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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

B2

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 2 8 2010

IN RE: Petitioner: 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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Mari Johnson

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner seeks classification as an "alien of extraordinary ability" 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 petitioner seeks recognition of his ability as a musician and songwriter but he listed his current employment on the Form G-325, submitted in support of his adjustment application, as A&R Director. His Internal Revenue Service (IRS) Form 1040 U.S. Individual Tax Return for 2008 lists his occupation as "analyst" and includes gross income on Schedule C from music consulting services. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel submits a brief and additional evidence, almost all of which was previously submitted. For the reasons discussed above, we uphold the director's ultimate conclusion that the petitioner has not submitted the required initial evidence to establish eligibility and that the evidence submitted does not support a finding that the petitioner enjoys national or international acclaim. In general, counsel mischaracterizes the evidence submitted and expects the AAO to presume the existence of required evidence the petitioner declines to submit. Counsel initially asserted that the petitioner meets all ten of the regulatory criteria, which range from the authorship of scholarly articles to commercial success in the performing arts and, thus, are designed to cover several fields.[1] Counsel's approach results in patently frivolous claims such as the claim that popular songs constitute scholarly articles published in professional or major trade journals or other major media pursuant to 8 C.F.R. § 204.5(h)(3)(vi).

I. Prior nonimmigrant visa in a similar classification

While U.S. Citizenship and Immigration Services (USCIS) approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased standard.

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[1] Counsel addresses all ten criteria despite numbering three of those criteria as "VI."

First, the regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts* are dramatically different. 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) as simply "distinction," which is further defined as follows:

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

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

Second, 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 beneficiary's qualifications).

Third, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. Due to the lack of required initial evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant visa petition.

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).

Fourth and finally, 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).

The director is instructed to review the previous nonimmigrant approval for possible revocation, pursuant to 8 C.F.R. § 214.2(o)(8).

II. 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.

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

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

through the submission of qualifying evidence under at least three of the following ten categories of evidence.

> (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*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation

of evidence submitted to meet a given evidentiary criterion.[2] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). 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 1119-20.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In 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* 8 C.F.R. 103.3(a)(1)(iv); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (recognizing the AAO's *de novo* authority).

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[2] 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).

III. Analysis

A. Evidentiary Criteria

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 the petitioner "received a GRAMMY nomination in 2006" that serves as qualifying evidence under 8 C.F.R. § 204.5(h)(3)(i). As evidence of this alleged nomination, the petitioner submitted a letter from Vice President of Awards for the Latin Academy of Recording Arts (LARAS), stating that the petitioner "participated" on the album *Polbo,* an album by the group Polbo, which was nominated for Best Rock Album by a duo or group during the 7th Annual Latin Grammy awards. does not suggest that the petitioner is or was a member of Polbo.

In the notice of intent to deny, the director noted that, according to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) "the petitioner must be a recipient of the award." In response, counsel asserted that whether the petitioner won the award is irrelevant as the Grammy awards are so significant that a nomination alone "is an honor." The petitioner submitted a letter from President of LARAS, asserting that every year, nearly 5,500 sound recordings compete for nomination and only five albums are nominated per category. While describing the petitioner as a "nominee," does not state that the petitioner is or was a member of Polbo and does not explain the petitioner's role on the album *Polbo.*

The director concluded that the petitioner was not the recipient of a qualifying prize or award. On appeal, counsel asserts that a nomination is "comparable evidence" pursuant to 8 C.F.R. § 204.5(h)(4). The regulation at 8 C.F.R. § 204.5(h)(4) provides that comparable evidence is allowed where the standards at 8 C.F.R. § 204.5(h)(3)(i) are not "readily applicable" to the petitioner's occupation. As the petitioner has submitted evidence of the existence of nationally recognized music awards for his occupation, 8 C.F.R. § 204.5(h)(3)(i) clearly is readily applicable to his occupation. Moreover, while not persuasive, counsel has asserted that the petitioner meets all ten of the criteria at 8 C.F.R. § 204.5(h)(3), suggesting that there is no issue of these standards not being readily applicable to the petitioner's occupation. An inability to meet a given criterion in no way suggests that the criterion is not readily applicable to the petitioner's occupation.

Even if we accepted that a Latin Grammy nomination is a nationally or internationally recognized prize or award due to the limited number of nominations and the publication of the nominees, the petitioner has not satisfactorily established that he personally received a nomination. The petitioner has not documented that he was a member of Polbo at the time the group recorded the album *Polbo*. Rather, the album credits reflect that Polbo's bassist on the album is Joscan Rosario and that the petitioner was a session musician. Not every session musician on an award-nominated album can be considered to share in the nomination.

Moreover, the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires evidence of qualifying prizes or awards in the plural, consistent with the statutory requirement for extensive evidence. We note that not all of the regulatory criteria are worded in the plural. For example, the regulation at 8 C.F.R. § 204.5(h)(3)(iv) only requires a single occasion where the petitioner participated as a judge and the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires only evidence of a single high salary. Thus, we can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation.[3] The petitioner has not submitted evidence of other lesser nationally or internationally recognized prizes or awards.

In light of the above, the petitioner has not submitted qualifying evidence under 8 C.F.R. § 204.5(h)(3)(i).

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

The regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires evidence of membership in qualifying associations in the plural, consistent with the statutory requirement for extensive evidence. Initially, counsel asserted that the petitioner's "voting" membership in the National Academy of Recording Arts and Sciences (NARAS) and LARAS and his membership in the American Federation of Musicians (AFM) serve as qualifying evidence under 8 C.F.R. § 204.5(h)(3)(ii).

The petitioner submitted a letter from of LARAS' Membership Department, confirming that the petitioner is "an active voting member" of LARAS. The petitioner also submitted a letter from NARAS addressed to "Recording Academy Member" and containing a label with the petitioner's name and address on top. The petitioner submitted a membership application for LARAS stating that voting membership "is for creative and technical professionals who qualify in at least one of the categories of eligibility." For vocalists, producers, songwriters, engineers and instrumentalists, eligibility is established by "at least six commercially released recordings (singles, tracks or the album equivalent." The petitioner also submitted a list of guitarist members of the South Florida Musicians Association, which appears to be affiliated with the AFM. The list includes the petitioner.

In the notice of intent to deny, the director advised that the petitioner must document the minimum requirements and criteria for membership in the associations of which the petitioner is a member. In response, the petitioner submitted the membership requirements for NARAS and a newer membership application for LARAS that includes the same membership requirements stated above for vocalists, songwriters and instrumentalists. The new evidence reflects that NARAS requires that the applicant be

[3] *See Maramjaya v. USCIS,* Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff,* 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

credited on a minimum of 12 tracks, have a website, and have albums available for sale to the general public in an established online retail setting. The petitioner submitted no evidence regarding the criteria for AFM or the South Florida Musicians Association.

The director concluded that membership requirements based on experience, recommendations from colleagues and the payment of dues are insufficient. On appeal, counsel asserts that the director failed to consider the requirements for LARAS and proceeds to list the requirements for NARAS as those of LARAS. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The petitioner resubmits the previously submitted evidence, already part of the record of proceeding.

The petitioner has only documented his membership in LARAS, NARAS and the South Florida Musicians Association. Six commercially released recordings indicate an ability to work in the field and do not constitute an outstanding achievement for a vocalist, songwriter or instrumentalist. Moreover, while the application indicates that qualifications will be confirmed, confirmation of album credits would not appear to require a nationally or internationally recognized expert. The record contains no evidence that LARAS utilizes nationally or internationally recognized experts to judge the achievements of applicants and admits only those with outstanding achievements as judged by those experts. Thus, the petitioner has not established that LARAS is a qualifying membership.

Similarly, credit on 12 tracks (which would appear to include mere session work), maintaining a promotional website and having albums available for sale do not appear to be outstanding achievements or otherwise usual for a professional musician. Thus, NARAS also does not appear to require outstanding achievements of its members and the record lacks evidence that they utilize nationally or internationally recognized experts to judge prospective members..

The petitioner has not submitted the membership requirements for the South Florida Musicians Association or evidence that nationally or internationally recognized experts judge the achievements of prospective members for what appears to be a local association.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements for 8 C.F.R. § 204.5(h)(3)(ii).

> *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 director concluded, in part, that the published material submitted could not establish "sustained" acclaim in 2008 when the petition was filed. On appeal, the petitioner submits published material from 2009 as evidence that the petitioner's name still appears in the media. While the submission of this material is understandable given the director's expressed concern regarding "sustained" acclaim,

published material that postdates the filing of the petition cannot be considered evidence of the petitioner's eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). We acknowledge, however, that the record contains published material from 2008, the year the petition was filed, and, thus, we withdraw the director's apparent concern that the published material was not sufficiently recent.

Initially, the petitioner submitted several articles in a foreign language accompanied by "summary" translations that were neither complete nor certified as required by 8 C.F.R. § 103.2(b)(3). Counsel asserted that, according to www.onlinenewspapers.com and www.abyznewslinks.com, four of the newspapers from which material was submitted are "major Guatemalan newspapers."

The director stated in the notice of intent to deny that the published materials must be supported by any necessary translation. Nevertheless, the petitioner did not submit complete, certified translations in response. The petitioner submits certified translations on appeal, a few of which are slightly more comprehensive than the earlier "summary translations." Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. at 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Even if we considered the translations for the materials dated prior to the date of filing, the foreign language material is insufficient. First, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires published material "about" the petitioner relating to his work. *Compare* 8 C.F.R. § 204.5(i)(3)(i)(C) (requiring published material about the alien's work). As such, the published materials must be "about" the petitioner. Most of the articles are about the band Bohemia Suburbana and mention the petitioner only in passing as the bass player. These articles primarily interview or quote band vocalist [redacted] The May 30, 2008 article in *El Periodico* regarding the band's material on YouTube is more persuasively "about" the petitioner and will be considered below.[4] The petitioner also submitted articles translated through an online translation service from foreign language newspaper websites. While the petitioner is mentioned by name in these articles, they are not "about" him.

Second, the published material must appear in professional or major trade publications or other major media. The petitioner must establish the significance of both print and Internet media. In the notice of intent to deny, the director noted that the published material must qualify under the regulation at 8 C.F.R. § 204.5(h)(3)(iii), such as by having a national or international circulation. In response, the petitioner submitted a self-serving chart purporting to document the publication rate and circulation of the publications that have mentioned the petitioner. Going on record without supporting documentary

[4] On appeal, the petitioner submits a second article in *El Periodico* that appears to be a joint interview of the petitioner and [redacted] While the translation identifies this article as appearing in 2008, the original article itself lists a date in 2009.

evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). Similarly, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at, 506. More specifically, the AAO need not rely on self-serving assertions on the cover of a magazine or attorney argument as evidence that a given publication is major media. *Braga v. Poulos,* No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009).

Counsel's brief and the chart state that the period in which to respond did not provide sufficient time to obtain documentary evidence supporting the claims on the chart but that contact information is being provided. According to the chart, the data for one publication was purportedly obtained from the Internet. As stated above, counsel initially asserted that the websites www.onlinenewspapers.com and www.abyznewslinks.com demonstrate that the newspapers are major Guatemalan newspapers. It is the petitioner's burden, however, to submit the required initial documentation rather than suggest a place where that documentation might be obtained. Neither counsel nor the petitioner explains why the petitioner was unable to download this information or obtain supporting documentation from the publications in the 33 days provided to respond to the notice of intent to deny.

We note that the regulation at 8 C.F.R. § 204.5(h)(3)(iii) states specifically that the published material must appear in professional or major trade publications or other major media, placing the petitioner on notice that such evidence was required even before he filed the petition. It is the petitioner's obligation to provide the necessary required initial evidence; USCIS is not required to call six publications and access the website of a seventh publication to obtain circulation data. We further note that counsel represented the petitioner on his previous petition filed under this classification, On October 25, 2007, the director advised the petitioner through counsel that 8 C.F.R. § 204.5(h)(3)(iii) requires evidence that the published materials appeared in professional or major trade journals or other major media. Thus, both the petitioner and counsel have been on notice of this requirement since 2007.[5] As such, the claim that *El Periodico* is a daily newspaper with a circulation of 260,000 in Central America, the Caribbean and Mexico, as well as the other circulation claims, are unsupported.

Given the petitioner's failure to provide the requested circulation data, the director determined that the petitioner had not established that the published material appeared in professional or major trade publications or other major media. On appeal, counsel resubmits the self-serving chart, once again with no explanation as to why the petitioner was unable to obtain supporting evidence of this data within the 63-day filing period for the appeal (33 days) and supplemental brief (an additional 30 days). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). On this basis alone the petition may not be approved.

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[5] In response to that notice, the petitioner submitted printed material from www.onlinenewspapers.com and www.abyznewslinks.com. The first site merely provides links to the Guatemalan newspaper sites without identifying the circulation or distribution of the newspapers. The latter site does identify *El Periodico* as "national" but provides no specific circulation or distribution data.

Even if we considered the one article in *El Periodico* qualifying, the regulation at 8 C.F.R. § 204.5(h)(iii) requires evidence of published material in qualifying publications or media in the plural, consistent with the statutory requirement for extensive evidence. Thus, a single article in qualifying media cannot serve as sufficient evidence under 8 C.F.R. § 204.5(h)(3)(iii)

In light of the above, the petitioner has not submitted the initial required evidence necessary to meet the plain language requirements of 8 C.F.R. § 204.5(h)(3)(iii).

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.

Initially, counsel relied on the ballot for the 47th Grammy Awards sent to the petitioner in 2004 as a recording academy member. In response to the notice of intent to deny, the petitioner submits evidence that in 2009 LARAS invited him to participate in a screening committee. This evidence postdates the filing of the petition and cannot be considered evidence of the petitioner's eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49.

While we will not consider the petitioner's post-filing service on the screening committee, the petitioner's participation in the balloting for the Grammy awards technically meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

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

Under the regulation at 8 C.F.R. § 204.5(h)(3)(v), counsel discusses the petitioner's original song compositions, some of which were the title songs for Bohemia Suburbana's "hit albums" that "received substantial media attention." The petitioner submits photocopies of several album covers, few of which reflect any music or lyric credits. The petitioner does receive music writing credits for two tracks on an album by Malacates Trebol Shop. The results of a search on [redacted]s website, provided by the petitioner, produces 32 songs listing the petitioner as one of one to four writers. The list does not reflect the albums on which the songs appeared, although several of them are co-written with [redacted] and, thus, appear to be Bohemia Suburbana songs.

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 in the field" is not superfluous and, thus, that it has some meaning. To be considered a contribution of major significance in the field of music, the contribution must be influential and impact the field as a whole rather than contribute to the success of a single band.

The petitioner submitted a letter purportedly from [redacted] Senior Editor for *Billboard Latino.* As the letter is unsigned, however, it has no evidentiary value.

The petitioner submitted two letters from Marketing Director for EMI Music Latin America. In her first letter dated August 28, 2006, she asserts that the petitioner is the bass player and artistic director for and has made a critical contribution to singer/songwriting career. In her second letter dated January 2, 2008, discusses Latin Grammy nominations and media coverage in 2005. While we do not question credibility, the record of proceeding is devoid of corroborating evidence of the petitioner's role with , such as official album credits. Moreover, the record contains no evidence that is an influential band or that the band's art direction or bass playing is specifically influential in the field of Latin music.

the Latin America Regional Managing Director of Warner/Chappell Music, asserts that the petitioner is a commercially successful songwriter who has composed, arranged and produced more than fifty original published songs for "distinguished artists" including Bohemia Suburbana, "one of the greatest rock bands to emerge from South America and Guatemala in recent years." affirms that the petitioner is prolific and innovative, but does not explain how the petitioner or Bohemia Suburbana has influenced or otherwise impacted the field of Latin music as a whole. In a second letter, asserts that the petitioner has brought "new and fresh sounds into the Latin American Rock & Pop market." Once again, it is insufficient that the petitioner's work is original. Rather, he must establish that his original compositions constitute a contribution of major significance to the field of Latin music as a whole.

Vice President and Head of Latin Music for the praises the petitioner's "innate understanding of music composition," but does not provide examples of how the petitioner has influenced or impacted Latin music as a whole.

Director of Latin Talent for AEG Live, asserts that Bohemia Suburbana has been "one of the most active Latin American bands on the United States arena touring circuit" and has inspired an "explosive American interest in a Latin American rock band," a first for a Guatemalan band. While asserts that the group's recent tour "truly set the band apart and places them in the upper echelon of Latin American talent," she provides no examples of their influence in Latin music as a whole.

Product Manager for Latin Pop at Sony/BMG Music Entertainment, asserts that the petitioner was the "unofficial 'frontman' of Bohemia Suburbana and by far the crowd and media favorite." As stated above, however, the majority of the published material about the band focuses on . further asserts that Bohemia Suburbana is "possibly the first Guatemalan band to successfully cross over into mainstream rock with concerts throughout the United States and Latin America." Even assuming that the record contained box office receipts documenting the band's commercial success, such evidence relates to the regulation at 8 C.F.R. § 204.5(h)(3)(x). If the regulation at 8 C.F.R. § 204.5(h)(3) is to be interpreted with any logic, it must be presumed that the regulation views contributions as a separate evidentiary requirement from commercial success.

The petitioner also submitted letters providing general praise from , Manager of A&R and Business Development at Warner Chappell Music, and Assistant Vice President for Latin Music at BMI. These letters do not explain how the petitioner has impacted the field of Latin music as a whole.

Counsel did not specifically address the regulation at 8 C.F.R. § 204.5(h)(3)(v) in response to the director's notice of intent to deny, but submitted new letters as "evidence of [the petitioner's] acclaim and standing as an individual." Entertainment Editor for *Donjuan Magazine*, discusses the intent of the magazine to profile the petitioner. The record contains no evidence that the magazine had, in fact, profiled the petitioner prior to the date of filing, the date as of which the petitioner must establish his eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. Even the new published material submitted on appeal does not contain this planned profile.

The petitioner also submitted general praise from Guatemalan politicians, primarily as evidence of the petitioner's alleged leading or critical role for the entire country of Guatemala. These letters will be discussed in that context below pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). We acknowledge them here, but note that they do not explain the petitioner's influence on Latin music as a whole.

The director did not address this regulation in the final notice of denial and counsel does not address this regulation on appeal. We have considered the above letters, but find that they do not establish the petitioner's contributions of major significance on the field of Latin music as a whole. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. [6] *See id.* at 795; *see also Matter of V-K-,* 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

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[6] The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.*; *see also Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998) (noting that there is a greater need for corrobative evidence when the testimony lacks specificity, detail, or credibility).

The letters considered above primarily contain bare assertions of acclaim and vague claims of contributions without specifically identifying contributions and providing specific examples of how those contributions rise to a level consistent with major significance in the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.[7] The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

In light of the above, the petitioner has not submitted qualifying evidence that meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

Initially, counsel indicated that the petitioner was submitting "evidence of authorship in the major media." Counsel then discusses the petitioner's authorship of songs that counsel characterizes as "highly ranked." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506. The record does not contain Billboard or other chart rankings of the petitioner's songs.

Counsel does not address the regulation at 8 C.F.R. § 204.5(h)(3)(vi) in response to the director's notice of intent to deny or on appeal. The plain language of this regulation requires evidence of authorship of "scholarly articles" that appear in "professional or major trade publications or other major media." USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008). Popular songs are not "scholarly articles." Albums and their packaging are not professional or major trade publications or other major media.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements under 8 C.F.R. § 204.5(h)(3)(vi). In fact, as stated above, this claim is patently frivolous.

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

Throughout the proceeding, counsel has asserted that the petitioner's public performances serve as qualifying evidence under 8 C.F.R. § 204.5(h)(3)(vii). We do not agree with counsel's interpretation in this case. The petitioner is a musician and song writer. When he plays before an audience, he is not displaying his music in the same sense that a painter or sculptor displays his or her work in a gallery or museum. He is performing his music; he is not displaying his work. IN addition to the extent that the

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[7] *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. 9, 15 (D.C. Dist. 1990).

petitioner is a performing artist, it is inherent to his occupation to perform. Not every performance is an artistic exhibition designed to showcase the performer's art. If we were to accept counsel's argument that a performance artist like the petitioner meets this criterion, it would render the regulatory requirement that a beneficiary must meet at least three criteria meaningless as this criterion would effectively be collapsed into the criteria at 8 C.F.R. § 204.5(h)(3)(viii). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. This interpretation has been upheld by at least one district court. *See Negro-Plumpe v. Okion,* 2:07-CV-820-ECR-RJJ at 8-9 (D. Nev. Sept. 8, 2008) (finding that the AAO did not abuse its discretion in finding that a performing artist should not be considered under the display criterion). While we acknowledge that the district court's decision is not binding, the court's reasoning indicates that the AAO's interpretation of the regulation is reasonable.

Therefore, while the petitioner's performances have evidentiary value for other criteria, they cannot serve to meet this criterion. Instead, as the petitioner's performances are far more relevant to the aforementioned "leading or critical role" criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii) and the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x), they will be discussed separately within the context of those criteria.

In light of the above, the petitioner ha not submitted qualifying evidence that meets the plain language requirements of 8 C.F.R. § 204.5(h)(3)(vii).[8]

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

Initially, counsel asserted that the petitioner has performed in a leading or critical role for Bohemia Suburbana as their bassist and songwriter; and her label, EMI Televisa Music and Warner Chappell, as a bassist and artistic director and Chappell Music as a producer, arranger, composer and songwriter. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506. The petitioner relies on letters and songwriting credits in support of counsel's assertions.

In response to the director's request for additional evidence, counsel reiterates the claim that the petitioner plays a leading or critical role for Warner Chappell Music and asserts that the petitioner also plays a leading or critical role for the entire country of Guatemala, a somewhat frivolous claim for a rock musician, and Gibson Guitars.

On appeal, counsel reiterates that the petitioner has played a leading or critical role for the entire country of Guatemala and Gibson Guitars. We will address all of the claims below. At the outset, however, we note that we have already considered the petitioner's claims of contributions of major significance above under 8 C.F.R. § 204.5(h)(3)(v). At issue for this criterion are the role the petitioner

[8] In the interest of thoroughness, we will still address this evidence again in the final merits determination.

was selected to fill and the reputation of the entity that selected him for that role. While letters from employers or other organizations or establishments that contract with the petitioner are important and useful evidence, other evidence such as organizational charts can also be useful in documenting how the petitioner's role fit within the hierarchy of the organization or establishment.

A. Bohemia Suburbana

The petitioner has documented that he is the bassist and songwriter for Bohemia Suburbana. While most of the published material focuses on the vocalist, the petitioner is interviewed in one article that predates the filing of the petition. Thus, we are satisfied that the petitioner has performed in a critical role for the band. Next, we must consider whether the band enjoys a distinguished reputation. The petitioner failed to submit the required complete translations of the published material or document the record sales and concert attendance claimed by counsel, Guatemalan politicians and a concert promoter. Even if we accept the attestations of the band's distinguished reputation in the various letters supporting the record, the band is not an organization or establishment.

B. and EMI

Once again, is not an organization or establishment. Moreover, the record lacks album credits for her albums documenting the petitioner's role as a member of her band and artistic director. Moreover, the petitioner did not submit an organizational chart for EMI or comparable evidence establishing how a single artistic director for a single band on the company's label constitutes a leading or critical role for the company as a whole.

C. Warner Chappell Music

As stated above, Latin America Regional Managing Director for Warner Chappell, supports the petition. He lists some of the renowned musicians represented in Warner Chappell's catalogue, including and concludes that the company "owes much of its success to the songwriters and artists who create the original music." asserts that the petitioner has "composed, arranged and produced more than fifty original published songs for distinguished artists such as Malacates Trebol Shop and, most notably, Bohemia Suburbana." In response to the director's notice of intent to deny, the petitioner submitted a letter addressing the petitioner's work on an upcoming album. This letter does not address the petitioner's role for Warner Chappell Music as of the date of filing, the date as of which the petitioner must establish eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49.

First, the record does not contain any album credits listing the petitioner as the producer. Second, does not provide the number of total songs in Warner Chappell Music's catalogue. Third, the record does not contain the chart rankings or album sales for any of the albums for which the petitioner has composed music. Thus, the petitioner has not established that his work on 50 songs of

unknown success for Warner Chappell Music constitutes a leading or critical role for the company as a whole.

D. The Country of Guatemala

The petitioner has submitted a letter from a Guatemalan congressman; Minister of Culture and Sport in Guatemala and Minister of the Guatemala Tourist Bureau. The letters from and are identically worded, suggesting that the language has a common source. While the letters attest to the petitioner's success and alleged contribution to the local economy where he performs, they cannot establish that the petitioner was selected for a leading or critical role for Guatemala. We reiterate that any claims of commercial success must be considered under 8 C.F.R. § 204.5(h)(3)(x). Finally, a country is a geopolitical entity and not an organization or establishment.

E. Gibson Guitars

In response to the director's notice of intent to deny, the petitioner submitted a letter from Director of Latin Entertainment Relations for Gibson Musical Instruments, confirming that Gibson Musical Instruments sponsors the petitioner in addition to further asserts that the company receives thousands of solicitations and selects only a "handful" to sponsor. Finally, attests to a correlation between Gibson' sponsorship of the petitioner and guitar sales in Central and South America. The record contains a pass for the Latin Alternative Music Conference in New York City that predates the filing of the petition and indicates that the petitioner was already sponsored by "Gibson Guitars."

does not provide the total number of guitarists/bassists sponsored by Gibson Musical Instruments. Without this information, the petitioner cannot establish the significance of his individual role for the organization.

In light of the above, the petitioner has not provided qualifying evidence that meets the plain language requirements under 8 C.F.R. § 204.5(h)(3)(viii).

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

Initially, the petitioner submitted a November 3, 2006 contractual advance of $7,500 and an October 1, 2006 songwriting contract with Warner Chappell Music requiring six compositions per year. Warner Chappell Music agrees to pay the petitioner songwriter royalties and 40 percent of net income from the compositions. The petitioner's renewal options were for between a minimum of $15,000 for the first year and a maximum of $50,000 for the fourth year. On the same date, the petitioner assigned all of his interest in the songs listed on Schedule A, which included 23 songs, to Warner Chappell Music. Counsel concludes from this evidence that the petitioner was paid an annual salary of $57,000 plus

bonuses in 2005, above the median salary of $34,570 in May 2004. Counsel's claims appear unrelated to the 2006 contract and advance actually provided. Moreover, counsel's assertion regarding the mean salary for May 2004 is not documented in the record. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506.

In response to the director's notice of intent to deny, the petitioner submits wage data for musicians and singers for May 2008. Counsel focuses on the median hourly salary of $28.28, which, counsel states, should be multiplied by 2,080 hours to obtain an annual salary. Significantly, the same evidence reflects that the 90th percentile hourly wage for musicians and singers was $59.92 in May 2008. The petitioner also submitted his 2008 IRS Form 1040, filed jointly with his wife. Counsel asserts that the petitioner's wife earned no wages that year and that the full $80,578 in wages represents the petitioner's earnings. The petitioner did not provide his Forms W-2 or similar forms to document the source of this income. Significantly, both the petitioner and his wife list their occupation as "analyst" on the bottom of the form, suggesting that both individuals worked in 2008 and that their listed wages derived from employment as analysts. The petitioner's attached Schedule C reflects gross income of $2,789 from music consulting. This tax documentation does not appear to document any income as a musician or songwriter.

Even if we assumed that the petitioner's entire $80,578 derived from his employment as a musician, as stated above, the 90th percentile hourly wage in his occupation is $59.92. If we multiply this amount by 2,080 hours as requested by counsel, that amounts to $124,633.60, more than the petitioner earned in 2008. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires evidence of a high salary in relation to others in the same field. We are not persuaded that earning less than those in the top ten percent is a high salary. Moreover, if the petitioner's income is not a salary but "other" remuneration such as royalties, that remuneration must be "significantly" high.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(ix).

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

The regulation at 8 C.F.R. § 204.5(h)(3)(x) states clearly what type of evidence must be submitted under this regulation: box office receipts or media sales data. According to the regulation at 8 C.F.R. § 103.2(b)(2), affidavits are only acceptable in lieu of primary or secondary evidence where such evidence has been documented as unavailable or nonexistent.

Initially, the petitioner submitted a list of his original compositions with Warner Chappell Music and a letter from [redacted] attesting to the petitioner's popularity with crowds. The petitioner did not provide any evidence of box office receipts or media sales. In response to the notice of intent to deny, the petitioner submitted a chart listing his albums, the number of albums sold (between 5,000 and 25,000)

and either "Gold" or "Platinum" status. The bottom of the chart indicates that the data was obtained from the production companies by telephone and is not readily available. Moreover, the petitioner still fails to provide the documentation to support this self-serving chart on appeal despite the additional 63 days to obtain evidence (33 days to appeal and an additional 30 days to supplement the appeal). Moreover, this evidence was requested in support of the previous petition filed by the petitioner, on October 25, 2007. As such, counsel and the petitioner have been on notice of this requirement since 2007. We note that Gold and Platinum standards are typically set by and confirmed by the industry.[9] As such, evidence that an album has been certified gold or platinum should be readily available.

While not claimed as evidence under 8 C.F.R. § 204.5(h)(3)(x), we note the submission of letters attesting to ticket sales. Congressman Contreras affirms that the petitioner has been "the star of countless sold-out performances." Ministers attest to the "huge revenues" generated by the petitioner's concerts. provides a list of concert dates and "spectators." Only two of the concert dates precede the date of filing. These two concerts purportedly had 5,000 and 6,000 spectators. The petitioner did not provide the box office receipts as tabulated by the venue. Moreover, the record does not establish whether the petitioner's band was the headlining band at these two events.

In light of the above, the petitioner has not submitted the qualifying evidence required under 8 C.F.R. § 204.5(h)(3)(x).

Summary

In light of the above, the petitioner has not submitted the requisite evidence under at least three of the evidentiary categories for which evidence must be submitted to meet the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. Nevertheless, we will review the evidence in the aggregate as part of our final merits determination.

B. 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

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[9] *See* http://www.riaa.com/goldandplatinum.php?content_selector=certification, accessed August 5, 2010 and incorporated into the record of proceedings. While the numbers may vary in Guatemala, in the United States, Gold albums must sell 500,000 copies and Platinum albums must sell 1,000,000 copies. *See* http://www.riaa.com/goldandplatinum.php?content_selector=criteria, also accessed August 5, 2010 and incorporated into the record of proceedings. This information comes from the publicly available website of the Recording Industry Association of America, which certifies Gold and Platinum albums in the United States.

national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). *See Kazarian,* 596 F.3d at 1119-20.

The petitioner has failed to provide the necessary evidence to support a claim of eligibility under section 203(b)(1)(A) of the Act. Specifically, the petitioner has never submitted the required complete certified translations of the published material. Without those translations, it is impossible to determine whether the published material complies with the requirements set forth at 8 C.F.R. § 204.5(h)(3)(iii). The petitioner has also made completely unsubstantiated claims regarding the circulation of the media and his record sales. Moreover, the petitioner's tax returns strongly suggest that his main income is not from his work as a musician. The remaining evidence, the petitioner's onstage performances and voting on the Grammy ballot, are not indicative of or consistent with national or international acclaim. It is inherent to the field of performing arts to perform. Not every performance, even if a "display" of the petitioner's work, sets the performer apart from every other performing musician able to make a living in the field. Moreover, the record does not establish the number of NARAS members who receive Grammy ballots every year. For the reasons discussed above, NARAS voting membership is open to those working in the field and is not limited to those with outstanding achievements. If nearly every professional musician is eligible to join and receive a ballot, than the receipt of the ballot does not set the musician apart from the rest of the field.

In light of the above, the evidence in the aggregate is not consistent with the statutory standard in this matter, sustained national or international acclaim.

III. Conclusion

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

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

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.