

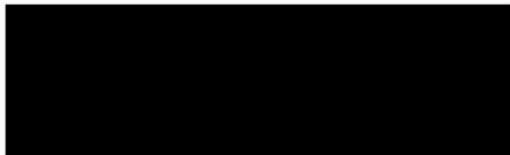
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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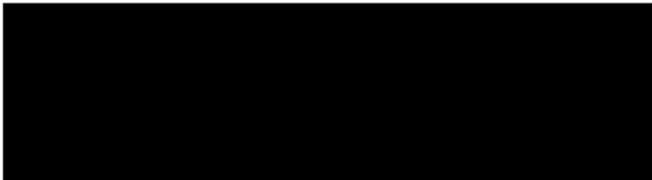
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 29 2009
LIN 07 133 52301

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The director subsequently concluded that the appeal, filed after 31 days,¹ was untimely and considered it as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2). On July 30, 2008, the director reconsidered, concluding that the appeal was timely, and forwarded the appeal to the Administrative Appeals Office (AAO). The matter is now before the AAO on appeal. The appeal will be dismissed.

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

On appeal, counsel submits a brief and resubmits evidence that is already part of the record of proceeding. In his brief, counsel relies on regulations that do not relate to the immigrant classification sought, precedent decisions that predate the Act and non-precedent decisions by this office, which are not binding on the director or this office. *See* 8 C.F.R. § 103.4(c).

Counsel has cited *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. E. Div. 1995) for the proposition that all evidence must be considered. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Regardless, we will carefully consider all of the evidence submitted below. For the reasons discussed below, however, we uphold the director’s ultimate conclusion that the petitioner has not established her eligibility for the immigrant classification sought. Specifically, the evidence submitted cannot meet any of the regulatory criteria, of which the petitioner must meet at least three. As discussed below, even if we considered the evidence in the petitioner’s two strongest categories, display of her work and leading or critical role for a distinguished entity, sufficient to meet the criteria at 8 C.F.R. § 204.5(h)(3)(vii) and (viii), the petitioner falls far short of meeting any other criterion.

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 --

¹ An appeal must be filed within 30 days of the decision. 8 C.F.R. § 103.3(a)(2)(i). The regulation at 8 C.F.R. § 103.5a(b) provides that where the decision is mailed, an additional three days shall be added to the period in which an appeal may be filed. The alternative means of service in this regulation, however, is personal service by a government agent. The decision in this matter was sent by facsimile. While not identical to mailing, it is not personal service. Thus, we consider the period in which an appeal must be filed to be 33 days. Thus, the appeal in this matter was timely filed.

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (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 she has sustained national or international acclaim at the very top level.

While U.S. Citizenship and Immigration Services (USCIS) has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

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

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *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).

Assuming that the approval of the petitioner's nonimmigrant petition was appropriate, that approval does not create a presumption that the instant immigrant petition is approvable. Counsel acknowledges that the regulatory criteria for nonimmigrant aliens of extraordinary ability in the arts are different from those relating to the similarly named immigrant classification. While counsel asserts that the different criteria represent different reasonable interpretations of extraordinary ability, it is significant that not only are the regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts* dramatically different, the statutory and regulatory standards for the classifications are dramatically different. Section 101(a)(46) of the Act and the regulation at 8 C.F.R. § 214.2(o)(3)(ii) define extraordinary ability in the arts (including the performing arts) for non-immigrants as simply "distinction," which is further defined as follows:

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

8 C.F.R. § 214.2(o)(3)(ii). The regulation relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." *See also* H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). As such, the petitioner's approval for a non-immigrant visa under the lesser standard of "distinction" is not evidence of her eligibility for the similarly titled immigrant visa. Regardless, each petition must be adjudicated on its own merits under the regulations which apply to the benefit sought. Thus, the petitioner's eligibility will be evaluated under the ten regulatory criteria relating to the immigrant classification, discussed below.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a violinist. 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). Initially, counsel asserted that the petitioner's early and continued success in her field serves as evidence of a one-time achievement. The director acknowledged counsel's assertion that the petitioner has a qualifying one-time achievement but concluded that the petitioner did not submit any evidence of such an achievement. Counsel does not challenge this assertion on appeal.

We concur with the director. Congress' example of a one-time achievement is a Nobel Prize. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). The regulation is consistent with this legislative history, stating that a one-time achievement must be a *major, internationally recognized* award. 8 C.F.R. § 204.5(h)(3). Significantly, even a lesser internationally recognized award could serve to meet only

one of the ten regulatory criteria, of which an alien must meet at least three. 8 C.F.R. § 204.5(h)(3)(i). The selection of Nobel Laureates, the example provided by Congress, is reported in the top media internationally regardless of the nationality of the awardees, is a familiar name to the public at large and includes a large cash prize. While an internationally recognized award could conceivably constitute a one-time achievement without meeting all of those elements, it is clear from the example provided by Congress that the award must be internationally recognized in the alien's field as one of the top awards in that field. Significantly, Congress stated that in the absence of such an award, an alien could qualify based on "a career of acclaimed work in the field," which is what the ten alternative regulatory criteria are designed to demonstrate. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); 8 C.F.R. § 204.5(h)(3). Thus, counsel's assertion that the petitioner's successful career is evidence of a one-time achievement is not persuasive. Notably, the regulation at 8 C.F.R. § 204.5(h)(4), which allows the submission of "comparable" evidence where the regulatory criteria are not readily applicable does not apply to the one-time achievement, which can only be met by 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. The petitioner has submitted evidence that, she claims, meets the following criteria.²

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

Counsel initially asserted that following accomplishments, all accomplished by a young age, serve to meet this criterion:

1. The petitioner's selection to study at the Sapporo Academy Salon,
2. The petitioner's selection to join the Sapporo Academy String Orchestra and
3. The petitioner's selection as concertmaster in the Kyoto Symphony, the Civic Orchestra of Chicago and the New World Symphony.

Counsel explains: "Each and every selection occurred only after an extensive selection/testing process and is to be considered as nationally recognized awards of excellence and accomplishments." The only "award or prize" actually referenced by counsel is first prize at the Hokkaido Young People's Competition.

The petitioner submitted a 1988 certificate of merit from the 13th Hokkaido Young People's Music Competition. The petitioner did not submit any information about this competition. The petitioner was in sixth grade at the time. The petitioner also submitted a letter from Stephen Squires, former faculty

² The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

member of the Northern Illinois University (NIU), asserting that the petitioner won the university's concerto competition while studying there for her Master of Music degree.

On May 16, 2007, the director issued a request for additional evidence (RFE). In that notice, he concluded that orchestral positions were not prizes or awards and requested copies of any awards the petitioner claimed to have won as well as evidence regarding the significance of the awards. In response, the petitioner submits a letter from [REDACTED] Assistant Director and Coordinator of Graduate Studies at Northern Illinois University asserting that the concerto competition at the university begins with approximately 50 applicants and that the winners perform a movement from or a full concerto with the university's philharmonic. The petitioner also submitted materials about the competition that indicate that the competition is limited to current full-time music majors studying with Northern Illinois University faculty at the upper or graduate level.

The director concluded that the Northern Illinois University competition was limited to students at that competition and could not serve to meet this criterion, that the petitioner had failed to submit evidence regarding the significance of the Hokkaido Young People's Music Competition and that the petitioner's selection for positions within various orchestras were not prizes or awards.

On appeal, counsel asserts that in the petitioner's field, each professional accomplishment is the result of an intense, highly scrutinized audition process and that selection under these circumstances "is tantamount to the winning of an award or prize."

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires evidence of prizes or awards. Acceptance to academic or training programs, even prestigious ones, are not prizes or awards. Similarly, job offers, even for prestigious positions, are not prizes or awards. Rather, they are best considered under 8 C.F.R. § 204.5(h)(3)(viii), a criterion the petitioner also claims to meet with this evidence. While the regulation at 8 C.F.R. § 204.5(h)(4) permits the submission of "comparable" evidence where the criteria are not "readily applicable" the petitioner has not documented that this criterion is not readily applicable to her field. Notably, one of her references was nominated for a Grammy, one won the Koussevitsky Prize, one won the Tchaikovsky Competition and another won a prize at the Queen Elizabeth International Music Competition.³ Thus, it appears that prizes and awards do exist in the petitioner's field.

Regardless, we do not find that selection for competitive fellowships or positions within orchestras are "tantamount" or comparable to prizes or awards. Counsel concedes that every professional accomplishment in the field results from an audition. Thus, according to counsel, every orchestra member in the 1,200 U.S. adult orchestras referenced by one of the petitioner's references obtained his or her position as a result of an audition. We are not persuaded that every orchestra performer able to secure employment in the music field meets this criterion. While we acknowledge that the petitioner's

³ As the record contains no evidence regarding the significance of these awards, we note them merely as evidence that awards exist in the petitioner's field rather than as examples of awards that presumptively meet this criterion.

selection as concertmaster and principal second violin carry more weight than selection to perform in a non-principal role with an orchestra, we reiterate that these roles are directly related to, and thus must be considered under, the leading or critical role criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii). To consider evidence directly relating to that criterion as comparable evidence under this criterion undermines the statutory requirement for extensive evidence and the regulatory requirement that an alien meet three separate criteria.

The only actual awards referenced in the record are the Hokkaido Young People's Music Competition and the Northern Illinois University Concerto Competition. Despite the director's request, the petitioner has never submitted evidence regarding the significance of the Hokkaido competition, which appears to be limited to young performers on the island of Hokkaido. As stated above, the concerto competition was limited to current graduate students at a single university. Thus, the petitioner has not established that either award is nationally or internationally recognized.

In light of the above, the petitioner has not established that the petitioner 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.

Initially, counsel asserted that the petitioner's selection to perform at certain festivals and selection as concertmaster and principal second violin serve to meet this criterion. The petitioner submitted evidence that she is an elected member of the Society of Pi Kappa Lambda. In the director's RFE, he concluded that festivals and orchestras are not associations and requested evidence of the membership criterion for Pi Kappa Lambda. The petitioner's response did not address the membership criteria for Pi Kappa Lambda. The director concluded that the petitioner had not submitted the necessary evidence regarding Pi Kappa Lambda and that symphony and orchestra "membership" could not serve to meet this criterion.

On appeal, the petitioner submits evidence indicating that Pi Kappa Lambda has a local State of Illinois Charter and that members are judged by faculty at the local chapter institution. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO, however, will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

We concur with the director that the festivals where the petitioner has performed and the orchestras of which she has been a member are not associations. We further concur with the director that the petitioner had not established that membership in Pi Kappa Lambda requires outstanding achievements or that membership is judged by nationally or internationally recognized experts.

In light of the above, the petitioner has not established that she 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.

The petitioner submitted her biography as it appears in a printed concert program. While "printed," a program is not "published material" in professional or major trade publications or other major media. The petitioner also submitted a 1996 article in *Asahi* about five Hokkaido residents selected to participate in the Pacific Music Festival, three of whom (including the petitioner) had never participated in this concert previously. A 1999 article in *Hokkaido* reports on the petitioner's performance at the Sapporo Luther Hall. A 2002 article in *Hokkaido* reports on the Tanglewood Music Festival and the petitioner's participation in this festival. A 2006 advertisement in *Asahi* promotes the petitioner's guest performance at the Asahi Culture Center in Sapporo. A 2005 article in the *Birmingham News* discusses the addition of the petitioner as principal second violinist to the Alabama Symphony Orchestra. In his RFE, the director requested evidence of the significance of the publications covering the petitioner, such as their distribution or circulation. The petitioner did not provide the requested evidence and, thus, the director concluded that she had not established that she meets this criterion.

On appeal, the petitioner submits no new evidence. Thus, the petitioner has still not established the circulation or distribution of the publications mentioned above or submitted other evidence indicative of their status as professional or major trade journals or other major media. Instead, counsel simply reiterates and resubmits the evidence discussed above. Without evidence of the circulation or distribution of the above publications or other evidence of their significance, we cannot conclude that the petitioner meets the plain language of this criterion. We note that based on the names of at least two of the publications, they appear to be local to the island of Hokkaido or Birmingham, Alabama.

In light of the above, the petitioner has not submitted the necessary required initial evidence to meet 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.

In response to the director's RFE, the petitioner submitted evidence that the principal second violin participates as part of the violin and viola audition committees for the Alabama Symphony Orchestra. The director concluded that this participation was not evidence indicative of or consistent with national or international recognition.

On appeal, counsel merely reiterates and resubmits evidence already in the record of proceeding. The evidence submitted to meet this or any criterion must be indicative of or consistent with national or international acclaim if that statutory standard is to have any meaning. *Accord Yasar v. DHS*, 2006 WL 778623 *9 (S.D. Tex. March 24, 2006); *All Pro Cleaning Services v. DOL et al.*, 2005 WL

4045866 *11 (S.D. Tex. Aug. 26, 2005). We are not persuaded that the petitioner's collateral job duty of auditioning new violin and viola players for her employer is indicative of or consistent with national or international acclaim.

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

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

In his RFE, the director acknowledged the submission of letters from the petitioner's teachers and colleagues but concluded that the record contained no objective evidence to meet this criterion. The director ultimately concluded that the evidence did not establish that "the petitioner has developed new techniques, styles, methods, etc. that have been recognized and adopted by others and which have impacted the field." In response to the RFE and again on appeal, counsel cites two precedent decisions that predate the Act discussing the significance of expert testimony. As these cases predate the Act, which requires extensive documentation of acclaim, and the designation in the regulations of specific objective evidence, these cases have no value.

Counsel then cited non-precedent decisions discussing expert testimony as persuasive authority. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Regardless, it is not our position that expert letters have no value. Rather, while such letters are useful in putting the remaining evidence in context, they cannot form the cornerstone of a successful claim of sustained national or international acclaim. USCIS, in its discretion, uses as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

In evaluating the reference letters under this criterion, we note that letters containing mere assertions of widespread acclaim and vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field. Ultimately, evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce unsolicited materials reflecting that acclaim.

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be both original and of major significance. None of the reference letters explain how the petitioner's talent and skill have resulted in an "original" contribution. Moreover, we must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. None of the reference letters provide specific examples of how the petitioner's work has influenced the field at a national level such that her work can be considered a contribution of major significance.

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

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

Artistic Director for the New World Symphony (NWS) confirms that the petitioner "was one of a select few who played principal violin in the New World Symphony" from 2002 through 2005. The materials about NWS indicate that it was founded in 1987 by [REDACTED] and that it is a "national orchestral academy for the most gifted graduates of America's music conservatories." The materials further indicate that 1,000 musicians compete for "about 35 available fellowships." The record also includes several NWS programs confirming her status as a fellow. A 2002 article in *Hokkaido*, notes the petitioner's participation in the Tanglewood Music Festival. [REDACTED]

[REDACTED], Principal Second Violinist with the Saint Paul Chamber Orchestra, asserts that the Tanglewood Music Center is "the country's premiere summer music fellowship program and festival run by and in partnership with the Boston Symphony Orchestra" offering summer fellowship positions "to 150 exceptional musicians from around the world." The petitioner submitted a program from the 1996 Pacific Music Festival listing the petitioner as one of several violinists. [REDACTED], Conductor and Music Director of the National Repertory Orchestra, asserts that the petitioner successfully competed against 60 other violinists for a position at the summer festival in Breckenridge, Colorado. The petitioner also submitted several programs for solo and orchestral performances. The orchestral performances include a performance at Carnegie Hall as part of the New York String Orchestra.

[REDACTED], a faculty member of the New England Conservatory, asserts that the New York String Orchestra is "the orchestra for the most talented young musicians at the Carnegie Hall." The solo performances occurred at Japanese venues with undocumented significance.

The director requested evidence of the significance of the venues other than Carnegie Hall and the petitioner's role in those performances. In response, the petitioner submits a letter from [REDACTED] a violinist with the Buffalo Philharmonic Orchestra who has performed at Tanglewood. He asserts that thousands from around the world audition for this festival and only about 80 are invited to perform. This information is inconsistent with that provided by [REDACTED], who asserts that approximately 1,500 compete for 150 fellowships. The record contains no information from the festival's sponsor, the Boston Symphony Orchestra. The petitioner also submitted an invitation from the Alabama Symphony Orchestra to perform solo after the date of filing. This invitation is not relevant to the petitioner's eligibility as of the date of filing, the date as of which she must establish her eligibility. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

The director concluded that the petitioner was not the featured performer at Carnegie Hall or any other prestigious venue and that she had not established the significance of the venues where she performed solo. On appeal, counsel asserts that the petitioner has performed at prestigious venues, is featured on a compact disc of unknown sales volume and had a solo with the Alabama Symphony Orchestra after the date of filing.

This criterion applies to the visual arts. As performing is inherent to the performing arts, merely appearing on stage cannot, by itself, serve as comparable evidence to meet this criterion. Rather, the petitioner must demonstrate the significance of the venues and that the events constituted an exhibit or showcase of her work.

As stated by the director, the petitioner performed as a member of a large ensemble at Carnegie Hall and other significant venues. The record contains no evidence that the events were promoted in whole or in part as an exhibition or showcase of her work. Moreover, the record contains no evidence regarding the significance of the venues where her work was the focus of the event.

In light of the above, we concur with the director that the evidence submitted to meet this criterion is not indicative of or consistent with national or international acclaim.

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

Counsel asserted that the petitioner's roles as concertmaster and principal second violinist as well as the festivals with which she has been "associated" serve to meet this criterion. The petitioner submitted her contract for Principal Second Violinist with the Alabama Symphony Orchestra. [REDACTED] one of the petitioner's professors at the New England Conservatory of Music, asserts that this is a "principal position." [REDACTED] asserts that the principal second violinist is "vital to an orchestra because it requires a musician who can combine superior artistry with strong leadership and interpersonal skills." The petitioner submits a program for a 2002 Northern Illinois University Philharmonic concert listing the petitioner as the concertmaster. [REDACTED] affirms that the petitioner performed as concertmaster with the NWS from 2002 through 2005. [REDACTED] Resident Conductor of the Civic Orchestra of Chicago, confirms that the petitioner was the co-concertmaster for that orchestra during the 2000-2001 season. He explains:

The concertmaster's responsibilities are varied including meeting with the conductor to go over the style and technique, demonstrating in front of the entire orchestra any passage from the music being prepared, assuming the position of "assistant conductor," and in general, being the second most important person in the entire group.

[REDACTED] asserts that the Civic Orchestra of Chicago is "the training orchestra of [the] Chicago Symphony."

The director requested evidence such as organizational charts to establish the relation of the petitioner's role within the above entities. In response, the petitioner submitted materials from National Public Radio's website indicating that the concertmaster is the first chair violinist, plays the solo compositions in an orchestral composition, decides on the bowing of the violin section, leads that section and presides over the tuning of the orchestra.

The petitioner also submitted a letter from [REDACTED] Director of Artistic Administration of the Alabama Symphony Orchestra. [REDACTED] indicates that the symphony ranks 45th in size among the 1,200 adult orchestras in the United States and is Alabama's sole full-time orchestra. The orchestra performs over 150 concerts per year with total attendance of more than 100,000. [REDACTED] further asserts that the principal second violin presides over the second violin section and leads that section in fitting in with the orchestra. [REDACTED] notes that of the 54 musicians in the orchestra, only 16 are designated "principals."

The director concluded that the petitioner had not established that the Alabama Symphony Orchestra was a sufficiently distinguished entity or that the role of second principal violin, vacant for two years before the petitioner was hired, was sufficiently leading or critical. On appeal, counsel asserts that the petitioner's role as concertmaster serves to meet this criterion.

The petitioner served as concertmaster for university and training orchestras. NWS is a summer fellowship. While competitive among recent graduates, we cannot ignore that the most established and renowned violinists do not compete for training fellowships. The record contains little evidence regarding the Civic Orchestra of Chicago other than that it is the "training orchestra" for the Chicago Symphony. Without evidence of its distinguished reputation nationally, we cannot conclude that the petitioner's role with this orchestra serves to meet this criterion.

We are persuaded that principal second violin is a critical role for the Alabama Symphony Orchestra. That said, the petitioner has not established the reputation of this orchestra nationally. We are not persuaded that its rank by size or its status in the State of Alabama sufficiently document its reputation nationally. Thus, the petitioner has not established that she meets this criterion.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The petitioner's contract with the Alabama Symphony Orchestra reflects annual wages of \$41,392.94. In response to the director's RFE, [REDACTED] asserted that the base salary for a member of the Alabama Symphony Orchestra is \$34,494.12. The director concluded that the petitioner had not demonstrated that she earns significantly high remuneration in relation to others in the field nationally.

On appeal, counsel asserts that the petitioner's wages are based on union contracts and that she is paid a premium salary 20 percent above the base string salary. We have already acknowledged that the

petitioner performs a critical role for the Alabama Symphony Orchestra, which appears to be the basis of her premium wage. In order to meet this criterion, the petitioner must demonstrate that her remuneration is “significantly” high independent of union wage scale requirements if we are to distinguish this criterion from the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii). Moreover, her wages should compare with the most experienced and renowned violinists nationally. While meeting this criterion may be difficult in an industry with union wage scales, the purpose of the regulatory criteria is to demonstrate that the alien is one of the small percentage at the top of the field.

In light of the above, the petitioner has not established that she 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.

The record contains no box office receipts or record, cassette, compact disc or video sales data. On appeal, counsel provides a chart comparing the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv) relating to non-immigrants. On this chart, counsel compares the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5) with the commercial success criterion at 8 C.F.R. § 204.5(h)(3)(x). The regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5) states:

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 testimony must be in a form which clearly indicates the author’s authority, expertise, and knowledge of the alien’s achievements.

Thus, counsel appears to be asserting that the reference letters should be considered as meeting the commercial success criterion set forth at 8 C.F.R. § 204.5(h)(3)(x). The regulation at 8 C.F.R. § 204.5(h)(3)(x) is very specific, requiring box office receipts or record, cassette, compact disc or video sales data. Nothing in that regulation suggests that reference letters attesting to general talent from the petitioner’s teachers and colleagues can serve to meet this criterion.

Moreover, this criterion specifically relates to the performing arts. Thus, the petitioner cannot assert that this criterion is not readily applicable to her field. As such, the regulation at 8 C.F.R. § 204.5(h)(4), which permits the submission of comparable evidence where the criteria at 8 C.F.R. § 204.5(h)(3) are not readily applicable, does not require us to consider comparable evidence under this criterion. Regardless, it cannot be credibly asserted that the subjective opinions of experts chosen by the petitioner attesting to her talent are remotely comparable with the objective evidence of commercial success mandated under 8 C.F.R. § 204.5(h)(3)(x).

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

Comparable evidence pursuant to 8 C.F.R. § 204.5(h)(4).

Initially, counsel asserted that the evidence submitted as evidence of the petitioner's eligibility for her non-immigrant visa in a similar classification and education and fellowships are comparable evidence of the petitioner's eligibility for the immigrant visa pursuant to 8 C.F.R. § 204.5(h)(4). The regulation at 8 C.F.R. § 204.5(h)(4) permits the submission of comparable evidence where the regulatory criteria are not "readily applicable" to the petitioner's field. Counsel asserts that the petitioner meets several of the regulatory criteria and has not demonstrated that they are not "readily applicable" to the petitioner's field. Regardless, as stated above, the statutory standard for the petitioner's non-immigrant visa is far different than the standard for the immigrant visa classification now sought. Thus, even assuming that petition was not approved in error, the evidence supporting that petition is not necessarily comparable to the evidence required to meet the above criteria. Moreover, academic success and selection for prestigious training fellowships are not comparable to the above criteria, which require evidence relating to acclaim in the occupation, not academic success or eligibility for prestigious training programs for the occupation.

In light of the above, we are not persuaded that the petitioner has submitted comparable evidence to meet any of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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

Review of the record, however, does not establish that the petitioner has distinguished herself as a violinist to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence indicates that the petitioner shows talent as a violinist, but is not persuasive that the petitioner's achievements set her significantly above almost all others in her field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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

ORDER: The appeal is dismissed.