

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

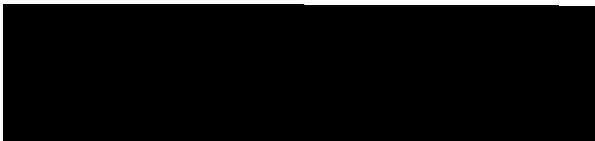
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B3



FILE: LIN 06 057 51930 Office: NEBRASKA SERVICE CENTER Date: FEB 19 2008

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

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 thus qualifies for classification as an alien of extraordinary ability.

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.

Citizenship and Immigration Services (CIS) 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 December 16, 2005, seeks to classify the petitioner as an alien with extraordinary ability as a French horn musician. According to Part 3 of the petitioner's Form I-140, Immigrant Petition for Alien Worker, and other documentation in the record, he has been residing in the United States since 1998. At the time of filing, the petitioner was employed as member of the Illinois Symphony Orchestra.

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.

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 a certificate from the Gheorghe Dima Academy of Music's June 1999 Performance Contest. The certificate states that the petitioner and four other members of his brass quintet "Harmony" were awarded third prize. In addressing this evidence, the director noted that the Gheorghe Dima Academy was the petitioner's undergraduate educational institution and that an award from his alma mater reflects recognition at the "institutional level" rather than national or international recognition for excellence in the field. The director also concluded the record lacked "documentation regarding the significance of this award" and evidence showing the award is nationally or internationally recognized. We concur with the director's observations. On appeal, counsel argues that the director "failed to recognize that the petitioner graduated from the Gheorghe Dima Academy of Music in 1998" and received the award in June of 1999. Counsel further states that the letters of support from [REDACTED] and [REDACTED] identify the Gheorghe Dima Contest as an "international competition," but none of these individuals were affiliated with the contest and there is no documentary evidence to support their assertions. Further, their letters include no substantive information about the Gheorghe Dima Contest to demonstrate that its third prize constitutes a nationally or internationally recognized award for excellence in the field.

The petitioner submitted an April 1995 first prize certificate from the Moldavian Republic National Performing Contest for Aerophonic and Percussion Instruments. The petitioner also submitted a May 1996 "Graduation Diploma" from the "International Music Contest 'Jeunesses Musicales'" stating that he received second prize in the "D" category. In addressing these prizes, the director's decision noted that the record included no documentation regarding the significance of these prizes or the selection criteria for recipients. The director's decision further stated that it was unclear if the preceding awards were specifically for students or amateurs, or if they encompassed professional musicians already working in the field as well. We concur with the director's observations. The plain language of this regulatory criterion requires "prizes or awards for excellence in the field of endeavor." Therefore, the petitioner must demonstrate that the preceding contests were open to musicians already well established in the field rather than limited to student or amateur musicians. The petitioner's receipt of prizes restricted to students or amateurs is not an indication that he "is one of that small percentage who have risen to the very top of the field of endeavor." See 8 C.F.R. § 204.5(h)(2).

With regard to the three preceding prizes, the plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that they be nationally or internationally *recognized* in the field of endeavor and it is the petitioner's burden to establish every element of this criterion. In this case, the petitioner has not submitted evidence showing that his awards commanded national or international recognition consistent with sustained national or international acclaim. The record includes no evidence establishing the significance and magnitude of the preceding contests. National or international contests typically issue event programs listing the names of the participating contestants and the award categories. At a contest's conclusion, results are usually provided indicating how each participant performed in relation to the other contestants in his or her category. The petitioner, however, has provided no evidence of the official comprehensive results for the contests in which he received prizes. Further, the record includes no evidence that would demonstrate the number of prizes given, the geographic area from which the individuals eligible for consideration for these prizes were drawn from, the criteria for granting the prizes, the level of expertise of those considered, and the number of individuals eligible to compete. Nor is there supporting evidence showing that the recipients of the preceding prizes were announced in major media or in some other manner consistent with national or international acclaim. Moreover, there is no evidence that the petitioner has received any relevant prizes or awards since 1999. As such, the petitioner has not established that his national or international acclaim has been sustained.

The director's decision also stated:

Finally, the Service notes that the witness letter from [REDACTED] contends that the petitioner's audition for a position within the Civic Orchestra of Chicago, which is a "training orchestra for young, pre-professional musicians" according to a press release, and subsequent hire in that position constitutes an internationally recognized award. While the Orchestra did open the auditions to national and international musicians, these auditions were held for the purpose of recruitment and employment in a specific position. The Service cannot find that securing a position over other applicants, whether through an interview process or through a musical audition, can be construed as an award. By this logic, every musician who has auditioned for and secured a position in an orchestra would have a national or international award, which would render this criterion meaningless for classical musicians. Further, as the orchestra itself is a training orchestra for pre-professional musicians, it would appear that selection would likely exclude the most eminent and established musicians already working in the field from consideration and therefore would not rise to the level of a nationally recognized award.

We concur with the director's observations regarding the petitioner's 2001 audition and subsequent selection for training by the Civic Orchestra of Chicago. The October 13, 2004 press release mentioned in the director's decision states: "Founded in 1919, the Civic Orchestra of Chicago is . . . affiliated with . . . the Chicago Symphony Orchestra. The principal goal of the Civic Orchestra program is to recruit a diverse group of the very best pre-professional musicians, train them at the highest level as orchestra players, and further develop skills . . ." A letter of support from [REDACTED] Executive Director, Civic Orchestra of Chicago, further states: "The personal attention that the young musicians receive from [REDACTED] the Chicago Symphony musicians that serve as Civic coaches, and from Resident Conductor [REDACTED], culminate in classical music training not found anywhere else . . ."

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

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

The petitioner submitted his membership card for the International Horn Society. In response to the director's request for evidence, the petitioner submitted information about this society stating that its membership included "students" and "amateur players of all ages and walks of life." There is no evidence (such as membership bylaws or official admission requirements) showing that this society requires outstanding achievements of its members, as judged by recognized national or international experts in the petitioner's field. As such, 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 or international level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.¹

The petitioner submitted a 2005 article about him in the Arts and Culture section of *Adevarul de Cluj*. On appeal, counsel asserts that this publication is a "major newspaper . . . with a readership of approximately 300,000." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record includes no evidence that this newspaper is a major publication with substantial national or international readership.

The petitioner submitted a music review published in the September/October 2003 issue of *American Record Guide* discussing music played by the [REDACTED] Ensemble. The five-paragraph music review, appearing on page 238, mentions the petitioner only once as one of several contributing musicians.² The plain language of this regulatory criterion, however, requires "published material about the alien." We cannot conclude that a single mention of the petitioner's name in a publication having more than 500 music reviews in each issue is consistent with sustained national or international acclaim at the very top of the classical music field. Further,

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

² Two other musicians were mentioned in the same sentence as the petitioner and additional musicians are discussed throughout the remainder of the review.

there is no evidence (such as circulation statistics) showing that this publication qualifies as a professional or major trade publication or other form of major media.

The petitioner also submitted postings of two and three sentences appearing in the "Member News" section of the May 2003 and February 2005 issues of *The Horn Call*. The author of this material was not provided as required by the plain language of this regulatory criterion. In addressing this material, the director's decision stated: "Each notice . . . announced a performance in which the petitioner participated and was included in a long list of announcements in the Member News section. These were not articles primarily written about the petitioner. Further, there is nothing to demonstrate that *The Horn Call* is a major publication." We concur with the director's observations.

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." Evidence of the petitioner's participation as a judge must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criterion at 8 C.F.R. § 204.5(h)(3)(iv), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" 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 submitted an August 22, 2005 letter from _____ Executive Director, Green Bay Symphony Orchestra, stating:

The Green Bay Symphony Orchestra engaged [the petitioner], the utility horn in our horn section, to serve as a judge in our auditions for 4th horn position on May 21, 2005. [The petitioner] was selected from among the Orchestra to serve in this capacity on the basis of his excellent musicianship and orchestral experience. His service to the Green Bay Symphony Orchestra is consistently outstanding, and we deeply value his participation as a player.

In response to the director's request for evidence, the petitioner submitted a June 19, 2006 letter from _____ Executive Director, Illinois Symphony Orchestra, stating:

I am writing this letter to support [the petitioner's] petition for an . . . immigrant visa, and also to document and provide details about the criteria used to select him as a judge of the work of others, in which quality he served as panelist, for the audition committee for the 4th horn audition process in 2005. [The petitioner] is the only horn player in our orchestra qualified enough to serve as judge in the audition committee, due to the fact that his expertise is well above the rest of our musicians.

[Emphasis in original]

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 . . . field.” There is no evidence showing the names of the individuals evaluated by the petitioner, their level of expertise, or any other documentation of his assessments. Further, we cannot ignore that the petitioner was a French horn player for both of the preceding orchestras. In this capacity, he became involved in the audition process to select new members of his horn section. There is no evidence that the petitioner judged the work of others in his field in a manner significantly outside the general duties of his position and consistent with sustained national or international acclaim. Nor is there evidence establishing that the petitioner, rather than the Executive Director, conductor, or principal horn, held final authority over the decision to hire prospective candidates. With regard to the petitioner’s involvement in the audition process for his orchestras, duties or activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself, or in a substantial proportion of positions within that occupation.³ There is nothing in the record to establish that the petitioner’s involvement in evaluating prospective musicians for his immediate employers elevates him to that small percentage who have risen to the very top of his field. Without substantive evidence of the petitioner’s participation as a judge of the work of others in his field that is consistent with sustained national or international acclaim, we cannot conclude that he meets this criterion.

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

The petitioner submitted several letters of recommendation.

[REDACTED], Chair, Performance Studies, DePaul University School of Music, states:

[The petitioner] was a student in my performing ensembles at DePaul University, when he was pursuing his Master of Music Degree in French Horn. I have followed his career and kept in touch with him personally since his graduation.

When [the petitioner] came to the United States to study, he had already begun a significant career as an orchestral horn player in his home country. While at DePaul, he distinguished himself as one of the most outstanding students we have had in the 26 years I have been teaching at this institution. He played principal horn in the University Wind Ensemble and Orchestra. In those positions he performed important solos on recordings we made in those years, and his performances received rave reviews. Since his graduation he has come into his own as a performing artist. By virtue of his truly excellent performing skills and positive, friendly attitude he has become a performer that is called upon regularly by the best orchestras and conductors in Chicago. Among the world-class conductors for whom he has played are [REDACTED]

³ This is true with all duties inherent to an occupation. For example, publication is inherent to the occupation of scientific researchers. Thus, the mere publication of scholarly articles cannot demonstrate national acclaim in that field. The petitioner must demonstrate that the articles have garnered national or international acclaim, for example, by being widely cited.

██████████ and ██████████ He has been a member of the Civic Orchestra of Chicago, the Chicago Symphony's training orchestra. In addition he has performed throughout the world with the Transylvania State Philharmonic, performed world wide as a recitalist, and has recorded and performed live in a variety of radio broadcasts in the United States and Europe.

██████████ Resident Conductor for the Civic Orchestra of Chicago, states: "[The petitioner] has won many positions with different orchestras world-wide through a rigorous audition process against many other extraordinary auditionees. He is a truly world-class horn player with exceptional talent and character."

██████████ Principal Trombone, Cincinnati Symphony Orchestra, states:

Since I met [the petitioner] in 1992 I have had the opportunity not only to witness his growth but also his achievements and fulfillment as an artist. He made every conceivable effort to acquired the highest skills in this very special art of horn performance.

* * *

[The petitioner] is an extraordinarily gifted and highly professional individual who is a great asset for our musical community. Along with his outstanding talent he brings with him a seriousness and commitment to excellence that is an irreplaceable force within the orchestra (Illinois Symphony Orchestra). His colleagues have openly recognized his contributions to the organizations he has worked for.

[The petitioner's] astonishing technical abilities as a horn player go from an unusual breath control, which allows him to play incredibly legato for extended periods of time, to an impeccable use of articulation and phenomenal use of musicality.

Therefore, he has become a valuable member of the Illinois Symphony Orchestra, and certainly an individual of extraordinary abilities.

██████████, Orchestra Manager, Illinois Symphony Orchestra, states:

[The petitioner] holds a position with the Illinois Symphony Orchestra due in part to his exceptional participation with the Civic Orchestra of Chicago. [The petitioner] has performed with world-renowned conductors such as ██████████ and ██████████ [The petitioner] continues to perform and work with the same caliber of conductors with the Illinois Symphony Orchestra. He is a splendid world-class horn player with extraordinary ability. His technical, musical and interpretative abilities are highly developed. [The petitioner] has studied with some of the world's top horn teachers and has excelled in college as Principal Horn at DePaul University in Chicago, IL and in his studies in his native Romania. He is a valuable member of the Illinois Symphony Orchestra that prides itself in performing at the highest artistic levels.

The letters of recommendation submitted by the petitioner discuss his talent as a French horn player, musical performances, activities in Romania and the United States, employment, education, and past musical training,

but these letters fail to demonstrate that he has made original contributions of major significance in his field. The preceding letters include no substantive discussion as to which of the petitioner's specific achievements rise to the level of original artistic contributions of major significance in music. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner has earned the admiration and respect of his colleagues, there is nothing to demonstrate that his work has had major significance in the field. For example, the record does not indicate the extent of the petitioner's influence on other musicians nationally or internationally, nor does it show that the field has somehow changed as a result of his work.

In this case, the letters of recommendation submitted by the petitioner are not sufficient to meet this criterion. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS 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; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Thus, the content of the experts' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of a musician who has sustained national or international acclaim. Without extensive documentation showing that the petitioner's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

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

The petitioner submitted promotional announcements, recommendation letters, and program books indicating that he participated in various concerts as an ensemble member. The plain language of this regulatory criterion indicates that it is intended for visual artists (such as sculptors and painters) rather than for instrumental musicians such as the petitioner. In the performing arts, acclaim is generally not established by the mere act of appearing in public, 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). Nevertheless, the director's decision addressed the petitioner's claim that his performances meet this criterion, stating:

The record contains little evidence of the national or international significance of these performances. For instance, while the petitioner provided general information regarding the Trans[y]lvania State Philharmonic Orchestra from its founding in 1955, it does not address specific performances or venues in which the petitioner was a party. Further, the petitioner was one of many performers on these occasions, and the petitioner has not demonstrated that these other musicians all enjoyed national or international reputations. Therefore, the petitioner has not shown that his performances

have a national reputation or that participation in such performances was a privilege extended to only the top musicians in his field.

We concur with the director's observations for this criterion. On appeal, the petitioner does not challenge the director's findings.

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.

In order to establish that he performed a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of his role within the entire organization or establishment and the reputation of the organization or establishment.

The petitioner submitted letters of support and other evidence indicating that he performed as an ensemble member for orchestras such as the Civic Orchestra of Chicago, Green Bay Symphony Orchestra, Transylvania Philharmonic Orchestra, DePaul University Music Ensemble, Illinois Symphony Orchestra, and Illinois Chamber Orchestra. Aside from their own self-serving promotional material, there is no evidence showing that the preceding orchestras have earned distinguished national reputations in the same manner as (for example) the New York Philharmonic, Boston Symphony Orchestra, or Chicago Symphony Orchestra. While the petitioner has played for several orchestras, there is no evidence showing that the petitioner's name has received top billing or that the popularity of the orchestras increased when the petitioner was known to be performing. Nor is there any evidence demonstrating how the petitioner's role differentiated him from the other musicians employed by these orchestras. As such, the petitioner has not established that he was responsible for his orchestras' success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim.

With regard to the petitioner's role for the Illinois Symphony Orchestra, a letter of support from K [REDACTED] the orchestra's Music Director, states:

I hired [the petitioner] after he was unanimously voted as winner of our nationally held auditions for the position of 3rd Horn in the Illinois Symphony Orchestra and 2nd Horn in the Illinois Chamber Orchestra.

[The petitioner] possess a rare talent on his instrument, one of the most difficult to play in the orchestra. I can easily say that he is one of the finest horn players I have worked with and I believe he is a great asset to our organization and to the orchestra world in general.

Nothing in [REDACTED]'s letter indicates that 2nd or 3rd horn is tantamount to a leading or critical role for the orchestra. Nor is there evidence that the petitioner's role is more notable or important than that of the numerous other musicians employed by the Illinois Symphony Orchestra including its conductor, music director, and "principal" musicians.

In addressing this criterion, the director's decision stated:

[T]he . . . record documented [the petitioner's] participation in these ensembles, but not how his role was leading or critical. All members of a musical ensemble or orchestra are vital for the performance, but not all are responsible for an organization's success or standing to a degree consistent with the meaning of "leading or critical role." Further, none of the documentation indicates that the petitioner acted as the Principal Horn for his sections or otherwise performed a leading or critical role. The record did not demonstrate how his role differentiated him from the other members of the orchestra holding similar roles, let alone the more senior members of the orchestras.

On appeal, the petitioner does not specifically challenge the director's findings. While the director's decision stated there was no documentation indicating that the petitioner "acted as the Principal Horn for his sections," the letter from ██████████ states that the petitioner was the Principal Horn for DePaul University during his studies there. Further, the letter from ██████████ indicates that the petitioner was Principal ████████ for the Civic Orchestra of Chicago during his training with that orchestra. We cannot ignore, however, that membership in the preceding orchestras consisted of DePaul University students and "pre-professional musicians." As such, the petitioner's role for these orchestras was not consistent with sustained national or international acclaim at the very top of his field. Moreover, the record does not demonstrate how the petitioner's role was leading or critical to these orchestras as a whole. For example, there is nothing differentiating the petitioner from the other members of the orchestras who were principals in their respective sections or the "more senior members" such as the conductor, the managing faculty at DePaul University, or the "Civic coaches" (established professional musicians employed by the Chicago Symphony Orchestra).

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 criterion calls for evidence of commercial successes in the form of "sales" or "receipts;" simply submitting evidence indicating that the petitioner participated in various concerts or made recordings of his music cannot meet the plain language of this criterion. The record includes no 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. For example, there is no indication that the 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 the petitioner. Nor is there evidence showing, for example, that the petitioner's musical recordings had a high national or international sales volume.

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

In this case, we concur with the director's determination that the petitioner has failed to demonstrate receipt of a major, internationally recognized award, or that he meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3).

Documentation in the record indicates that the alien was the beneficiary of five approved O-1 nonimmigrant visa petitions filed in his behalf since 2000. Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, “The term ‘extraordinary ability’ means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines extraordinary ability as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the petitioner’s prior receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability.

While CIS approved five prior O-1 nonimmigrant visa petitions filed on behalf of the petitioner, those prior approvals do not preclude CIS from denying an immigrant visa petition based on a different, if similarly phrased standard. It must be noted that many I-140 immigrant petitions are denied after CIS 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).

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. 1988). It would be absurd to suggest that CIS 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 has approved a nonimmigrant petition on behalf of the petitioner, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff’d*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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 the national or international level. Therefore, 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. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

LIN 06 057 51930

Page 13

ORDER: The appeal is dismissed.