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

PUBLIC COPY

[redacted]

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DATE: JUN 13 2012 Office: TEXAS 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 with the field office or service center that originally decided your case by filing a 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, Texas 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" as a musician in the performing arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A). 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 14, 2010. On October 21, 2010, the director served the petitioner with a notice of intent to deny (NOID). After receiving the petitioner's response to the NOID, the director issued his decision on December 3, 2010. On appeal, the petitioner submitted a brief and additional documentary 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,
>
> (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.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

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

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

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

II. ANALYSIS

A. Previous Nonimmigrant O-1 Approval

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

> Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

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

In addition, it must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

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

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Glara Fashion, Inc. v. Holder*, 11 CIV. 889 PAE, 2012 WL 352309 *7 (S.D.N.Y. Feb. 3, 2012); *Royal Siam v. Chertoff*, 484 F.3d 139, 148 (1st Cir.2007); *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 177 (D.Mass.2000)) (Dkt.10); *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp.2d 800, 803 (E.D.La.1999), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

B. Field of Endeavor

Counsel asserted that the AAO should view the petitioner's field of endeavor or field of expertise as "Alternative/Christian Rock." However, the petitioner's field is that of a musical recording artist. Notably, within the initial petition filing as the Form I-140, the petitioner clearly indicated in Part 5 that his occupation is that of a "Music Recording Artist." The AAO is not persuaded by counsel's attempt to narrow the petitioner's general field of musical recording artists down to Christian alternative rock recording artists. Notably, *Buletini v. INS*, 860 F. Supp. 1222, 1229-30 (E.D. Mich. 1994), a case that counsel cites as persuasive, faulted legacy INS for narrowing that alien's field from medicine to nephrology.

C. Non-precedential District Court Decisions

In his appellate brief, counsel refers to two district court decisions: *Buletini*, 860 F. Supp. at 1222, and *Muni V. INS*, 891 F. Supp. 440 (N.D. Ill. 1995). Counsel cites *Buletini* and *Muni* as support for his position that the director erred in requiring that the petitioner first demonstrate that he meets at least three of the regulatory criteria listed at 8 C.F.R. § 204.5(h)(3) and subsequently show:

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. § 204.5(h)(2); and

2. "[T]hat 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).

The AAO is not persuaded by counsel's characterization of *Muni's* holding as finding that "satisfying three criteria through meeting the plain language of the regulations, an alien is deemed to have sustained acclaim . . . ." Contrary to counsel's claim, *Muni* specifically found that "the satisfaction of the three-category production requirement does not mandate a finding that the petitioner has sustained national or international acclaim and recognition in his field." 891 F. Supp. at 446. Rather it is only "a start." *Id.* The court then faulted legacy INS for failing to attempt to explain why the evidence "did not meet the acclaim and recognition standard." *Id.* Further, *Buletini* stated:

> Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 C.F.R. § 204.5(h)(3), the alien must be deemed to have extraordinary ability

> unless [USCIS] sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard.

Id. at 1234.

Contrary to counsel's claim that sustained national or international acclaim is demonstrated by meeting at least three of the regulatory criteria, both *Muni* and *Buletini* contemplate a final merits analysis to determine whether the alien has sustained national or international acclaim in light of meeting at least three of the criteria.

In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In this matter, there is a recent circuit court decision that is far greater authority.

D. Standard of Proof and Totality of the Evidence

Counsel's appellate brief also indicated that the final merits portion of the director's decision failed to consider the evidence as a whole and instead of applying the preponderance of the evidence standard of proof, the director applied the "criminal law standard of 'beyond a reasonable doubt.'" The record does not support counsel's assertion that the director held the petitioner's evidence to an elevated standard beyond that which is required by most administrative immigration cases, the preponderance of the evidence standard of proof. This standard is outlined in *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010), which indicated that in evaluating evidence, USCIS must "examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." USCIS determines the truth not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. at 376 citing *Matter of E-M-* 20 I&N Dec. 77, 80 (Comm'r 1989). Using this standard, the AAO concurs with the director's ultimate conclusion that the evidence does not establish the petitioner's eligibility.

E. Evidentiary Criteria[2]

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

This criterion contains several evidentiary elements the petitioner must satisfy. According to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i), the evidence must establish that the alien be the

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

recipient of the prizes or the awards (in the plural). The clear regulatory language requires that the prizes or the awards are nationally or internationally recognized. The plain language of the regulation also requires evidence that each prize or award is one for excellence in the field of endeavor rather than simply for participating in or contributing to the event. The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion.

The petitioner provided a single award, [redacted] issued by the International Songwriting Competition (ISC). The director determined that the petitioner failed to meet the requirements of this criterion.

The director credited the petitioner with one award that satisfied this criterion's requirements, first place for the [redacted]' issued by the ISC. However, the petitioner provided no evidence demonstrating that this award is nationally or internationally recognized for excellence in the field. The evidence of media coverage relating to this award derives from the website directly associated with the petitioner's band, [redacted] The preceding information from the [redacted] is insufficient to demonstrate that the 2004 award is a nationally or internationally recognized award for excellence in the field. In addition, the petitioner provided a press release from the ISC. USCIS need not rely on the self-promotional material from ISC about its own award. *See Braga v. Poulos,* No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). This document is a photocopy and the petitioner failed to provide a copy that displays the full text. However, the document indicates that this competition received exposure in the media via the *New York Times*, which allegedly called it the "songwriting competition to take note of." The record is absent of such exposure from the *New York Times*. Furthermore, even if this assertion bears out, without the full *New York Times* article, the quote is without context and relates to the competition while the regulation requires that the award itself be nationally or internationally recognized. As such, this award will not serve to meet the requirements of this criterion.

Additionally, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires evidence of "awards" in the plural, which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS,* Civ. Act. No. 06-2158 (RCL) at *1, *12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff,* 2006 WL 3491005 at *1, *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

Consequently, even if the ISC award were to satisfy the regulatory requirements, the petitioner would still fail to meet the plain language requirements of 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.*

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.

The petitioner provided numerous forms of evidence relating to this criterion. The director determined that the petitioner failed to meet the requirements of this criterion. A review of the director's decision reveals that the director may have considered the quality of the evidence within the antecedent procedural step rather than simply determining if the petitioner provided evidence that meets the plain language requirements of this criterion. This type of analysis is more appropriate within the final merits determination.

The bulk of the evidence the petitioner provided failed to meet the regulatory requirements under this criterion as the petitioner neglected to include any independent evidence to demonstrate that the provided media is one of the regulatory mandated publication types (professional or major trade publications or other major media). Much of the evidence is also considered to be self-serving as it originated from www.fono.net, the website directly relating to the petitioner's band, Fono. In addition, with regard to the compact disc reviews, they are not about the petitioner relating to his work. *See generally 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).

Considering the evidence cited within the director's decision, the evidence relating to *Billboard Magazine* is not about the petitioner relating to his work in the field. Instead, the article failed to even mention the petitioner by name and it is about the band, [redacted] and their new album. The statute requires that the coverage be "about the alien" and "relating to the alien's work in the field." *See* 8 C.F.R. § 204.5(h)(3)(iii). Also, as the director noted, this article is missing the publication date.

The record contains multiple interviews that appeared [redacted]. Regarding the interview in [redacted] the petitioner submitted information from the magazine's website indicating that it has a "nationwide" readership of 100,000 and is distributed in New York City, California, Texas and Florida. This information does not establish that this magazine is a professional or major trade publication or other major media. Regarding the posting of articles on the Internet, in today's world, many entities post at least some of their stories on the Internet. To ignore this reality would be to render the "major media" requirement meaningless. International accessibility by itself is not a realistic indicator of whether a given publication is "major media." The AAO will not presume that the mere inclusion on the Internet of articles from music oriented websites will qualify as major media. On appeal, the petitioner provided information from [redacted] revealing monthly page views worldwide of only 20,000. The record does not establish that these numbers are consistent with a professional or major trade publication or other major media.

The petitioner also submitted a letter from [redacted], who claims to be a former producer for the [redacted] also claims to have produced a 30 minute BBC special about [redacted], the petitioner's band and that he "made a variety of features about the band for other BBC stations. The petitioner has not provided evidence to demonstrate that [redacted] remains employed by the BBC, and the petitioner failed to provide evidence to corroborate [redacted] claims. The AAO will not presume that a letter from a former employee of a television station, without additional corroborating evidence, will satisfy this criterion's requirements.

Additionally, the petitioner provided articles originating from *Cross Rhythms*, both the magazine and the website. Regarding the 1996 *Cross Rhythms* magazine article, the petitioner failed to provide any evidence relating to the circulation or distribution of this publication from 1996. Instead, the petitioner submitted general information about Cross Rhythms' history and a list of radio stations that carry its shows. As such, the petitioner has not demonstrated that this publication qualifies as one of the required publication types. This decision has already explained why the AAO will not presume that the mere inclusion on the Internet of articles from music oriented websites will qualify as major media.

Therefore, the petitioner has not submitted evidence that satisfies each of this regulation's requirements.

> *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) to 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.

The petitioner provided the opinion of experts as evidence under this criterion. The director determined that the petitioner failed to meet the requirements of this criterion.

Within the appellate brief, counsel lists ten expert letters that the director allegedly ignored. A review of the director's decision reveals that the director did not perform an in-depth analysis on the expert letters, but concluded generally that expert letters, per se, are insufficient to demonstrate that the petitioner has met this criterion's requirements. The director also stated that no other evidence within the record demonstrated the petitioner's eligibility to meet this regulatory requirement.

[redacted] who served as [redacted] indicated that the petitioner is "widely considered a true innovator in our industry," and that "[the petitioner] has permanently influenced his field" as a member of the bands [redacted] Although [redacted] further indicated that the petitioner is widely renowned, she failed to detail in what manner the petitioner has been an "innovator" or how he has "permanently influenced his field" as she claims. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F.Supp. 9, 15 (D.C. Dist. 1990).

[redacted] indicated that he has consistently been impressed with the petitioner's performances and songwriting talent, which factored into [redacted] requesting that [redacted] go on tour with [redacted] While [redacted] indicated that the petitioner has performed at prestigious concerts, he does not explain how the petitioner has impacted the musical industry with his contributions that can be construed to be of major significance.

The letter from [redacted] states: "[The petitioner] is widely considered a true innovator in our industry." Much of the language in [redacted] letter mirrors that from [redacted] letter above. In fact, several of the letters contain nearly identical language extoling the petitioner's accomplishments and abilities, but do not provide specific information indicating how the petitioner's contributions to his field have made an impact tantamount to contributions of major significance as the regulation requires. The petitioner's talent and experience in his field are not necessarily indicative of original artistic contributions of major significance in his 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 through identifiable specific contributions in order to meet this regulatory criterion.

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.

The director determined the petitioner met the requirements of this criterion. The AAO departs from the director's eligibility determination related to this criterion for the reasons outlined below.

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. *See Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at *7 (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)."[3] 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."[4] 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.

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). Therefore, the AAO departs from and withdraws the director's favorable determination as it relates to this criterion.

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

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role's matching duties. A critical role should be apparent from the petitioner's impact on the organization or the establishment's activities. The petitioner's performance in this role should establish whether the role was critical for organizations or establishments as a whole. The petitioner must demonstrate that the organizations or establishments (in the plural) have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-Webster's online dictionary defines distinguished as, "marked by eminence, distinction, or excellence."[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. at 306. Therefore, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or a similar reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director determined that the petitioner met the requirements of this criterion. The AAO departs from the director's favorable determination as it relates to this criterion for the reasons outlined below.

Initially, counsel mischaracterized the plain language of this criterion, asserting that the petitioner "has performed and will perform services as a lead or starring participant in productions or events." This language does not follow the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). Counsel also, however, went on to address this criterion as written.

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[3] *See* http://www.merriam-webster.com/dictionary/exhibition, [accessed on April 24, 2012, a copy of which is incorporated into the record of proceeding.]

[4] *See* http://www.merriam-webster.com/dictionary/showcase, [accessed on April 24, 2012, a copy of which is incorporated into the record of proceeding.]

[5] *See* http://www.merriam-webster.com/dictionary/distinguished, [accessed on April 24, 2012, a copy of which is incorporated into the record of proceeding.]

The director's decision indicates that the petitioner meets this criterion's requirements based on one of the petitioner's bands appearing on the soundtracks of television shows such as *ER*, *Dog the Bounty Hunter*, *Road Rules*, *Real World*, two video games, and a beer-maker's now-defunct online audio player. The regulation requires that the leading or critical role be performed for organizations or establishments that have a distinguished reputation. The aforementioned are not organizations or establishments as contemplated by the regulation and the petitioner has not demonstrated that he performed in a leading or critical role for the organizations under which these entities exist. Consequently, these will not serve to satisfy the evidentiary requirements related to this criterion.

Within the initial filing brief, counsel indicates that the petitioner qualified under this criterion based on:

1. Performing at some of the most prominent Christian music and modern rock events of recent years, as well as playing with many of the top bands in those fields;

2. Performing on rock tours;

3. The fact that his band was featured [redacted] and that the band's music was featured on the abovementioned television programs;

4. His leading role within the band, [redacted];

5. His leading role within his band [redacted], which Universal Music Group is distributing;

6. By his role for [redacted]

7. Performing on [redacted] record label; and

8. His upcoming performances and productions on behalf of [redacted]

Items 1 – 5 are not qualifying organizations or establishments as contemplated by the regulation and will not serve to meet the plain language requirements of this criterion. Regarding item six, counsel refers to the letter from [redacted] Within her letter, [redacted] failed to specify the manner in which the petitioner performed in a leading or critical role for [redacted] Instead, [redacted] discussed the petitioner's leading role for the band, [redacted]. As [redacted] is not a qualifying organization or establishment contemplated under the regulation, it will not satisfy this criterion's requirements. Regarding items seven and eight, while the petitioner provided information relating to each organization, he failed to submit evidence demonstrating that he performed in a leading role as represented by his position in either organization's hierarchy. Additionally, the record lacks evidence of the impact that the petitioner has had on either of these organizations.

In view of the foregoing, the petitioner has not submitted evidence that meets the plain language requirements of this criterion. Therefore, the AAO departs from and withdraws the director's favorable determination as it relates to 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 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.

The petitioner's song was selected to appear on [redacted]. The petitioner did not provide evidence to demonstrate if his band's song appeared on the original version of the game or if it was merely as an aftermarket song that was downloadable to the gaming console. Regardless, as the evidence on record failed to indicate the volume of the song's sales for [redacted] it will not serve to satisfy the plain language requirements of this criterion.

The petitioner provided licensing agreements between himself and various entities. The director determined that the petitioner met the requirements of this criterion. The AAO departs from the director's favorable determination as it relates to this criterion for the reasons outlined below. The regulation contains no caveat for an alien to demonstrate eligibility under this criterion based on licensing agreements. 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). The appropriate measure is through sales volume.

Lastly, the petitioner submitted documentation relating to numerous "major industry airplay charts." While these charts indicate that songs that the petitioner's band performed rose to the top of many of the charts, this is insufficient evidence to meet the plain language requirements of this regulatory criterion. This evidence does not demonstrate commercial successes through sales volume as mandated by the regulation at 8 C.F.R. § 204.5(h)(3)(x). As the petitioner failed to provide evidence of record, compact disc, or other similar sales relating to his work, he has failed to submit evidence that satisfies the plain language requirements of this criterion.

Accordingly, the petitioner has not submitted evidence that meets the plain language requirements of this criterion. Hence, the AAO departs from and withdraws the director's favorable determination as it relates to this criterion.

F. Summary

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

G. Final Merits Determination

Although the petitioner failed to satisfy at least three of the evidentiary criteria and a final merits determination is not required, the director performed this analysis and the AAO concurs with the director's determination. In accordance with the *Kazarian* opinion, the next step is 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. § 204.5(h)(2); 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)(3). *See Kazarian*, 596 F.3d at 1119-20.

The only award the petitioner provided was the [redacted] issued by [redacted] This decision has already addressed why the submitted award does not rise to the level of nationally or internationally recognized award for excellence in the field. A single award issued six years prior to the petition filing that lacks evidence of any significant recognition is not indicative of or consistent with sustained national acclaim or a level of expertise indicating that the petitioner is one of that small percentage who have risen to the very top of his field.

Published material that is either not about the petitioner or his work or that appears in a news medium where it is not established that the publication has at least a national reach is not representative of national or international acclaim nor does it demonstrate the petitioner enjoys the status as one of that small percentage who have risen to the very top of their field of endeavor. Moreover, the most significant interviews of the petitioner date from 2007, which predates the filing of the petition by three years. Such evidence is not indicative of sustained acclaim in 2010 when the petitioner filed the petition.

The petitioner's claim to have made contributions of major significance rests almost entirely on recommendation letters. The letters submitted on behalf of the petitioner fail to reflect any original contributions of major significance made by the petitioner and their simple repetition of the statutory and regulatory requirements is insufficient to establish her national or international acclaim. *See Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc.*, 1997 WL 188942 at *5 (S.D.N.Y.).

Performing in a leading or critical role for entities and projects that are not organizations or establishments is not indicative of or consistent with sustained national acclaim or a level of expertise indicating that the petitioner is one of that small percentage who have risen to the very top of his field.

The petitioner has not established that he has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. The documentation submitted by the petitioner is not indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of his field. Moreover, there is no evidence indicating that the petitioner has performed in a leading or critical role for organizations or establishments that have a distinguished reputation since his arrival in the United States in 1996. The

statute and regulations, however, require the petitioner to demonstrate that his national or international acclaim has been *sustained*. *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 documentation submitted for the criterion at 8 C.F.R. § 204.5(h)(3)(viii) is not commensurate with *sustained* national or international acclaim as of the petition's filing date.

While the petitioner submitted evidence of his musical performances, musical recordings and their placement with some popularity charts, performing and recording is inherent to the petitioner's occupation and are not, by themselves, indicative of acclaim or being within the small percentage at the top of is field of endeavor. The petitioner failed to submit documentation of his commercial successes in the form of evidence that documents sales volume. This failure makes it impossible to gauge whether his performances rise to the appropriate level related to the commercial successes criterion. Additionally, the petitioner's evidence failed to demonstrate that he "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).

In this matter, the petitioner has not established that his achievements at the time of filing were commensurate with sustained national or international acclaim as a musician in the performing arts, or being among that small percentage at the very top of the field of endeavor. The submitted evidence is not indicative of a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). The conclusion the AAO reaches by considering the evidence to meet each category of evidence at 8 C.F.R. § 204.5(h)(3) separately is consistent with a review of the evidence in the aggregate. Ultimately, the evidence in the aggregate 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). While the petitioner need not demonstrate that there is no one more accomplished than himself to qualify for the classification sought, it appears that the very top of his field of endeavor is far above the level he has attained.

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.

Review of the record, however, does not establish that the petitioner has distinguished himself as a musician in the performing arts 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 indicates that the petitioner shows talent as a musican, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683;

see also Soltane v. DOJ, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.