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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 25 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined that the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. More specifically, the director found that the petitioner had failed to demonstrate receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The director also determined that the petitioner had not established that his entry will substantially benefit prospectively the United States.

On appeal, counsel argues that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and that his work will prospectively benefit the United States.

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.

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* 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means 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 specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition, filed on May 27, 2008, seeks to classify the petitioner as an alien with extraordinary ability as a musician who plays the clarinet. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. A lower evidentiary standard would not be consistent with the regulatory definition of "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 petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).[1]

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

The petitioner submitted the following:

1. Certificate stating: "Band of Former Music Students, 15 Years, 1985 – 2000, To [the petitioner] In Gratitude and Recognition for his Unconditional Dedication to the Villamaria Music Band (October 15, 2000);
2. Certificate issued by the "Music Bands National Competition Corporation . . . in recognition for [the petitioner's] participation during the 30th National Band Competition" (September 2004);
3. Certificate of recognition issued to the petitioner "for his participation as an Evaluating Juror in Category 'A'" in the "XXIV Festival of Student Musical Bands in Caldas Department" (August 30, 2005);
4. An April 14, 2008 letter from [redacted], Director, [redacted], stating: "The [redacted]-wide annual search every single year in order to recruit members. . . . [The petitioner] . . . auditioned for the position of CLARINET PLAYER during competitions held for 2003, 2004, 2005, and 2006, in which he was declared the WINNER;"
5. A February 3, 2006 letter from [redacted], Academic Coordinator, [redacted], to the petitioner stating: "I am pleased to inform you have been declared WINNER of the [redacted] of Colombia Young Soloist Competition . . . . We are indeed proud to count on the cooperation talented young people such as yourself for our 2006 Symphonic Season;"

[1] The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

6. An April 15, 2008 letter from [redacted] Head of the Musical Arts Section, [redacted] Colombia, stating: "[The petitioner] . . . gave a Clarinet recital in the Luis Angel Library Concert Hall on May 23, 2005, as part of a series 'Mondays of Young Interpreters.' Said presentation was the outcome of auditions held before a jury on October 29, 2004, from which [the petitioner] was one of the selected winners;"
7. A November 17, 2005 letter from [redacted], Coordinator, Latin American Clarinet Academy, State Foundation for the National System of Young People's and Children's Orchestras of Venezuela, stating: "[The petitioner] . . . auditioned as a Clarinet Player in preparation for the VII Venezuelan Young Adult Festival that has been scheduled to be held in Caracas, Venezuela, January 12 through January 22, 2006. He was declared WINNER and, on that basis, has earned a spot to represent Colombia in said Festival."

Item 1 reflects local recognition from the town of Villamaria, Colombia rather than a nationally or internationally recognized prize or award for excellence in the field. With regard to items 2 and 3, there no evidence showing that these certificates are nationally or internationally recognized prizes or awards for excellence in the field, rather than simply acknowledgments of the petitioner's participation in the competition and the festival. Moreover, item 3 reflects recognition in the Caldas region rather than national or international recognition.

With regard to items 4 through 7, there is no indication that the petitioner faced competition from throughout his field, rather than competition limited to his approximate age group within the field. For example, in response to the director's notice of intent to deny, the petitioner submitted the entry requirements for the Monday Series of Young Performers (item 6) reflecting an age limit for instrumental performers of 25 years. We cannot conclude that the petitioner's selection as a winner in competitions restricted by their terms to "young" musicians demonstrates that he is among "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). For comparison, USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *See, e.g., Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.[2] Likewise, it does not follow that a clarinet player who has had success in competitions restricted to "young" musicians in the early stage of their music career should necessarily qualify for an extraordinary ability employment-based immigrant visa. To

[2] While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

> [T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor." The petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. Moreover, it has not been established that securing a position in an orchestra, a music festival, or a recital by means of winning an audition equates to receipt of nationally or internationally recognized "prizes or awards" for excellence in the field of endeavor. Further, the plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this case, there is no evidence demonstrating that the petitioner's selection for the preceding orchestra, music festival, and recital had a significant level of recognition beyond the organizations that designated him as a winner of their auditions.

The petitioner submitted an April 2, 2008 letter from the "[redacted]ls in [redacted] stating that the petitioner "was a member of the [redacted] BAND" and "performed . . . in the following competitions: Armenia (First Place, 1993); Ciudad Bolivar, Antioquia (First Place, 1993), San Pedro, Valle (First Place 1994), La Vega, Cundinamarca (First Place, 1994), Winner, Soloist Competition, 1996, Paipa, Boyaca (First place, 1996), Retiro, Antioquia (First Place, 1997)." The record, however, does not include evidence of the first place awards from the preceding competitions' organizers. Rather than submitting primary evidence of his prizes or awards from these competitions, the petitioner instead submitted a third-party letter attesting to their existence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. Where a record does not exist, the petitioner must submit an original written statement on letterhead from the relevant authority indicating the reason the record does not exist and whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii). In this instance, the letter from the Coordinator of Student Musical Bands in the Caldas region does not meet the aforementioned regulatory requirements. Further, there is no evidence showing that the preceding first place awards equate to nationally or internationally recognized prizes or awards for excellence in the field of endeavor. Moreover, with regard to the petitioner's band's awards, the plain language of this criterion requires "[d]ocumentation of *the alien's receipt* of . . . nationally or internationally recognized prizes or awards." [Emphasis added.] Accordingly, it cannot suffice that the petitioner was part of large group that earned collective recognition.

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

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

In general, in order for published material to meet this criterion, it must be primarily about the petitioner 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.[3]

The petitioner submitted several non-translated newspaper articles from various Spanish language newspapers, the majority of which were not identified. The plain language of this regulatory criterion requires "[p]ublished material about the alien in professional or major trade publications or other major media" including "the title, date, and author of the material." The articles submitted by the petitioner do not meet these requirements. For example, the authors of the articles were not identified and the articles do not appear to be about the petitioner.[4] Further, pursuant to 8 C.F.R. § 103.2(b)(3), any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. The preceding articles were unaccompanied by complete English language translations as required by the regulation at 8 C.F.R. § 103.2(b)(3) and by the plain language of this criterion.

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

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.*

The regulation at 8 C.F.R. § 204.5(h)(3) provides that "a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." The evidence submitted to meet this criterion, or any criterion, must be indicative of or consistent with sustained national or international acclaim.[5] A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of

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[3] 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.

[4] *Accord Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor).

[5] Although not binding, this interpretation has been upheld in *Yasar v. DHS,* 2006 WL 778623 *9 (S.D. Tex. March 24, 2006) and *All Pro Cleaning Services v. DOL et al.,* 2005 WL 4045866 *11 (S.D. Tex. Aug. 26, 2005).

that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). For instance, judging a national competition involving professional musicians is of far greater probative value than judging a local competition involving students or amateurs.

The petitioner submitted a certificate stating that he participated as an "Evaluating Juror in Category 'A'" in the "XXIV Festival of Student Musical Bands in Caldas Department" in 2005. In response to the director's notice of intent to deny, the petitioner submitted a resolution from the Governorship of Caldas stating that would-be jurors for the preceding band competition "are mandated to prove academic education and at least five-year's experience in their specialty fields." The plain language of this regulatory criterion requires "[e]vidence of the alien's participation . . . as a judge of the work of others in the same or an allied field of specification." We cannot conclude that evaluating students, who have not yet begun working in the field, meets the requirements of this criterion. Further, the petitioner has not established that judging a single student competition in his locality in 2005 is commensurate with sustained national or international acclaim. Internal review of student work is not indicative of or consistent with national or international acclaim and, thus, cannot serve to meet this criterion. *See Kazarian v. USCIS*, 580 F.3d 1030, 1035 (9th Cir. 2009). Without evidence showing, for example, that the petitioner has judged experienced professionals in a manner consistent with sustained national or international acclaim at the very top of his field, we cannot conclude that he meets this criterion.

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

The petitioner submitted evidence of his concert performances in a university setting and in conjunction with various orchestras, bands, or recitals consisting of "young" musicians. The petitioner also submitted evidence of his performances with the Philharmonic Orchestra of Cundinamarca in 1999 and 2000. There is no evidence showing that these performances were consistent with sustained national or international acclaim at the very top of his field. For example, the record lacks supporting evidence showing that the petitioner's performances were singled out for critical acclaim by others in his field or that participation in his concerts equates to the exclusive exhibition of an artist's work contemplated by this regulation for visual artists. As discussed previously, the evidence submitted to meet a given criterion must be indicative of or consistent with national or international acclaim if that standard is to have any meaning. We cannot conclude that every musician who participates in a public performance is among that small percentage who have risen to the very top of the field of endeavor. Nevertheless, the plain language of this regulatory criterion indicates that it is intended for visual artists (such as sculptors and painters) rather than for instrumentalists such as the petitioner. In the performing arts, acclaim is generally not established by the mere act of playing music in a public setting, but rather by attracting a substantial audience. For this reason, the regulations establish separate criteria, especially for those whose work is in the performing arts. The petitioner's musical performances are far more relevant to the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x) and will be further addressed there.

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

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

At issue for this criterion are the position the petitioner was selected to fill and the reputation of the entity that selected him. In other words, the position must be of such significance that the alien's selection to fill the position, in and of itself, is indicative of or consistent with national or international acclaim.

On appeal, counsel argues that the petitioner has performed in a leading or critical role for the [redacted] (through his recitals in the Luis Angel Library Concert Hall), the [redacted], the Florida International University (FIU) Wind Ensemble, the South Beach Chamber Ensemble, the Latin American Clarinet Academy, and the [redacted] With regard to the preceding organizations, there is no evidence showing that they have distinguished reputations.[6] Moreover, there is no evidence demonstrating that petitioner's role for them was leading or critical. For example, there is no evidence differentiating his role from that of the other participating performers, let alone their section leaders or principal musicians. Further, there is no evidence showing that the petitioner's name frequently received top billing or that the organizations' popularity increased when he was known to be performing. Accordingly, the petitioner has not established that he was responsible for the success or standing of the preceding organizations to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim.

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

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

This regulatory criterion requires evidence of commercial successes in the form of "sales" or "receipts;" simply submitting evidence showing that the petitioner participated in various concerts, programs, and recitals cannot meet the plain language of this criterion. The record does not include evidence of documented "sales" or "receipts" showing that the petitioner achieved commercial successes in the performing arts in a manner consistent with sustained national or international acclaim at the very top of his field. For example, there is no evidence showing that petitioner's performances consistently drew record crowds, were regular sell-out performances, or resulted in greater audiences than other similar performances that did not feature him. Further, there is no evidence showing, for instance, that the petitioner's musical recordings have generated substantial national or international sales. Accordingly, the petitioner has not established that he meets this criterion.

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[6] For comparison, some examples of orchestras with distinguished reputations include the [redacted], and the New York Philharmonic. *See* article entitled "Chicago Symphony Tops U.S. Orchestras" at http://www.npr.org/templates/story/story.php?_storyId=97291390, accessed on January 28, 2010, copy incorporated into the record of proceeding.

In this case, we concur with the director's finding that the petitioner has failed to demonstrate his receipt of a major, internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the national or international acclaim necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3). 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 petitioner as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

Beyond the regulatory criteria, the petitioner submitted letters of support from his educators, local officials in Colombia, and his music groups praising his talent as an instrumentalist and briefly discussing his activities in the field. Several of these letters have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). We cite additional representative examples here.

Jonathan Cohler, clarinetist and faculty member of the Boston and New England Conservatories of Music and Music Director of the [redacted]

> [The petitioner] . . . was selected to participate in the VII Festival of Young Venezuelan Clarinet Players . . . where he attended and played in several clarinet masterclasses with me.
>
> [The petitioner] has great artistic and musical qualities. . . . He is considered a great clarinet player and has all the qualities to perform the clarinet in any musical setting.

Dr. [redacted] Director of [redacted], states that the petitioner has participated with the [redacted] since the summer of 2007 and that he has been "invited to participate as a regular member for the upcoming Fall semester, 2008." Dr. [redacted] further states: "We are hoping that [the petitioner] will be able to enroll in school on scholarship . . . . I hereby attest to his exceptional performance skills in the field of music. He is considered a great clarinet player and has all the tools to perform his instrument in any musical setting."

[redacted] Clarinet professor from FIU, states: "I have been doing musical work with [the petitioner] since two years ago . . . . I personally recommend [the petitioner] as an exceptional performer, an individual full of artistic qualities and a talented musician."

Dr. [redacted] Professor of Music, [redacted] states:

> I have known [the petitioner] for the past six months. At the time we met, [the petitioner] was enrolled at the West Campus of Miami Dade College, where I normally teach on Tuesdays and Thursdays.
>
> I . . . was so excited about his potential that I formed an informal chamber music group at the West Campus in order to work with [the petitioner] to help him achieve his musical goals.

The preceding individuals' statements regarding the petitioner's talent and potential do not establish that he is among that small percentage at the very top of his field. *See* 8 C.F.R. § 204.5(h)(2). Moreover, the petitioner's invitations to perform in an educational setting are not commensurate with sustained national or international acclaim as a clarinetist. **For comparison, Mr.** [redacted] biography describes him a "recognized throughout the world as 'an absolute master of the clarinet' (International Clarinet Association's *Clarinet Magazine*)." Mr. [redacted] biography further states: "A highly acclaimed recording artist, his recordings have received numerous accolades and awards.... He collaborates frequently with many well-known musicians and ensembles including **members of the** [redacted] . . . ." The achievements of Mr. [redacted] and the experts' repeated references to the petitioner's ongoing musical studies and training indicate that the very top of his field is a level above his present level of achievement.

Moreover, while reference letters can provide useful information about an alien's qualifications or help in assigning weight to certain evidence, such letters are not a substitute for objective evidence of the alien's achievements and recognition as required by the statute and regulations. The nonexistence of **required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Further, the** classification sought requires "extensive documentation" of sustained national or international acclaim. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). The commentary for the proposed regulations implementing the statute provide that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Primary evidence of achievements and recognition is of far greater probative value than opinion statements from individuals selected by the petitioner.

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). 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 achievements and recognition that one would expect of a musician who has sustained national or international acclaim.

The director also found that the petitioner had not established that his entry will substantially benefit prospectively the United States. *See* section 203(b)(1)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(iii). Given the petitioner's failure to satisfy the statutory and regulatory requirements set forth at section 203(b)(1)(A)(i), 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. §§ 204.5(h)(2) and (3), the petitioner's substantial prospective benefit cannot be automatically assumed. The petitioner submitted a February 6, 2009 letter from [redacted] of the [redacted] of the Arts stating **that he "has an ongoing employment offer," but** her

letter does not address the specific nature of his work. The petitioner also submitted evidence of his local music projects and collaborations in Florida. As previously discussed, the petitioner submitted a letter from Dr. [redacted] noting the petitioner's participation with the FIU Wind Ensemble since July 2007 and expressing hope that the petitioner "will be able to enroll in school on scholarship and become a matriculating student" in the graduate program. Dr. [redacted] letter further states: "We here at FIU expect to have him play in the Wind Ensemble, Orchestra, and chamber wind groups. He is a complete player and the scholarship that he will be offered, assuming he qualifies for admission, will include these conditions." With regard to the petitioner's work as a teacher at the [redacted] and School of the Arts, his enrollment as a student at FIU, and his other local projects, we find that the proposed benefit arising from the petitioner's involvement would be so attenuated at the national level as to be negligible. Accordingly, we concur with the director's finding that it is unclear how the petitioner's entry will substantially benefit prospectively the United States.

Review of the record does not establish that the petitioner 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 petitioner's achievements set him significantly above almost all others in his field at a national or international level. Moreover, the evidence is not persuasive that the petitioner's entry into the United States will substantially benefit prospectively the United States. Therefore, the petitioner has not established eligibility pursuant to sections 203(b)(1)(A)(i) and (iii) of the Act and the petition may not be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.