



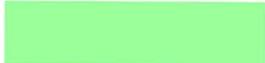
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 09 2013**

Office: CALIFORNIA SERVICE CENTER

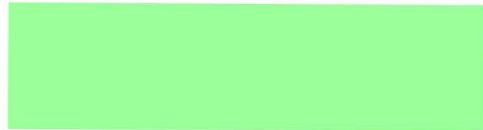
FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, an artist management and production company, filed this nonimmigrant petition seeking to classify the beneficiary pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O), as an alien with extraordinary ability in the arts. The petitioner seeks to employ the beneficiary as a reggae/dancehall music recording artist for a period of five years.¹

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary qualifies as an alien of extraordinary ability in the arts. The director determined that the evidence submitted was insufficient to establish that the beneficiary's achievements and recognition have reached the level of "distinction" as defined at 8 C.F.R. § 214.2(o)(3)(ii). The director observed that the evidence submitted failed to meet any of the evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(A) or (B).²

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the petitioner has established the beneficiary's eligibility under all six of the evidentiary criteria. In addition, counsel asserts that new evidence submitted on appeal establishes "the beneficiary's distinction in his field and occupation, and a degree of skill and recognition substantially above that ordinarily encountered . . . in the art of dancehall." Counsel submits a brief and documentary evidence in support of the appeal.

I. The Law

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

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

¹ Pursuant to 8 C.F.R. § 214.2(o)(6)(iii)(A), an approved petition for an alien classified under section 101(a)(15)(O)(i) of the Act shall be valid for a period of time determined by the Director to be necessary to accomplish the event or activity, not to exceed 3 years.

² The director also determined, as set forth in the request for evidence (RFE), that the petition was untimely filed, since it was filed after expiration of the beneficiary's period of previously authorized status as a B-2 nonimmigrant. A beneficiary who is out of status at the time of filing is ineligible for the requested change of status and extension of stay. The regulations at 8 C.F.R. § 214.1(c)(4) provide that an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service. The petitioner provided an explanation for filing the petition approximately six days late, and the director chose to exercise this discretion.

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts.

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the 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 at 8 C.F.R. § 214.2(o)(3)(iv) states, in pertinent part:

Evidentiary criteria for an O-1 alien of extraordinary ability in the arts. To qualify as an alien of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

- (A) Evidence that the alien has been nominated for, or the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or
- (B) At least three of the following forms of documentation:
 - (1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;
 - (2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;
 - (3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;
 - (4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;
 - (5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in

the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

- (6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or
- (C) If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

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

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

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

The decision of U.S. Citizenship and Immigration Services (USCIS) in a particular case is dependent upon the quality of the evidence submitted by the petitioner, not just the quantity of the evidence. The mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification. *See* 59 Fed. Reg. 41818 (August 15, 1994)(Final Rule).

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Similar to the regulations governing this nonimmigrant classification, the regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. *Cf.* 8 C.F.R. § 204.5(h)(3). 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. The court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet two of the 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, if qualifying under at least three criteria, considered in the context of a merits determination.

The AAO finds the *Kazarian* court's two-part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). Therefore, in reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner has failed to submit evidence that satisfies three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence.

II. Discussion

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation on October 1, 2012. The director issued a request for additional evidence (RFE) on October 16, 2012, to which the petitioner replied on January 11, 2013. The AAO has considered the evidence of record in its entirety in reaching its decision.

In a short biography submitted at filing, the beneficiary is described as a performer of "dancehall" music, "a high tempo derivative of reggae." The beneficiary is further described as having "achieved success in Jamaica and abroad in the U.S. and Europe." The beneficiary is stated as having released his first single, [REDACTED] and his first album, [REDACTED] in 2009, after launching a "new indie island music company" named "[REDACTED]." The record also reveals the beneficiary released an additional album, [REDACTED]

In a document titled "[REDACTED]" submitted in support of the petition the petitioner stated that it "requires our recording artist, [REDACTED], to complete **five (5)** albums within a **seven (7) year** period . . . The Completion of these albums **MUST** be acquired by October 15, 2014 . . . The albums will be recorded at . . . [REDACTED] Florida." The itinerary also contains a six-month studio recording schedule. The petitioner further stated that the completion of the five albums "would in turn prepare [the beneficiary] for shows in the U.S." An "Exclusive Recording Agreement" also submitted in support of the petition further describes the proffered employment. In response to the RFE, the petitioner submitted a three-year itinerary of the beneficiary's "performances, recording and promotional dates" including events in the United States, Trinidad & Tobago, Barbados, Grenada, Virgin Islands and Jamaica.

A. The Evidentiary Criteria

The first issue to be addressed is whether the petitioner submitted evidence to establish that the beneficiary satisfies the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), or at least three of the six criteria set forth at

8 C.F.R. § 214.2(o)(3)(iv)(B).

If the petitioner establishes through the submission of documentary evidence that the beneficiary has been nominated for or has been the recipient of, significant national or international awards or prizes in the particular field pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The regulation lists an Academy Award, an Emmy, a Grammy, or a Director's Guild award as examples of qualifying significant awards or prizes.

The petitioner did not claim that the beneficiary is eligible for this classification based on his nomination for or receipt of a Grammy award or comparable award in his field, and raised no objection to the director's finding that the evidence submitted does not establish the beneficiary's eligibility under 8 C.F.R. § 214.2(o)(3)(iv)(A).

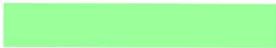
Therefore, the petitioner must establish the beneficiary's eligibility under at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). Counsel has asserted the beneficiary's eligibility under each of the applicable regulatory criteria. The AAO will consider the beneficiary's eligibility under each of the six criteria below.

Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements; and

The evidence of record indicates that the beneficiary has been a dancehall/reggae music performer. The petitioner has provided posters and articles regarding events at which the beneficiary has performed in Jamaica, Ethiopia and the United States. The posters specifically mention the beneficiary by name, either as the solo artist or as one of many performers at the event. Two articles dated in 2004 on the websites [REDACTED] and [REDACTED] describe the beneficiary as "fast-rising" and "up-and-coming." A third article dated September 1, 2005 on the website [REDACTED] lists the beneficiary as one of many performers at a concert at Jamaica College.

Upon review, although the AAO finds that the evidence establishes that the beneficiary has performed in a lead or starring role for productions or events, the AAO agrees with the director's determination that the petitioner has not submitted critical reviews, advertisements, publicity releases, publications or other evidence to establish that the events themselves have a distinguished reputation, as required pursuant to the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). As described above, the posters and articles regarding events at which the beneficiary has performed do not establish that the live shows have distinguished reputations among industry publications that cover the beneficiary's genre of music.

Further, in order to meet this criterion, the petitioner must establish that the beneficiary *will perform* services as a lead or starring participant in productions or events which have a distinguished reputation upon approval of the petition. The evidence of record indicates that if the requested classification is granted the beneficiary as a dancehall/reggae music performer shall record at least five albums for the petitioner. The evidence submitted by the petitioner indicates that the recording of the five albums "would in turn prepare [the beneficiary] for shows in the U.S." The petitioner has also submitted a six-month studio recording schedule and a three-year "itinerary of performances, recording and promotional dates." The petitioner has not submitted critical reviews,



advertisements, publicity releases, publications or other evidence to establish the identity of any upcoming events at which the beneficiary will perform, or to establish that the events themselves have a distinguished reputation, as required pursuant to the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). Therefore, the petitioner has offered no information regarding the beneficiary performing services as a leading or starring participant in any upcoming events or productions.

In sum, the petitioner has neither identified nor documented, through submission of the evidence prescribed by regulation, the beneficiary's previous or forthcoming lead or starring role in events with a distinguished reputation. Therefore, the AAO agrees with the director that the petitioner has not established that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications

The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2) requires the petitioner to demonstrate that the beneficiary has achieved national or international recognition for achievements through submission of critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications. In general, in order for published material to meet this criterion, it must be primarily about the beneficiary and, as stated in the regulations, be printed in major newspapers, magazines or other major publications. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.³

The director determined that the petitioner failed to submit any published materials about the beneficiary from major newspapers, trade journals, magazines or other publications. The director observed that the evidence submitted is insufficient to establish that the beneficiary has received national or international recognition as a dancehall/reggae music performer.

On appeal, counsel asserts:

The petitioner did submit reviews and published materials about the beneficiary in newspapers and journals intrinsically linked to the field. The beneficiary is involved in the Dancehall industry, and has been written about and worked extensively since 2003.

* * *

The evidence submitted demonstrates the beneficiary's distinction in his field and occupation, and a degree of skill and recognition substantially above that ordinarily encountered, as

³ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

required by the statute and regulation. The beneficiary is prominent in his occupation, as he is renowned, leading or well known in his field of arts. The director's conclusion that the petitioner did not establish the beneficiary's qualification for classification was erroneous based on the evidence submitted. The petitioner demonstrated the beneficiary's extraordinary ability in the art of dancehall.

Upon review, the AAO agrees with the director's determination that the petitioner has not submitted evidence to satisfy this criterion. The record remains devoid of any evidence to support the statements made above. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

The record contains two articles in which the beneficiary is mentioned in passing: an article dated September 1, 2005 titled "[REDACTED]" on the website "[REDACTED]" and an article dated March 7, 2003 titled "[REDACTED]" on the website "[REDACTED]".

In addition, the petitioner has submitted several published articles which are about the beneficiary as follows: an article dated August 27, 2002, when the beneficiary was 17 years old, in "[REDACTED]" an article dated 2004 titled "[REDACTED]" on the website "[REDACTED]" and an undated article titled "[REDACTED]" published on the website "[REDACTED]". In the articles the beneficiary is quoted extensively and not merely mentioned in passing. The articles consist of summaries of interviews with the beneficiary regarding his musical influences and interests. The authors of the articles speak positively of the beneficiary's performances and songs, referring to him as an "up-and-coming artist," "one of the fastest-rising deejays," and "the young artiste" who "has been performing at youth events such as socials, [REDACTED] a few high school barbecues and fetes, and functions at the [REDACTED]". However, the articles fail to recognize the beneficiary's individual achievements as a songwriter or performer or the national and international recognition he received for such achievements. Accordingly, the petitioner has not submitted evidence that meets the plain language of the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iv)(B)(2).

In addition, the petitioner has not established that the publications which published articles about the beneficiary have a significant national or international distribution or otherwise qualify as "major" online magazines or newspapers. The record contains an additional article titled "[REDACTED]" which also mentions the beneficiary in passing. The title of the publication and date of the publication were not provided and thus it cannot be determined that it appeared in a major newspaper or magazine.

Accordingly, the petitioner has not submitted evidence that meets the plain language of the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iv)(B)(2).

Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials

The director determined that the petitioner has failed to establish that the beneficiary has performed a critical role for organizations and establishments that have a distinguished reputation.

The petitioner has submitted evidence that the beneficiary has performed with other management/production companies. The petitioner submitted a letter from the president of [REDACTED], a management/production company in Kingston, Jamaica. The letter states the beneficiary worked with the company between 2003 and 2009, during which time “the beneficiary proved to be a reliable hard working and outstanding entertainer.” In addition, the letter states the beneficiary was featured in the following shows:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]

The petitioner submitted a letter from the manager of [REDACTED] Kingston, Jamaica stating that the beneficiary “worked at our studio” and that the beneficiary is “an **amazing talented** songwriter and song performer” and “has an extraordinary ability as a songwriter, musician and Performer.”

The record contains a letter from a representative of [REDACTED], a production company in Kingston, Jamaica, stating that the beneficiary worked with the company for ten years during which time the beneficiary was “a professional, reliable and trustworthy artiste.” The letter states the beneficiary “worked with [REDACTED]” and the beneficiary “has also written songs for other artistes who we have worked with; he has also contributed in the production of several commercials we have produced for our clients.”

The record also contains a letter from the chief executive officer (CEO) of [REDACTED], a production company in Florida, stating that the beneficiary worked with the company for “over six years” during which time the company “produced and released over ten songs for [the beneficiary].” The letter described the beneficiary as “an extremely talented vocalist with a sound like no other” and “a great songwriter, arranger and producer with a professional approach to his art.”

The petitioner also submitted several YouTube screen shots of the beneficiary as follows:

1. A screen shot labeled as showing the beneficiary in Kingston, Jamaica in 2004, [REDACTED]
2. A screen shot labeled as showing the beneficiary as a judge [REDACTED] by international recording artists [REDACTED]

3. A screen shot labeled as showing the beneficiary “featured beat boxing in [REDACTED] [REDACTED]”
4. A screen shot labeled as showing the beneficiary “featured in [REDACTED] video [REDACTED]”

The record also contains photographs labeled as showing the beneficiary “and Isses [REDACTED] and with [REDACTED] in Kingston, Jamaica.”

The petitioner also submitted a letter from the deputy director of [REDACTED] East Palo Alto, California, stating that the beneficiary, “as a member of [REDACTED]” served as a volunteer with the organization’s [REDACTED]. The letter states that the beneficiary “became one of the most memorable arts educators” in the seven-year history of the [REDACTED]. The letter describes that from January 7, 2010 to June 12, 2011, students worked with the beneficiary “to write, record, produce and master a 13-track album about [REDACTED] . . . and then performed live in front of over 900 community members at 11 different live performances.”

Similarly, the petitioner submitted screenshots from [REDACTED] regarding [REDACTED] and [REDACTED] to establish that these performers have a distinguished reputation. As there are no assurances about the reliability of the content from this open, user-edited Internet site, we will not assign weight to information from *Wikipedia*. See *Laamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008).⁴ Nonetheless, the screenshots from *Wikipedia* reflect a biography of [REDACTED] and [REDACTED] to establish that these performers have a distinguished reputation. Regardless, the evidence fails to establish that the beneficiary performed services in a lead or starring role for these performers.

In addition, regarding the remaining organizations, the petitioner has not submitted evidence that any of the organizations with which the beneficiary has worked have been featured in national or international music publications. Therefore, the evidence of record is insufficient to establish that the organizations with which the beneficiary has worked enjoy a distinguished reputation in the music industry.

⁴ See also the online content from http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on August 29, 2013, and copy incorporated into the record of proceeding is subject to the following general disclaimer:

WIKIPEDIA MAKES NO GURANTEE OF VALIDITY. Wikipedia is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . Wikipedia cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

Further, the petitioner has not articulated or documented, on the basis of the submitted evidence, the beneficiary has performed in a lead, starring or critical role for these organizations.

In addition, the director concluded that the evidence submitted was insufficient to establish that the beneficiary will perform similar critical roles for the petitioner or other management and production companies, or that the petitioner or the other companies have a distinguished reputation. Accordingly, the director concluded that the petitioner had not submitted evidence to satisfy the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3). We concur with the director's finding that the petitioner has not established that the beneficiary will perform in a lead, starring or critical role for an organization or establishment that has a distinguished reputation under the approved petition.

The petitioner has not submitted documentary evidence, in the form of articles in newspapers, trade journals or publications, to establish that its organization has a distinguished reputation in the field.

Moreover, the petitioner has not established that the beneficiary will perform in a lead, starring or critical role for the petitioner. As stated above, in a document titled [REDACTED] submitted in support of the petition the petitioner stated that it "requires our recording artist, [REDACTED] to complete **five (5)** albums within a **seven (7) year** period . . . The Completion of these albums **MUST** be acquired by October 15, 2014 . . . The albums will be recorded at . . . [REDACTED] Florida." The itinerary also contains a six-month studio recording schedule. The petitioner further stated that the completion of the five albums "would in turn prepare [the beneficiary] for shows in the U.S." An "Exclusive Recording Agreement" also submitted in support of the petition further describes the proffered employment. In response to the RFE, the petitioner submitted a three-year itinerary of the beneficiary's "performances, recording and promotional dates" including events in the United States, Trinidad & Tobago, Barbados, Grenada, Virgin Islands and Jamaica.

The AAO agrees with the director that the petitioner has not articulated or documented how the beneficiary will serve in a lead, starring or critical role for the petitioner. The plain language of the regulations requires the submission of evidence in the form of published articles or testimonials in support of this criterion. Although the petitioner has submitted documentary evidence, none of the documents establish that the beneficiary will perform a lead, starring or critical role within the petitioner's business, upon approval of the petition.

The petitioner has also submitted evidence to establish that the beneficiary will perform in a lead, starring or critical role for other organizations.

The petitioner submitted a letter from the CEO of [REDACTED], New York, stating in pertinent part:

[The beneficiary] has been chosen as a featured performer to promote an upcoming album, scheduled for release on December 18, 2012. He would be needed to perform alongside one of the Company's main artist (sic), [REDACTED]. They are both members of the musical group, [REDACTED]. As part of the promotional tour he will be performing at several clubs and events throughout the North Eastern and Mid Atlantic United States.

The record contains a letter from the CEO of [REDACTED] a video production company, stating the company “has an interest in working with [the beneficiary] to shoot three music videos over a two year period.”

The record also contains another letter from the deputy director of [REDACTED] East Palo Alto, California, stating that the organization is “interested in having [the beneficiary] continue to work with our [REDACTED] by performing with our youth artists at key events throughout the upcoming years, 2013-2016.”

The petitioner has also submitted several letters stating that in pertinent part as follows:

1. That [REDACTED] a U.S. festival organizer, would consider hiring the beneficiary for three specified annual events in 2013, 2014 and 2015;
2. That [REDACTED], a U.S. festival organizer and/or promoter, would consider hiring the beneficiary for five specified annual events in 2013, 2014 and 2015;
3. That [REDACTED] a U.S. promotion company, would consider hiring the beneficiary for six specified annual events in 2013, 2014 and 2015;
4. That [REDACTED] a U.S. promotion company, would consider hiring the beneficiary for six specified annual events in 2013, 2014 and 2015;
5. That [REDACTED] a U.S. festival organizer and/or promoter would consider hiring the beneficiary for three specified annual events in 2013, 2014 and 2015.

On appeal, the petitioner has submitted a letter stating that [REDACTED] a U.S. artist development, event planning, and promotions company, “is willing to hire and produce performance and musical events for [the beneficiary] specifically during the period of March 2013 ending March 2015.” The letter lists 13 proposed performance dates, and states “[v]enues and/or specific events to be determined at a later date.”

The AAO agrees with the director that the petitioner has not articulated or documented how the beneficiary will serve in a lead, starring or critical role for these organizations. As stated above, the plain language of the regulations requires the submission of evidence in the form of published articles or testimonials in support of this criterion. Although the petitioner has submitted documentary evidence, none of the documents establish that the beneficiary will perform a lead, starring or critical role within these organizations, upon approval of the petition.

Further, the petitioner has not submitted documentary evidence, in the form of articles in newspapers, trade journals or publications, to establish that these organizations have a distinguished reputation in the field.

Based on the foregoing, the AAO concurs with the director that the submitted evidence does not satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion

picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications

The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) requires a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications. In the beneficiary's field, evidence satisfying this criterion would reasonably include evidence of album or single sales, radio airplay rankings, evidence of concert revenues and similar evidence of tangible achievements in the music industry.

On appeal counsel asserts as follows:

[T]he petitioner included information in the evidence submitted about the beneficiary's original contributions in the form of tracks, and songs, including but not limited to collaborations and features, as well as solo performances on songs. In the music industry, success is gauged by working and collaborating with other successful artists, which the beneficiary has done. The service failed to take the evidence into account.

However, the petitioner did not submit any documentary evidence in support of this claim. The petitioner submitted copies of the album covers of the beneficiary's albums [REDACTED] and [REDACTED], and an Amazon.com screen shot of the track listings for [REDACTED]. The petitioner provided a listing from the [REDACTED] of songs the beneficiary is credited with writing or performing. The petitioner also submitted a listing of songs available for online purchase, performed by the beneficiary as a solo performer or with other artists. The record also contains YouTube screen shots of several of the beneficiary's music videos.

However, the petitioner has not submitted evidence of the major commercial or critically acclaimed success of the beneficiary's work. Again, 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. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

Based on the foregoing, the petitioner has not submitted evidence to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4).

Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements;

The petitioner has provided a total of four testimonial letters in support of the petition. For the reasons discussed below, the letters do not satisfy the plain language of the regulatory criterion at 8 § C.F.R. 214.2(o)(3)(iv)(B)(5).

The petitioner provided a peer review letter from [redacted] CEO [redacted] Florida. [redacted] stated:

I have known [the beneficiary] for over 10 years and he is one remarkable recording artiste. I am currently looking forward in aiding [the beneficiary] with his upcoming album which is going to be marketed and promoted in the United States of America and Europe. [The beneficiary] is a very determined recording artiste who is very serious about his music career and has one of the greatest voices Reggae/Dancehall is yet to hear. I would definitely say that [the beneficiary] is of extra-ordinary talent . . .

The petitioner submitted a joint letter from [redacted] executive producer, and [redacted] musician/producer, both of [redacted] in Kingston, Jamaica, who stated:

[The beneficiary] is a remarkable songwriter, producer and performer. We have seen [the beneficiary] rise from a youth over the years, and he has consistently focused on his career to become a versatile and talented artist. He has developed into and found his own unique persona where he grabs the attention of listeners for expressing his messages, which all can relate to.

The petitioner also submitted a letter from [redacted] self-described as a "[redacted]" [redacted] stated:

[The beneficiary] is an amazing recording artist in the Reggae/Dancehall music field. His voice is very unique and extraordinary. He is an excellent song writer and song performer. He is a hard working artist making major progress in the industry. I have been playing his music over 18 years now and whenever I play [the beneficiary's] songs anywhere in the world the response from the crowd is always excellent.

Finally, the petitioner submitted a letter from [redacted] self-described as a "[redacted]" [redacted] stated:

I have been selecting/spinning music for over eight (8) years and believe me when I say that [the beneficiary] has an extraordinary ability as a songwriter and performer. [The beneficiary's] lyrics are very clever and his voice is outstanding. I have known [the beneficiary] for three (3) years and it's an honor playing his songs where ever I go. He has the image, charisma and the capability of taking his music internationally. He has a lot of discipline and is also well focused on what he does. I think he is going to be the next to shine on the international scene.

As noted above, the regulation at 8 C.F.R. § 214.2(o)(2)(iii)(B) requires that affidavits written by recognized experts "shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information." The submitted letters fail to establish the witness's credentials as a recognized expert, fail to explain the manner in which the witness acquired information about the beneficiary, and fail to specifically describe the beneficiary's achievements in factual terms. None of the letters assert that the beneficiary has achieved international acclaim and renown. The letters also fail to detail the beneficiary's specific achievements. Furthermore, the letters are not in a form which clearly indicates the witness's authority, expertise and knowledge of the beneficiary's stated achievements.

As a matter of discretion, USCIS may accept expert opinion testimony.⁵ USCIS will, however, reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if it will assist the trier of fact to understand the evidence or to determine a fact in issue.").

The letters considered above primarily contain bare and unsupported assertions regarding the beneficiary's talent, achievements or recognition, without specifically identifying his achievements and the significant recognition he has received for those achievements in the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.⁶

In light of the above, the petitioner has not submitted qualifying evidence that meet the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5).

⁵ Letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. Black's Law Dictionary 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about facts, such as whether something occurred or did not occur, based on the witness' direct knowledge. *Id.* (defining "written testimony"); see also *id.* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

⁶ *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108; *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).

Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence

The petitioner has not claimed that the beneficiary has commanded a high salary in the past. The petitioner has submitted a copy of its exclusive recording agreement with the beneficiary, but failed to submit reliable evidence that the financial arrangements set forth under the terms of the agreement are considered "high remuneration" in relation to others in the field.

The agreement states, regarding remuneration that the beneficiary would receive, "[t]he songs to be recorded under this agreement are 8% Singles 14% Albums or more than this number if [the petitioner] so desires." The petitioner has provided no substantiated estimates of how much the beneficiary is likely to earn during the requested period of approval. Therefore, the director correctly determined based on the evidence submitted that the petitioner failed to establish that the beneficiary's earnings under the exclusive recording agreement with the petitioner are considered high or substantial in relation to others in the field.

On appeal, counsel asserts:

The petitioner has previously submitted a contract between the company and the beneficiary, outlining the agreement. This contract is commensurate with international recognition in the field in that it provides for [the beneficiary] to produce five albums, and perform in several international and national events in the upcoming years. Also, the beneficiary is a party to a letter of intent with [redacted] a California Based company looking to hire and contract the beneficiary to perform.

In the I-290B, Notice of Appeal, counsel states, "[T]he beneficiary has been made a party to a contract that represents substantial remuneration and is commensurate with recognition."

The petitioner attempts to overcome the director's finding by submitting a letter from [redacted] a U.S. artist development, event planning, and promotions company, preciously discussed in our analysis of the qualifying criterion set forth at section 8 C.F.R. § 214.2(o)(3)(iv)(B)(3). The letter states that [redacted] is willing to hire and produce performance and musical events for [the beneficiary] specifically during the period of March 2013 ending March 2015." The letter lists 13 proposed performance dates, and states "[v]enues and/or specific events to be determined at a later date." Regarding remuneration, the letter states, "Artist's performance fees and compensation will be based on specific details of each event, (i.e. track show or stage show) whereby a performance fee will be paid with hotel, transportation and *per diems*." The letter of intent from [redacted] does not state what remuneration the beneficiary will receive.

The plain language of this regulation requires that the petitioner submit "reliable evidence" to establish that the beneficiary has commanded or will command a high salary or other substantial remuneration for services in relation to others in the field. Clearly, an unsupported statement from the petitioner alone is insufficient to meet this criterion. The record remains devoid of any documentary evidence comparing the beneficiary's remuneration

to that of other musicians, so as to establish that his remuneration for services is high when compared to others in his field. In light of the above, the petitioner has not submitted evidence to satisfy this criterion.

Summary

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

B. Comparable Evidence

The petitioner has claimed eligibility under the “comparable evidence” regulation. Beyond the decision of the director, upon review of the record the AAO finds insufficient evidence to establish either that the regulatory criteria are not readily applicable to the beneficiary's occupation or the identity of the comparable evidence submitted to establish the beneficiary's eligibility.

The regulation at 8 C.F.R. § 214.2(o)(3)(iv) provides that an alien of extraordinary ability in the arts must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of receipt of a major internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(A), or by submitting evidence to satisfy at least three of the six forms of documentation set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). We further acknowledge that the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C) provides “[i]f the criteria in paragraph (o)(3)(iv) of the section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.” It is clear from the use of the word “must” in 8 C.F.R. § 214.2(o)(3)(iv) that the rule, not the exception, is that the petitioner is required to submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to the beneficiary's occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) through (6).

The petitioner states in its response to the director's RFE that the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B) are not readily applicable to the beneficiary's occupation.

In consideration of . . . the beneficiary's occupation, the petitioner contends that the criteria [at 8 C.F.R. § 214.2(o)(3)(iv)(B)] do not readily apply to the beneficiary's occupation, and he has therefore submitted comparable evidence to establish [the beneficiary's] eligibility for the O-1B visa.

Counsel utilizes similar language on appeal. Although counsel states the petitioner is claiming eligibility under the “comparable evidence” regulation, we note that the petitioner has not specified what evidence it is submitting under this criterion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). In addition, without documentary evidence to support the claim, 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).

In addition, the regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for O-1 classification in the beneficiary's occupation as a dancehall recording artist cannot be established by submitting documentation relevant to at least three of the six criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). In fact, as indicated in this decision, the petitioner specifically indicates that it is submitting evidence relating to each of the six criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the beneficiary's occupation.

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

III. Conclusion

The documentation submitted in support of a claim of extraordinary ability in the field of arts must clearly establish that the beneficiary is prominent to the extent that he could be considered renowned, leading or well-known in his field.

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 consideration of the evidence in the context of a final merits determination. However, as discussed above, the petitioner failed to establish eligibility under any of the criteria found under the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B). The AAO will not conduct a final merits determination.

For the above-stated reasons, the petitioner has not established the beneficiary's eligibility pursuant to the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), and the petition may not be approved.⁷

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁷ The AAO maintains *de novo* review. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding on motion or as a result of litigation, the AAO maintains the jurisdiction to conduct a final merits determination as the official who 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).