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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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 0 8 2010
LIN 08 002 58011

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined that the petitioner had not established the requisite extraordinary ability through extensive documentation and sustained national or international acclaim.

On appeal, counsel argues that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and that he submitted comparable evidence of his extraordinary ability (in the form of reference letters) pursuant to the regulation at 8 C.F.R. § 204.5(h)(4).

I. Law

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.* and 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that an alien demonstrate his or her sustained acclaim and the recognition of his or her achievements in the field. Such acclaim and achievements must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through meeting at least three of the following ten criteria.

(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(ii) 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;

(iii) 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;

(iv) 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 specialization for which classification is sought;

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

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

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

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification, *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.*

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

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 *6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

> If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at *3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under three criteria, considered in the context of a final merits determination. 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

II. Analysis

A. Evidentiary Criteria

This petition, filed on August 15, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a musician (guitarist), songwriter, and producer. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).[2]

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

The petitioner initially submitted copies of gold and platinum album plaques commemorating Recording Industry Association of America (RIAA) and Canadian Recording Industry Association (CRIA) certified sales relating to Nelly Furtado's album "Whoa Nelly!" The petitioner also submitted copies of plaques recognizing unit sales certified by the CRIA for Ariola's "Planet Pop 3" compilation and by the British Phonographic Industry (BPI) for Nelly Furtado's singles "Turn off the Light" and "I'm Like a Bird." While the petitioner received the preceding commemorative plaques

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

bearing his name from Dreamworks Records and Ariola (the record labels for which he worked), the "album credits" for the preceding recordings do not identify the petitioner. For example, the petitioner submitted "Whoa Nelly!" "album credits" posted at www.artistdirect.com listing twenty collaborators on Nelly Furtado's album, none of whom were identified as the petitioner.[3] Accordingly, the petitioner has not established that the sales of the preceding recordings were primarily attributable to his work. Moreover, it cannot suffice that the petitioner was part of a large group that earned collective recognition from the record label that employed his services. Nevertheless, the director informed the petitioner that these plaques do not meet this criterion as they commemorate album and single record sales and are more closely related to the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x).

In response to the director's request for evidence, counsel expressed agreement with the director's finding stating: "We do not dispute that the evidence submitted . . . is best classified as documentation of [the petitioner's] commercial success. We will not present any further evidence of national or international awards." Accordingly, the petitioner has not established that the plaques commemorating the record sales of Nelly Furtado and the "Planet Pop 3" compilation are tantamount to his receipt of nationally or internationally recognized prizes or awards for excellence in the field.

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

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

In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner initially submitted an August 31, 2004 letter from the American Society of Composers, Authors & Publishers (ASCAP) confirming his membership. The record, however, does not include evidence of the membership requirements (such as bylaws or rules of admission) for the ASCAP. In this case, there is no evidence showing that the preceding society requires outstanding achievements of its members, as judged by recognized national or international experts in the petitioner's field or an allied one. Accordingly, the petitioner has not established that he meets this criterion.

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[3] *See also* "Album Credits" for "Whoa Nelly!" at http://music.barnesandnoble.com/Whoa-Nelly/Nelly-Furtado/e/600445021723, accessed on February 3, 2010, copy incorporated into the record of proceeding.

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

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.[4]

The petitioner submitted a March 5, 2001 article posted at www.rollingstone.com entitled " This article briefly identifies the petitioner along with four other members of "solo performer" Nelly Furtado's "back-up" band. The petitioner also submitted a March 8, 2001 article posted at www.mtv.com entitled " " but the article only mentions the petitioner in passing as a member of the "rest of the band." The plain language of this regulatory criterion, however, requires "[p]ublished material about the alien." The preceding articles are about Nelly Furtado and her concert rather than the petitioner.[5] Further, the director found that the record lacked evidence showing that the aforementioned "websites can be considered commensurate with major media." On appeal, counsel states: "It is incomprehensible that the [Nebraska Service Center] would claim that websites operated by these two authorities cannot be considered 'major media.'" The burden is on the petitioner, however, to submit evidence (such as internet readership statistics) showing that the preceding websites where the articles were posted qualify as professional or major trade publications or some other form of "major" media. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Even on appeal, the petitioner has failed to submit evidence establishing that the websites are "major media."

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

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.*

In response to the director's request for evidence, the petitioner submitted a July 7, 2008 letter from of the Irvine Music Academy (IMA), stating:

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[4] 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.

[5] *See, e.g., Accord Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor).

> IMA offers private music instruction in guitar, piano, drums, bass guitar and voice. Every year the 70 plus students at IMA audition for coveted positions in the School of Rock program, designed to teach young musicians how to write and perform music in a band setting.
>
> [The petitioner] was asked to officiate as a judge on our panel of experts *this year* as his knowledge and opinion is highly valued in the industry. I have known [the petitioner] for 6 years and can attest to his award winning talents as a lead guitarist, performer and producer.
>
> * * *
>
> [O]ur school, and I personally, were both honored and grateful to have his opinions and expertise expressed on our panel *this year*.

[Emphasis added.]

letter, dated July 7, 2008, twice refers to the petitioner's participation as occurring "this year." The petitioner's participation as a panelist for the IMA School of Rock audition in 2008 post-dates the August 15, 2007 filing of this petition. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Accordingly, the AAO will not consider participation as a judge that occurred after August 15, 2007 in this proceeding. Even if the petitioner were to demonstrate his participation as of the petition's filing date, the plain language of this regulatory criterion requires "[e]vidence of the alien's participation . . . as a judge of the work of others in the same or an allied field of specification." We cannot conclude that evaluating a school's young students, who have not yet begun working in the field, meets the requirements of this criterion.

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

The petitioner submitted several letters of recommendation praising his talent as a guitarist, songwriter, and producer. We cite representative examples here. Talent and the ability to secure employment in one's field, however, are not necessarily indicative of artistic contributions of major significance. The record lacks evidence showing that the petitioner has made original artistic contributions that have significantly influenced or impacted his field.

Los Angeles, identifies himself as "a manager for [the petitioner]." states:

> Having worked with multitudes of skilled and talented persons in the industry throughout my career, I can confirm that [the petitioner] far surpasses the norm of producers/composers or lead guitarist. He does surpass what is normally hired and encountered in this business. His outstanding abilities make him indeed a rare asset to any project he is sought out for. He . . . has earned gold and multi-platinum certifications awards in the USA, Canada, UK Territories

> and Australia. These awards are only available to those who have made a significant contribution to the commercial successes of the projects associated with them.

for Warner/Chappell Music, Inc., Nashville, Tennessee, states:

> As a producer/composer or lead guitarist, [the petitioner] far extends what is normally found in this field. His outstanding ability makes him indeed a rare asset to any project we seek him out for. Artists and record labels alike seek out his outstanding ability in production and composition.
>
> [The petitioner] has earned gold and multi-platinum certification awards in the U.S., Canada, United Kingdom Territories and Australia, which indeed demonstrate his achievements. Those certifications are very big successes for anyone in the music industry because they signify a key role in the creation of a record that has gone on to sell a large number of units (in the U.S.: 500,000 for a Gold Record, 1million for Platinum). It takes a lot of people's efforts to make a record from start to finish and then to get it into the market place and make it a success, but not everybody gets a certification. The record labels determine whose contributions were crucial and who deserves the awards. The fact that [the petitioner] has received so many of these certifications speaks to the special talents he has that help make these records a success.
>
> * * *
>
> I have had the opportunity to work with [the petitioner] and introduce him to my top line of songwriters and have received great feedback from them as well about his talents.

Aside from the plaques commemorating the record sales of Nelly Furtado and the "Planet Pop 3" compilation, the petitioner's response to the director's request for evidence included additional evidence of plaques commemorating Australian Recording Industry Association (ARIA) certified sales of "25,000 copies of the BMG Australia compact disc single 'Ms. Vanity'" by Rob Mills and of "980,000 copies of the Sony Music compact disc 'Innocent Eyes'" by Delta Goodrem. As discussed previously, although the petitioner submitted commemorative plaques reflecting various levels of music sales as certified by RIAA, CRIA, BPI, and ARIA, there is no evidence of "album credits" or compact disc cover inserts for the preceding recordings which identify the petitioner. For example, the petitioner submitted "Whoa Nelly!" "album credits" posted at www.artistdirect.com listing twenty collaborators on Nelly Furtado's album, none of whom were identified as the petitioner. Further, there is no evidence that the petitioner was identified among the forty individuals credited as contributing to Delta Goodrem's "Innocent Eyes."[6] The petitioner's exclusion from the album credits for the preceding gold and platinum certified records does not support his manager's assertion that he "made a significant contribution to the commercial successes" of the recordings. Nevertheless, we

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[6] *See* "Album Credits" for Delta Goodrem's "Innocent Eyes" at http://music.barnesandnoble.com/Innocent-Eyes/Delta-Goodrem/e/9399700107876, accessed on February 3, 2010, copy incorporated into the record of proceeding.

find that the commercial success of the preceding recordings is primarily attributable to the original work of the featured vocalists (such as Nelly Furtado and Delta Goodrem).

, Studio City, California, identifies himself as "the personal manager for [the petitioner]." states:

> [The petitioner] is a remarkable live lead guitarist who has toured the globe with Nelly Furtado. Instrumental to the success of the group, his masterful lead guitar playing has been featured on many live TV show [*sic*] including but not limited to "Late Night with David Letterman," "The Jay Leno Show," "Saturday Night Live" . . . . It is clear that his remarkable talent has opened these doors for him . . . . There is indeed a great demand for his gifted talent and rare ability in the field of production/composition and his mastery as lead guitarist.

, recording artist and songwriter, states:

> [The petitioner] was not required to audition or compete for my project, on the contrary a person of his talents is rare and I found that [the petitioner] stood out as the best choice for my recordings.
>
> Having [the petitioner] produce/co-write and play lead guitar on my album *Twelve* has indeed provided me commercial success. The unique, yet universally commercial sound that [the petitioner] helped to create on many of my recordings has helped me secure my own successes such as the numerous television placements I have had or the Japanese Publishing and Record deals I received from Watanabe Publishing and Trident Style Records.

The record, however, does not include evidence of the album unit sales for "Twelve." Further, there is no evidence demonstrating that the petitioner's work with equates to an original contribution of major significance in the recording industry.

for Warner Chappell Music, Inc., states:

> [The petitioner] is an award winning guitarist and producer and certainly adds great value to every project he contributes too.
>
> Currently, he and I have compositions waiting on hold for some of the countries biggest artist, including Rascal Flatts and Keith Urban. He has just finished playing lead guitars on the new upcoming track for David Cook (the new 'American Idol') as his talents are sought out time and time again.

A petitioner, however, cannot file a petition under this classification based on the expectation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. at 49.

musician, songwriter, and producer, states:

> I have worked with [the petitioner] on several studio projects such as "I'm Like a Bird" acoustic version for Nelly Furtado, Juliette Goglia, and John Macintosh. We both toured as part of Nelly Furtado's band myself as keyboardist while [the petitioner] took the role of guitarist. Currently [the petitioner] and I are writing and producing library music for Warner Telepictures as well as writing and recording up and coming artists.
>
> Having worked regularly with [the petitioner] I deem it a great honor to recommend him as an expert and master in the field of musical arts.

, states: "A true talent like [the petitioner] is hard to find in this industry. . . . A person of his many talents is rare and I look forward to working with him in the future for years to come."

states: "As a writer and producer working on a variety of projects I often use the musical expertise of the multi talented [the petitioner]. . . . Such works include Disney's Jingle Jam, and Disney artist Christy Carlson Romano."

, musician, producer, and programmer, states: "I always turn to [the petitioner] for guitar, songwriting and production work that I need done, as he is an expert guitarist, songwriter, and producer."

The preceding letters identify various projects on which the petitioner has collaborated, but they do not specify exactly what his original contributions in the recording industry have been, nor is there an explanation indicating how any such contributions were of major significance in his field. It is not enough to be talented and to have others attest to that talent. An alien must have demonstrably impacted his field in order to meet this regulatory criterion. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner has earned the admiration of those with whom he has directly collaborated, there is no evidence demonstrating that he has made original artistic contributions of major significance in the field. For example, the record does not indicate the extent of the petitioner's influence on other musicians nationally or internationally, nor does it show the field has somehow changed as a result of his work.

Counsel cites to *Matter of T-C-F-F-C*, 5 I&N Dec. 454, 457 (C.O. 1953) for "the proposition that special and uncommon talents are more properly recognized by experts in the field rather than by the general population and certainly should be applied to this case." However, in that case, the petitioner sought classification for the beneficiary as an alien of exceptional ability as a potential actress under the statutory provisions of former section 203(a)(1)(A) of the Act (1953). This former immigrant classification had no requirement for evidence of sustained national or international acclaim.

In fact, in *Matter of T-C-F-F-C,* the Central Office of legacy INS noted that the alien *"had no experience whatsoever"* as an actress and thus the record contained no supporting evidence of prior contributions or achievements. 5 I&N Dec. at 457 (emphasis added). The Central Office did not find that expert testimony should be accepted in lieu of evidence of prior achievements. Instead, the Central Office found that "[t]he potentialities of the beneficiary as an actress, in the absence of any previous experience, is [*sic*] clearly beyond the knowledge or understanding of the average person," and thus relied on the expert opinion.[7] *Id.*

In contrast to section 203(a)(1)(A) of the Act in effect in 1953, the classification that the petitioner seeks is limited to aliens of extraordinary ability "which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation." Section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i). While we have considered the expert opinions as well as the other evidence submitted by the petitioner, we will not consider opinion letters in lieu of a "demonstration" of extraordinary ability through "extensive documentation," as required by the statute.

In this case, the letters of recommendation submitted by the petitioner are not sufficient to meet this criterion. These letters, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 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. Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of a musician, songwriter, or producer who has sustained national or international acclaim. Without extensive documentation showing that the petitioner's work has

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[7] History reveals that the testimony of the expert witness in *Matter of T-C-F-F-C* was not that of a disinterested expert. Leaving only their initials, the decision superficially redacts the identities of the petitioner, the beneficiary, and the vice president of the petitioning entity who provided the expert testimony. However, the identifying information that remains in the published decision makes clear that the petitioner was Twentieth Century Fox Film Corporation, the vice president is and the beneficiary is

It is now common knowledge that engaged in a romantic affair with the beneficiary that eventually destroyed his marriage and preceded his resignation from Twentieth Century Fox Film Corporation. Thus, it appears that legacy INS inappropriately relied on his testimony as a disinterested expert witness. career in the United States consisted of only three films, all made within two years of approval of the petition, where the beneficiary's "limited abilities were painfully transparent." Internet Movie Database (IMDB) "Biography for " at *h* *see also* "Biography for " at *h* accessed on April 2, 2010).

been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

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

At issue for this criterion are the position the petitioner was selected to fill and the reputation of the entity that selected him. In other words, the position must be of such significance that the alien's selection to fill the position, in and of itself, is indicative of or consistent with national or international acclaim.

The petitioner submitted an August 31, 2004 letter from Telepictures Productions, stating that the petitioner is one of the top producers who make significant contributions to the company's music library. The petitioner also submitted an August 30, 2004 letter of support from Development & Special Projects for the television show "Extra." Both letters credit the petitioner with composing a theme song for a host of the television show "Extra." The August 31, 2004 letter from the ASCAP states that the petitioner authored and composed several hundred individuals pieces of music for Telepictures Productions' "Extra," "Celebrity Justice," "Elimidate," "Ellen DeGeneres Show," "Judge Mathis," "Sharon Osborne Show," and "Street Smarts." As the petitioner's music is not the focus of these television programs, we cannot conclude that being contracted to compose music for brief segments of "Extra" or any of Telepictures Productions' other shows equates to a leading or critical role for the company or its shows. Further, there is no evidence differentiating the petitioner's role from that of the other top producers who contribute to the Telepictures Productions' music library, let alone the hosts of the shows (such as Dayna Devon and Ellen DeGeneres) or the shows' senior management. The petitioner's ability to secure contractual employment and contribute to a small percentage of a television show's overall content does not equate to a leading or critical role for the show or its production company.

The petitioner submitted a July 29, 2004 "Contract/Agreement" in which he agreed to "provide a theme song and two 'jingles' for use in the Comedy Central Show, known as 'The Brian Unger Project' aka 'The Hollywood Show.'" There is no evidence indicating that the petitioner's music was the focus of this show. Further, the record does not include a letter of support from the show's management describing the petitioner's role as leading or critical. As discussed previously, the petitioner's ability to secure contractual employment and contribute to a small percentage of a television show's overall content does not equate to a leading or critical role for the show or its production company.

In response to the director's request for evidence, the petitioner submitted a November 6, 2007 "Musical Composition & Master Recording Agreement" executed by the petitioner and DAWN Syndicated Productions, Inc. This agreement was executed subsequent to the petition's filing date. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider this agreement in this proceeding. Nevertheless, this agreement does not establish that the petitioner's role was leading or critical to DAWN Syndicated Productions, Inc.

The petitioner submitted a September 1, 2004 letter from of the Godin Guitar Company, Quebec, stating: "This letter is to confirm [the petitioner's] artist endorsement with Godin Guitars. We have been honored to have [the petitioner], a musician of remarkable talent, exclusively play Godin Guitars as his instrument of choice for 2 years now." While the petitioner has an artist endorsement with this company, there is no evidence demonstrating that his role for the Godin Guitar Company was leading or critical. For example, there is no evidence differentiating the petitioner's role from that of the scores of other artists identified on the company's "Player List," let alone the company's employees and top management. Moreover, there is no evidence showing that the company's guitar sales increased significantly after the petitioner began endorsing their products.

With regard to the preceding organizations, the record lacks supporting evidence showing that they have distinguished reputations when compared to others in their industry. Further, the petitioner has not established that he was responsible for the preceding organizations' success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim. Accordingly, the petitioner has not established that he 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 submitted a July 29, 2004 "Contract/Agreement" for $3000.00 in which he agreed to "provide a theme song and two 'jingles' for use in the Comedy Central Show, known as 'The Brian Unger Project' aka 'The Hollywood Show.'"

In response to the director's request for evidence, the petitioner submitted ASCAP "Writer Performance Statements" from 2006 to 2008 reflecting varying amounts of royalty distributions for his musical compositions. The petitioner also submitted a November 6, 2007 "Musical Composition & Master Recording Agreement" executed by the petitioner and DAWN Syndicated Productions, Inc. in which the company agreed to pay him $600.00 per composition. The petitioner's response also included four McDaniel Entertainment invoices stamped "PAID" from May and June of 2008 reflecting services performed by the petitioner totaling $35,000. The ASCAP Writer Performance Statements for periods after August 15, 2007, the November 6, 2007 agreement, and the 2008 McDaniel Entertainment invoices post-date the filing of the petition. As discussed previously, a petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider this evidence in this proceeding.

With regard to the July 29, 2004 "Contract/Agreement" for $3000.00 and the ASCAP statements from 2006 and the first three quarters of 2007, the plain language of this regulatory criterion requires the petitioner to submit evidence of a high salary "in relation to others in the field." The petitioner offers no basis for comparison showing that his compensation was significantly high in relation to others in his field. Without a proper basis for comparison and evidence showing his comprehensive earnings during a sustained period predating the filing of the petition (such an income tax return), we cannot conclude that the petitioner has commanded a high salary or other significantly high remuneration for

services in relation to others in his field. Accordingly, the petitioner has not established that he meets this criterion.

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

The petitioner submitted his Gold and Platinum Album and Single commemorative plaques from Dreamworks Records, Ariola, BMG Australia, and Sony Music. The specific level of the petitioner's contribution to these record sales cannot be ascertained from the submitted documentation. For instance, there is no letter of support from the preceding record labels specifying the nature of the petitioner's contribution to their record sales. Further, as previously discussed, the documentation of record does not include any "album credits" or compact disc cover inserts for the Gold and Platinum Album and Single recordings which identify the petitioner. Nevertheless, we find that the commercial success of the Gold and Platinum recordings is primarily attributable to the work of the featured vocalists (such as Nelly Furtado and Delta Goodrem) rather than the petitioner.

The petitioner submitted compact disc cover inserts for albums such as Natasha Bedingfield's "Relationship," Olivia the Band's "Where We Come From It Never Snows," Krystal Meyers' "Dying for a Heart," Four Alarm Fire's "The Distance," Three Graces' debut album, Xtreme Angel's "Six Foot Daisy," Paul Epic's "South of Heaven, North of Hell," Danielle McKee's "Twelve," and the soundtrack for the motion picture "Aquamarine." The petitioner also submitted the songbook from Walt Disney Pictures' and Walden Media's "Bridge to Terabithia" reflecting that the petitioner wrote the song "Try." While the compact disc covers and songbook reflect that the petitioner played music, composed songs, or produced and engineered material for these albums and motion pictures, there is no evidence showing that the recordings involving the petitioner were commercially successful. This regulatory criterion requires evidence of commercial successes in the form of "sales" or "receipts;" simply submitting evidence showing that the petitioner somehow participated in the production of a musical recording cannot meet the plain language of this criterion. As stated previously, 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 158, 165. In the preceding instances, the record does not include evidence of documented "sales" or "receipts" showing that the petitioner himself achieved commercial successes in the performing arts in a manner consistent with sustained national or international acclaim at the very top of his field.

The petitioner submitted the results of an ASCAP title search displaying cues written by him for various productions such as "Celebrity Justice," "The Tyra Banks Show," "The Ellen DeGeneres Show," and "Extra." As previously discussed, this regulatory criterion requires evidence of commercial successes in the form of "sales" or "receipts;" simply submitting evidence showing that the petitioner wrote cues for various television shows does not meet the plain language of this criterion.

The petitioner also submitted ASCAP "Writer Performance Statements" from 2006 to 2008 reflecting varying amounts of royalty distributions for his musical compositions. As discussed previously, the ASCAP Writer Performance Statements for periods after August 15, 2007 post-date the filing of the

petition. A petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider royalties received after August 15, 2007 in this proceeding. With regard to the ASCAP royalties received by the petitioner that pre-date the petition, there is no evidence demonstrating that this remuneration is commensurate with sustained national or international acclaim at the very top of the field. Moreover, this evidence has already been addressed as remuneration under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ix).

In this case, we concur with the director's finding that the petitioner has failed to demonstrate his receipt of a major, internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3).

B. Comparable Evidence Under 8 C.F.R. § 204.5(h)(4)

On appeal, counsel states that the letters of support submitted by the petitioner "could, as an alternative, be considered part of the 'comparable evidence' category to establish his extraordinary ability." The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten criteria "do not readily apply to the beneficiary's occupation." The regulatory language precludes the consideration of comparable evidence in this case, as there is no evidence that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, counsel's appellate submission and response to the director's request for evidence specifically address several of the preceding regulatory criteria. Where an alien is simply unable to meet three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3), the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

Nevertheless, there is no evidence showing that the documentation the petitioner requests reevaluation of as comparable evidence constitutes achievements and recognition consistent with sustained national or international acclaim at the very top of his field. We note that the petitioner's letters of support have already been addressed under the regulatory criteria at 8 C.F.R. § 204.5(h)(3). While reference letters can provide useful information about an alien's qualifications or help in assigning weight to certain evidence, such letters are not comparable to extensive evidence of the alien's achievements and recognition as required by the statute and regulations. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The classification sought requires "extensive documentation" of sustained national or international acclaim. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). The commentary for the proposed regulations implementing the statute provide that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Primary evidence of achievements and recognition is of far greater probative value than opinion statements from individuals selected by the petitioner.

C. Prior O-1 Nonimmigrant Visa Status

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

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 the alien'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. 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 has approved a nonimmigrant petition on behalf of the alien, 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).

D. Final Merits Determination

In accordance with the *Kazarian* opinion, we must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2); and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). *See also Kazarian,* 2010 WL 725317 at *3.

In this case, the specific deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The submitted evidence is not indicative of the petitioner's sustained national or international acclaim in the recording industry and there is no indication that his individual achievements have been recognized in the field through extensive documentation. Rather, the submitted documentation relating to the petitioner's achievements as a musician demonstrates that he has worked along with numerous other contributors in support roles for acclaimed artists (such as Nelly Furtado and Natasha Bedingfield). For example, the submitted online articles are about Nelly Furtado rather than the petitioner. With regard to the Gold and Platinum Album and Single recordings, the submitted documentation does not include any "album credits" or compact disc cover inserts for these recordings which identify the petitioner. Moreover, the evidence provided by the petitioner does not demonstrate that the commercial success of the Gold and Platinum recordings is primarily attributable to the petitioner rather than to the work of the featured artists (such as Nelly Furtado and Delta Goodrem). The evidence of record simply is not indicative of the petitioner's national or international acclaim as a musician or a producer. Even in the aggregate, the submitted evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

III. Conclusion

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

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the

benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.