identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

B2

[redacted]

DATE: JUL 17 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

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,

Perry Rhew
Chief, Administrative Appeals Office

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

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

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

The petitioner's priority date established by the petition filing date is October 1, 2010. On December 8, 2010, the director served the petitioner with a request for evidence (RFE). After receiving the petitioner's response to the RFE, the director issued her decision on April 22, 2011. On appeal, the petitioner submits a brief with new evidence. For the reasons discussed below, the AAO upholds the director's ultimate determination that the petitioner has not established his eligibility for the classification sought.

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,

[1] The petitioner's passport, issued in 1999, lists the petitioner's profession as accounting.

(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*, 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. [2] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

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

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

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

II. ANALYSIS

A. Presentation of Evidence

It is important to note that neither within the initial filing, nor in response to the RFE, did the petitioner or counsel provide a cover letter, statement or brief indicating under which criteria the director should apply the petitioner's evidence. Nor did the petitioner or counsel specifically assert which criteria the petitioner satisfied under the regulation at 8 C.F.R. § 204.5(h)(3). The burden is on the petitioner to establish eligibility. It is not the director's responsibility to infer or second-guess the intended criteria. The first instance in which the petitioner identified the particular criteria that he felt his evidence meets is within the appellate brief.

Additionally, the Form I-140, Immigrant Petition for Alien Worker does not contain any information on the petitioner's occupation or a job title relating to his proposed employment. The petitioner left both spaces on the Form I-140 regarding this information blank. The regulation at 8 C.F.R. § 103.2(a)(1) requires that a petitioner execute a petition in accordance with the instructions. The director accepted the petition and within the RFE categorized the petitioner's area of expertise as a teacher. Within the response to the RFE, neither counsel nor the petitioner refuted the director's assessment that the petitioner intended to work in the United States as a teacher. However, on appeal counsel's brief indicates that the director's characterization of the petitioner as a teacher is too narrow and that it was an error. Counsel fails to explain how the error is the director's when counsel never previously provided a cover letter or brief to place the evidence in context.

B. Evidentiary Criteria[3]

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 criterion and found that the petitioner failed to establish his 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 submitted qualifying evidence under this criterion.

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

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

This criterion contains three evidentiary requirements the petitioner must satisfy. First, the published material must primarily be about the petitioner and the contents must relate to the petitioner's work in the field under which he seeks classification as an immigrant. The published material must also appear in professional or major trade publications or other major media (in the plural). Professional or major trade publications are intended for experts in the field or in the industry. To qualify as major media, the publication should have significant national or international distribution and be published in a predominant national language. The final requirement is that the petitioner provide each published item's title, date, and author and if the published item is in a foreign language, the petitioner must provide a translation that complies with the requirements found at 8 C.F.R. § 103.2(b)(3). The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

Accompanying the initial petition, the petitioner provided a January 8, 2003, article from citypages.com; a June 29, 2010, article from millelacsmessenger.com; a website printout from cdbaby.com printed on September 25, 2010; and a pamphlet from The Blake School dated June 5, 2007. In response to the director's RFE the petitioner provided additional evidence accompanied by a list of the additional evidence, but failed to provide the director with any guidance as to which criterion each form of evidence should be applied. On appeal the petitioner provided a website printout from Kenwood School, a website printout from Duniya Drum & Dance, a 2007 Minneapolis Public Schools report to the community, a website printout from billboard.com, a website printout from Caveman Records, and a pamphlet from the Carter G. Woodson Institute for Student Excellence (WISE). The director determined that the petitioner met the requirements of this criterion. The AAO does not concur with the director's determination as it relates to this criterion for the reasons discussed below.

The plain language requirements of this criterion specify that the published material must be about the alien and related to his work in the field and must appear in one of the three publication types: a professional publication, a major trade publication or other major media.

The petitioner submitted articles from citypages.com and from millelacsmessenger.com. Each article appeared on a website, but the petitioner failed to provide evidence relating to which publication type each website constituted. While the article from millelacsmessenger.com highlights the petitioner, the article is not about him and relating to his work in the field. This article is primarily about the diversity of a local youth program and this is an insufficient representation to meet the plain language requirements of this criterion. The article in citypages.com is not about the petitioner. Rather it is about a unique restaurant in Minneapolis. These articles are insufficient evidence to meet the plain language requirements of this criterion.

The website printout from cdbaby.com suffers the same evidentiary deficiency as the two above articles in that the petitioner failed to provide evidence that the website is a professional publication, a major

trade publication or other major media. Regarding the pamphlet from the Blake School, the pamphlet is not about the petitioner and relating to his work. Furthermore, the record is deficient of evidence demonstrating that this pamphlet qualifies as a professional publication, a major trade publication or other major media.

The evidence from Kenwood School, Duniya Drum & Dance, billboard.com, Caveman Records, and WISE, each postdates the petition filing date. The director's RFE notified the petitioner that any additional evidence, beyond that submitted with the initial petition, must be dated prior to the petitioner's priority date established by the petition filing date. The AAO will not consider evidence that postdates the petition filing date. *See generally* 8 C.F.R. §§ 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Regarding the final form of evidence submitted on appeal, a 2007 Minneapolis Public Schools report to the community, the petitioner is listed as one among hundreds of arts and community partners. This falls far short of meeting the plain language requirements of this criterion that the published material be about the petitioner and relating to his work. Additionally, the petitioner provided no evidence that this report constitutes a professional publication, a major trade publication or other major media.

As the record is lacking the aforementioned required evidence, the AAO does not concur with the director's determination that the petitioner submitted evidence that meets the plain language requirements of this criterion. Therefore, the AAO withdraws the director's determination as it relates to 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.*

This criterion requires not only that the petitioner was selected to serve as a judge, but also that the petitioner is able to produce evidence that he actually participated as a judge. The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified at 8 C.F.R. § 204.5(h)(3)(iv). Additionally, these duties must have been directly judging the work of others in the same or an allied field in which the petitioner seeks an immigrant classification within the present petition. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner provided a letter describing how, for multiple years, he has judged children from kindergarten through eighth grade on behalf of WISE Charter School. The director determined that the petitioner failed to meet the requirements of this criterion.

The director concluded that judging elementary school children is not judging "others in the same or an allied field." The petitioner does not contest or address the director's findings on appeal. Counsel merely asserts that the petitioner's performance judging the children satisfied the requirements of this criterion. The AAO does not concur with counsel's assertion. 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). The unsupported assertions of counsel in a brief are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). The petitioner provided no explanation describing how judging the performance of children in an elementary school constitutes judging "the work of others in the same or an allied field." The record is lacking evidence to demonstrate that the children who won these competitions moved on to additional competitions outside of the WISE school that occurred at a level that could be considered to be in the field of music. Competitions limited to students at a single charter school who are not part of a "field" do not involve judging performances as contemplated by the regulation, and counsel failed to provide any legal analysis to support the position in the alternative.

Therefore, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

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

The plain language of this regulatory criterion contains multiple evidentiary elements that the petitioner must satisfy. The first is evidence of the petitioner's contributions (in the plural) in his field. These contributions must have already been realized rather than being potential, future contributions. The petitioner must also demonstrate that his contributions are original. The evidence must establish that the contributions are scientific, scholarly, artistic, athletic, or business-related in nature. The final requirement is that the contributions rise to the level of major significance in the field as a whole, rather than to a project or to an organization. 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). Contributions of major significance connotes that the petitioner's work has significantly impacted the field. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

As the petitioner failed to notify the director of which evidence should be applied under this criterion, the director determined that the numerous witness letters the petitioner provided should be considered here. The director determined that the petitioner failed to meet the requirements of this criterion.

On appeal, counsel asserts that the director did not adequately consider the evidence submitted by the petitioner as the director made no mention of the petitioner's music. It is unclear how the director committed an error when she was not notified of the petitioner's intentions of where to consider the submitted evidence. Nevertheless, counsel does not refute the director's assessment that the witness letters were insufficient to demonstrate the petitioner's eligibility under this criterion. In reference to the witness letters the director indicated that the letters boasted about the petitioner's accomplishments, career, extraordinary ability and talent, but that letters alone cannot form the cornerstone of an alien's eligibility under this criterion and that the record lacked evidence of the petitioner's impact on his field as a whole.

Regarding the petitioner's "music recorded for public consumption," the record contains evidence of the petitioner's recorded music with [redacted] in addition to the petitioner's debut work in 2004. Although the counsel's appellate brief asserts: "[T]he music recorded for public consumption constitutes evidence of [the petitioner's] artistic contribution of major significance in the arts," the record lacks an indication of the manner in which the release of the petitioner's music impacted his field as a whole. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The unsupported assertions of counsel in a brief are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. at 188-89 n.6.

The regulations contain a separate criterion regarding commercial success, including evidence of album sales. 8 C.F.R. § 204.5(h)(3)(x). If the regulations are to be interpreted with any logic, it must be presumed that the regulation views contributions as a separate evidentiary requirement from the sale of music. The AAO will not presume that evidence directly relating to the commercial success criterion is sufficient to meet the contributions of major significance criterion without specific evidence of the petitioner's impact in the field.

Most of the letters either thank the petitioner for his efforts or identify how the petitioner contributed to or impacted an individual organization rather than how the petitioner's work has had any impact in his field as a whole. The letters are primarily from school colleagues or officials with events where he has performed rather than from music experts. Accomplishments within single education programs affecting only those students in attendance is not the level of effect that carries the significant, measurable amount of "weight" that this regulation contemplates. Even those who claim to have worked with the petitioner for nearly a decade only comment on the petitioner's skill and abilities or the impact he had on small scale education programs. [redacted] stated in his undated letter provided on appeal that he has been working with the petitioner since 2000. However, [redacted] did not describe any impact the petitioner's achievements or contributions have had in the musical field. [redacted] merely asserts that one of the petitioner's songs is [redacted] highest selling records averaging approximately 1,000 downloads per month. The petitioner did not provide documentary evidence that might corroborate [redacted]'s claims. 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 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Even if true, commercial success is a separate criterion. 8 C.F.R. § 204.5(h)(3)(x).

Talent and experience in one's field are not necessarily indicative of original artistic contributions of major significance in the musical field. It is not enough to be skillful and knowledgeable and to have others attest to those talents. An alien must have demonstrably impacted his field in order to meet this regulatory criterion. The reference letters submitted by the petitioner discuss his musical skills and cultural activities, but they do not provide specific examples of how the petitioner's work has even had a minor impact in the field at large or otherwise constitutes original contributions of major significance.

The Board of Immigration Appeals (BIA) 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).

Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" was insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. The opinions of experts in the field are not without weight and have been considered above. While such letters can provide important details about the petitioner's skills, they 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 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Thus, the content of the writers' 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.

As such, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

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

This criterion contains multiple evidentiary elements the petitioner must satisfy. The plain language requirements of this criterion requires that the work in the field is directly attributable to the alien. Additionally, the interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). The alien's work also must have been displayed at an artistic exhibitions or showcases (in the plural). While neither the regulation nor existing precedent speak to what constitutes an exhibition or a showcase, Merriam-Webster's online dictionary defines

exhibition as, "a public showing (as of works of art)."[4] Merriam-Webster's online dictionary also defines showcase as, "a setting, occasion, or medium for exhibiting something or someone especially in an attractive or favorable aspect."[5] Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U.S. 304, 306 (1893). Therefore, it is the petitioner's burden to demonstrate that the display of his work in the field claimed under this criterion occurred at artistic exhibitions or at artistic showcases. The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion.

The director's RFE stated that no evidence was submitted under this criterion. Within the RFE response, neither counsel nor the petitioner refuted this declaration by the director. On appeal is the first instance that the petitioner or counsel articulated that the petitioner could satisfy this criterion's requirements. Counsel claims the petitioner's concerts and musical performances qualify as participation in artistic showcases.

As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, he has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

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

This criterion anticipates a petitioner will establish eligibility through volume of sales or box office receipts as a measure of the petitioner's commercial success in the performing arts.

On appeal the petitioner provided the letter from [redacted] indicating that the petitioner's song is downloaded approximately 1,000 times per month. The director determined that the petitioner failed to meet the requirements of this criterion.

The director's RFE stated that no evidence was submitted under this criterion. Within the RFE response, neither counsel nor the petitioner refuted this declaration by the director. On appeal is the first instance that the petitioner or counsel articulated that the petitioner could satisfy this criterion's requirements. Counsel claims the petitioner satisfies this criterion's requirements through the letter from [redacted] which lacks corroborating evidence to demonstrate the sales of the petitioner's music, in addition to several contracts that the petitioner has entered into with various entities. This criterion requires the petitioner to demonstrate his eligibility through either "box office receipts or record, cassette, compact disk, or video sales." USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian*, 596 F.3d at 1221, *citing Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir.2008). While the petitioner provided evidence

[4] *See* http://www.merriam-webster.com/dictionary/exhibition, [accessed on July 10, 2012, a copy of which is incorporated into the record of proceeding.]

[5] *See* http://www.merriam-webster.com/dictionary/showcase, [accessed on July 10, 2012, a copy of which is incorporated into the record of proceeding.]

showing that he has his own album or songs that are available for sale, he failed to provide sufficient evidence demonstrating the level of sales for any of his work.

Consequently, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

C. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

III. CONCLUSION

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

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination. [6] Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soriano*, 19 I&N Dec. at 766 (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

---

[6] 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).

ORDER: The appeal is dismissed.