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.” The petitioner submitted a letter from [redacted] [redacted] President and CEO of the [redacted] Organization. [redacted] indicates that he is a real estate developer, owner of a major retail development in [redacted] and a trustee and board member at several museums. With respect to the beneficiary, he states:

As an avid art collector, I have had the privilege of meeting [the beneficiary] when visiting the [redacted] Art Gallery in [redacted] where he served as a Director. I found [the beneficiary] to be incredibly knowledgeable in many facets of Fine Art and an acute eye, which is rare to find in many art dealers. The quality of the art was exceptional and [the beneficiary] was extremely charming.

On the basis of my professional background and experience, I can attest to the fact that [the beneficiary] is an individual of exemplary quality, possessing great knowledge and expertise in the international art community.

The petitioner also provided a letter from [redacted] founder and president of a [redacted] jewelry distribution company. [redacted] states that he has known the beneficiary personally and professionally for many years. With respect to the beneficiary's credentials, he states:

Professionally he has extensive expertise in the retail management business. He covered major roles for some of the most important companies in the fashion industry, such as [redacted]. In addition, he has many years of experience in the art field, having dealt with well known galleries all over the world, as well as, in the United States. As an art collector myself, I have had the opportunity of testing his expertise and deep knowledge of this market. I have often resorted to his valuable advice in the process of acquiring several artworks.

[redacted] indicates that the beneficiary's "experience in the retail industry, combined with his talent and taste in the art field, gives him unique and valuable credentials."

The petitioner submitted a third letter from [redacted] managing partner of [redacted] & Associates, LLP, a law firm specialized in international transactions. [redacted] states that he has "extensive knowledge and experience in the art world due to the firm's representations of major artists in their dealings, with art galleries, museums and art exhibitions, both in the United States and internationally." With respect to the beneficiary, [redacted] states:

I have reviewed the background of [the beneficiary] and can attest that his experience in the high end retail industry, as well as with private art galleries around the world, places him in an exclusive category of individuals in his field. I have appreciated and personally observed the talent of [the beneficiary] in connection with several businesses. The knowledge and skill possessed by [the beneficiary], and his connections in this international retail world as well as in the art community are at an elite level, rarely found in the United States.

[redacted] concludes that the beneficiary is "an individual of extraordinary talent and expertise" who "is well known for his accomplishments in the international retail and art community."

Finally, the petitioner submitted a letter from [REDACTED] who serves as a senior buyer for the petitioning company. [REDACTED] indicates that he and the beneficiary work together for [REDACTED] [REDACTED] states:

I remember our first buying trip in [REDACTED] in the summer of 2008, we spent an entire day visiting every boutique as [the beneficiary] taught me about high-end menswear. The lesson I got that day is invaluable. It truly opened my eyes because I understood that even though I have been a buyer for 10 years, high-end menswear is very particular and more complex than any ready-to-wear that I bought in the past. Because menswear focuses on the quality of the fabrics and the craftsmanship of the garments, attention to detail is a must in this field.

While I am analyzing selling reports and forecasting next year's budgets, [the beneficiary] is studying each piece of the collection, every detail of each garment. [REDACTED] is not a classic menswear line. Every jacket, shirt or shoe is particular and exclusive, like a piece of art. It requires the expertise of someone like [the beneficiary] who can appreciate and translate this art into retail. Spending a lot of time in the boutique, I have observed him display this extensive knowledge and expertise daily with his clients and his team.

[REDACTED] concludes that the beneficiary "is an individual of extraordinary ability, well known for his accomplishments and expertise in the high-end fashion."

Upon review, the preceding letters of recommendation demonstrate that the beneficiary's work has earned the respect and admiration of those with whom he has collaborated and consulted, but these letters do not establish that he has made original business-related contributions of major significance in his field.

According to the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner is admired for his skills in the fields of fine art and high-end retail management, and has on projects that benefited his clients and employers, there is no evidence demonstrating that he has made original contributions of major significance in his field. For example, the record does not indicate the extent of the petitioner's influence on others in his field nationally or internationally, nor does it show that the field has somehow changed as a result of his work.

In this case, the letters of recommendation submitted by the petitioner are not sufficient to meet this criterion. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. 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 (Commr. 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 evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Thus, the content of the experts' statements and how they became aware of the

petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of a business executive who has sustained national or international acclaim. Without extensive documentation showing that the beneficiary's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation

The director determined that the petitioner submitted evidence to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7).

The record includes evidence that the beneficiary has served in a critical or essential role as a gallery director for [REDACTED] at its locations in [REDACTED] and sufficient evidence to establish that [REDACTED] Gallery, which operates fine art galleries in major cities worldwide, has a distinguished reputation. We concur with the director's finding. As such, the petitioner has established that the beneficiary meets this single criterion.

Evidence that alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence

The petitioner has offered the beneficiary an annual salary of \$110,000 for the proffered position of Director of Branding. In the request for evidence, the director advised the petitioner that it must submit evidence, such as a statistical comparison of salaries in the beneficiary's field of endeavor from the Economic Research Institute or like organization, to establish that the alien has commanded or will command a high salary.

In response to the RFE, the petitioner submitted salary information for the occupation of "Curator, Art Gallery" from Payscale (www.payscale.com). The information provided indicates that the beneficiary's salary of \$110,000 is in the 99th percentile, while the average salary in the field is \$42,105. The petitioner also provided salary data for the occupation of "Art Gallery Manager" from SalaryExpert. The data provided is for ten major U.S. cities and indicates that the average salary for the occupation ranges from \$53,512 to \$94,087.

Finally, the petitioner submitted salary data for the occupation of "Art Directors" from the Department of Labor's 2006 edition of the *Occupational Outlook Handbook*. The information provided indicates that, as of May 2006, median annual earnings for art directors were \$68,100, while the middle 50 percent of salaried workers earned between \$49,480 and \$94,920. According to the Handbook, the highest 10 percent of art directors earned more than \$135,090 as of May 2006.

The director acknowledged receipt of all three sources of salary information, noting that the beneficiary's salary must be evaluated on a national level and should not be restricted to data for certain localities. With respect to the figures provided in the *Occupational Outlook Handbook* or OOH, the director stated:

The 2006 edition of the OOH states that the highest ten percent of art directors earned more than \$135,090.00 that particular year. The beneficiary's proposed annual salary of \$110,000.00 is well below what the highest ten percent of individuals were earning or able to command in 2006.

However, the 2006 data found in the OOH is quite dated. The 2010-11 version of the OOH is presently available and offers an updated analysis regarding wages in the beneficiary's field. After performing a search for an "art director" in the most recent version of the OOH, current data shows that the highest ten percent of art directors in the field are commanding at least an annual salary of \$154,840.00, well above the beneficiary's proposed annual salary.

On motion, the counsel stated that the petitioner was submitting additional evidence relevant to the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(8) which demonstrates that the salary offered to the beneficiary is "10% higher than the highest level of prevailing wages for comparable positions." The petitioner noted that the new information was published by the Economic Research Institute and the U.S. Department of Labor.

The petitioner has submitted the following additional evidence:

- Geographic Assessor data published by the Economic Research Institute (ERI) for the position of "Brand or Product Sales Manager" for the [REDACTED] area. According to this data, the "Level 4" wage for this occupation in the stated locality is \$102,586. Although published by ERI, the document contains an "Actual Extract from the Occupational Employment Statistics Data (ETA/BLS) Data as of November 2005 – November 2008 for use in the Period 7/1/09-6/30/10."
- O*Net Online Summary Report for Sales Managers, which reports a national median annual wage of \$97,260 for 2008.

The director dismissed the petitioner's motion to reopen based on a finding that the wage data could not be considered "new" pursuant to 8 C.F.R. § 103.5(a)(4). Upon review, the AAO concurs with the director's finding that the evidence submitted prior to the adjudication of the petition was insufficient to establish that the beneficiary's proffered annual salary of \$110,000 is a "high salary" for the position of "Director of Branding."

Furthermore, even if the director had accepted the evidence submitted on motion, we note that the above-referenced documentation would be insufficient to meet the petitioner's evidentiary burden. As emphasized by the director, the petitioner is required to submit national wage data. Therefore, evidence relating to the average salaries for the position in [REDACTED] need not be considered. With respect to the national data published by the U.S. Department of Labor's O*Net Occupational Information Network, the petitioner once again provided an outdated figure. Moreover, the beneficiary's salary of \$110,000 is not significantly higher than the listed median figure of \$97,260, and has not been shown to be significantly high compared to the highest percentiles of wages reported in the occupation.

Finally, we note that the petitioner has provided wage data for no less than four different occupational titles in an attempt to establish that the beneficiary earns a high salary. Of these, the occupation of “Brand or Product Sales Manager” appears to be the appropriate classification for the beneficiary’s proffered position. According to the Bureau of Labor Statistics, Occupational Employment Statistics, the national median annual wage for the occupation of “Sales Manager” as of May 2009 was \$96,790, with the 75th percentile wage reported is \$141,430. The mean annual wage for this same period was \$111,570.² Based on national data for the relevant occupation and time period, we can conclude that the beneficiary’s proffered salary is approximately average among similarly employed individuals.

In light of the above, the petitioner has not submitted the initial required evidence necessary to meet the plain language requirements of this criterion.

Summary

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

Comparable Evidence

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) provides that an alien of extraordinary ability in the fields of science, education, business or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of receipt of a major internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), or by submitting evidence to satisfy at least three of the eight forms of documentation set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). We further acknowledge that the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C) provides “[i]f the criteria in paragraph (o)(3)(iii) of the section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.” It is clear from the use of the word “must” in 8 C.F.R. § 214.2(o)(3)(iii) that the rule, not the exception, is that the petitioner is required to submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner’s burden to explain why the regulatory criteria are not readily applicable to the beneficiary's occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1) through (8).

The petitioner has not specifically claimed eligibility under the “comparable evidence” regulation, but we note that the director appeared to consider the petitioner’s testimonial evidence under this criterion, according to statements made in the request for evidence. On motion and on appeal, counsel emphasizes that the testimonial evidence in the record meets the requirements of the regulation at 8 C.F.R. § 214.2(o)(2)(iii)(B), in that it the petitioner has provided “affidavits written by present or foreign employers or recognized experts certifying to

² See “Occupational Employment and Wages, May 2009, 11-2022 Sales Managers” (accessed on April 11, 2011, copy incorporated into the record of proceeding); <http://www.bls.gov/oes/current/oes112022.htm>.

the recognition and extraordinary ability” which “specifically describe the alien’s recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.” Counsel cites to no authority for consideration of such evidence under 8 C.F.R. § 214.2(o)(3)(iii)(C) as comparable evidence of the beneficiary’s eligibility. The testimonial letters have been considered above with respect to the beneficiary’s business-related contributions to his field, and with respect to the beneficiary’s employment in a critical or essential capacity.

While the petitioner appears to claim eligibility under the "comparable evidence" regulation, it has also claimed eligibility under 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(2), (3), (7) and (8). The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for O-1 classification in the beneficiary's occupation as a brand director cannot be established by submitting documentation relevant to at least three of the eight criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). In fact, as indicated in this decision, the petitioner specifically indicates that it is submitting evidence relating to four of the eight criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the beneficiary's occupation.

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

B. Final Merits Determination

In accordance with the *Kazarian* opinion, we must next conduct 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," 8 C.F.R. § 214.2(o)(3)(ii) 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." See section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i) and 8 C.F.R. § 8 C.F.R. § 214.2(o)(3)(iii); see also *Kazarian*, 2010 WL 725317 at *3.

In evaluating our final merits determination, we must look at the totality of the evidence to determine the beneficiary's eligibility pursuant to section 101(a)(15)(O)(i) of the Act. The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 214.2(o)(3)(iii) depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability." 8 C.F.R. § 214.2(o)(3)(ii).

In this case, the deficiencies in the documentation submitted by the petitioner have already been addressed in the preceding discussion of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). The director determined, and we concur, that the petitioner submitted evidence to satisfy only one of the four evidentiary criteria it claimed to meet under 8 C.F.R. § 214.2(o)(3)(iii)(B). With respect to the remaining criteria, the petitioner

has contested only the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(8), while requesting that its testimonial evidence be given greater weight.

The opinions of experts in the field are not without weight and have been considered above. Letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. *Black's Law Dictionary* 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about whether something occurred or did not occur, based on the witness' direct personal knowledge. *Id.* (defining "written testimony"); *see also id* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, or credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). 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.* Again, the submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the experts' statements and how they became aware of the beneficiary's reputation are important considerations. As noted above, 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 business executive who is considered to be at the very top of his profession.

The beneficiary has undoubtedly been successful in both the high-end retail field and as an art gallery director. However, the petitioner has failed to document any achievements or recognition beyond praise from his employers and business contacts, two mentions in publications of unknown circulation, and his membership in [REDACTED] the significance of which has not been established. We cannot ignore that the statute requires the petitioner to submit "extensive documentation" of the beneficiary's sustained national or international acclaim. The petitioner seeks to rely primarily on vague testimonial letters rather than on any primary evidence of the beneficiary's achievements as a business person and the independent recognition he has received for such achievements.

The petitioner seeks to qualify the beneficiary for a highly restrictive visa classification, intended for individuals already at the top of their respective fields. The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii).

III. Conclusion

Review of the record does not establish that the beneficiary has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 101(a)(15)(O)(i) of the Act and the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.