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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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FILE: [Redacted] Office: TEXAS SERVICE CENTER

Date: NOV 15 2010

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

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on January 12, 2009, 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 as an artist, musician, and entertainer. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate "sustained national or international acclaim" and present "extensive documentation" of his or her 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, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific 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, the petitioner claims that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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 the petitioner demonstrate his or her 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.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.*

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.

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 *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); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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).

II. Translations

While not addressed by the director in his decision, the record of proceeding reflects that the petitioner submitted numerous non-certified English language translations, partial translations, and foreign language documents without any English language translations. The regulation at 8 C.F.R. § 103.2(b) provides in pertinent part:

(3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The regulation at 8 C.F.R. § 103.2(b)(3) specifically requires a "full English language translation." However, the petitioner submitted partial translations for the majority of his foreign language documents. Moreover, the record of proceeding reflects that the petitioner submitted several documents without any English language translations, let alone fully certified translations. Because the petitioner failed to comply with the regulation at 8 C.F.R. § 103.2(b)(3), the AAO cannot determine whether the evidence supports the petitioner's claims. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

III. Analysis

A. Evidentiary Criteria

This petition, filed on July 27, 2007, seeks to classify the petitioner as an alien with extraordinary ability as an artist, musician, and entertainer. 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.

At the time of the filing of the petition, the petitioner claimed eligibility for this criterion based on his participation as a trombone player at the 2007 Latin Billboard Music Awards. In support of the petitioner's claim, he submitted a copy of his badge from the event along with several photographs with captions claiming that they reflected winners from the event. The director found that the documentary evidence submitted by the petitioner failed to establish eligibility for this criterion.

On appeal, the petitioner states:

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

Even though, I recognized that individually I haven't received a major award, the service shouldn't disqualify my participation on the Billboard awards – 2007 version. This proves my very high standard as a musician.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized *prizes* or *awards* for excellence in the field of endeavor [emphasis added]." Although the petitioner concedes to not receiving any major awards, the plain language of the regulation requires the petitioner to demonstrate his receipt of prizes or awards. Merely submitting documentation reflecting his participation at an awards event without evidence demonstrating his receipt of any prizes or awards is insufficient to meet the plain language of the regulation.

Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires the petitioner to demonstrate his receipt of more than one award or prize. Therefore, even if we were to find that his participation at the 2007 Latin Billboard Music Awards qualified under this criterion, which we do not, the petitioner would have established eligibility for only one award. As such, the petitioner failed to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

Accordingly, the petitioner failed to establish 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.

At the time of the filing of the petition, the petitioner claimed eligibility for this criterion based on his membership with The Recording Academy (TRA) and the Columbian Association of Recording Artists and Composers (CARAC). The petitioner submitted a letter dated January 12, 2007, from [REDACTED] of TRA, congratulating the petitioner on becoming a member. In addition, the petitioner submitted a copy of his TRA membership card. In response to the director's request for evidence, the petitioner submitted another letter from Mr. Crilly who stated:

In order to be accepted as a voting member, applicants must have met membership criteria including a demonstration of their creative and/or technical involvement in a minimum number of nationally-released musical recordings.

The director found that the petitioner failed to establish that any of these associations require outstanding achievements of their members. On appeal, the petitioner argues:

The Service erred disqualifying my membership to "The Recording Academy," unknowing the worldwide importance of this institution. In my field of expertise (music) the GRAMMY and LATIN-GRAMMY awards are the most internationally recognized awards, only comparable with the OSCARS,

PULITZERS and NOBEL prizes for great achievements in other fields of expertise.

* * *

The wording of this element of the Criteria asks for the applicant's membership, and because the Academy is the most relevant institution in my field of expertise and because only the best musicians can be members of the association; the Service should recognize that I qualitatively satisfy with the requirement.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires "[d]ocumentation of the alien's membership in associations in the field for which is 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.

While the petitioner argues about the "worldwide importance" of the Grammy Awards, the issue for this criterion is the membership requirements for TRA. In other words, the petitioner must demonstrate that membership with TRA requires outstanding achievements of its members, as judged by national or international experts in the field. In this case, while [REDACTED] indicated that "applicants must have met membership criteria," he failed to specifically identify the criteria and only stated that applicants must demonstrate "their creative and/or technical involvement." We are not persuaded that demonstrating creative and/or technical involvement in a minimum number of nationally-released musical recordings is tantamount to outstanding achievements. Furthermore, the petitioner failed to establish that membership is judged by recognized national or international experts.

Moreover, as indicated by the director, the petitioner failed to submit any documentary evidence establishing his membership with CARAC. 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)). In addition, the petitioner failed to submit any documentary evidence regarding the membership requirements of CARAC, so as to establish that membership requires outstanding achievements of its members, as judged by recognized national or international experts.

Finally, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires the petitioner to demonstrate membership in more than one association. Even if we were to find that the petitioner's membership with TRA was a qualifying membership, which we do not, the petitioner would have established membership with only one qualifying association. As such, the petitioner failed to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

Accordingly, the petitioner failed to establish that he meets this criterion.

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

At the time of the filing of the petition, the petitioner claimed eligibility for this criterion by submitting the following documentation:

1. An article entitled, "Fruko Puts Passion into Every Measure of Colombian Salsa," July 22, 2006, [REDACTED] *Chicago Sun-Times*;
2. An uncertified and partial translation an article entitled, "Kenny Quintero and His Band Take the Genre Everywhere," February 3, 2007, unidentified author, *El Sentinel*;
3. An uncertified and partial translation of an article entitled, "Grupo Sarao Continues with Strength," unidentified date, unidentified author, unidentified source;
4. An uncertified and partial translation of an advertisement entitled, "Claudia Diez & Tono 40," unidentified date, unidentified author, unidentified source;
5. An uncertified and partial translation of an article entitled, "The Stars of Calle 8," unidentified date, unidentified author, www.univision.com; and
6. An uncertified and partial translation of an article entitled, "Kenny Quintero in the Miami Carnival," unidentified date, unidentified author, www.univision.com.

The director found that the documentary evidence barely mentioned the petitioner in the articles and failed to establish eligibility for this criterion. On appeal, the petitioner argues:

I disagree with the Service because I attached in my application sufficient proofs of my participation on those musical groups/orchestras and as a musician I can only expect publications of about the groups I was part of and not of me individually.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished 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." In other words, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about" the petitioner relating to his work. As such, articles that mention a group in which the petitioner performs is insufficient to meet the plain language of the regulation.

We agree with the findings of the director for this criterion. Regarding item 1, the petitioner is never mentioned in the article. In fact, there is no evidence that the petitioner even performed at the Colombian Independence Day Festival. Regarding item 2, the petitioner is mentioned one time as being credited as one of the arrangers. As the petitioner only submitted a partial translation, the article appears to be about Grupo Sarao and its song, "Eres Tu." Regarding item 3, the newspaper advertisement never mentions the petitioner, and we are not persuaded that a newspaper advertisement equates to the plain language of the regulation of "published material." Regarding items 4 – 6, the partial translations never mention the petitioner. In fact, regarding items 5 and 6, the partial translations only consist of one sentence for each article. In summary, only one of the six articles mentions the petitioner's name. As such, we cannot conclude that such scant evidence equates to published material about the petitioner relating to his work.

We note that the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) also requires that "[s]uch evidence shall include the title, date, and author of the material, and any necessary translation." The petitioner failed to include the date and/or author of the material and certified and full translations for items 2 – 6.

Moreover, the plain language of the regulation requires the material to be published "in professional or major trade publications or other major media." In general, to qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the New York Times, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.³ The petitioner failed to submit any documentary evidence demonstrating that the material was published in professional or major trade publications or other major media. We note that regarding items 3 and 4, the petitioner failed to demonstrate where the material was published. We further note regarding items 5 and 6 that the articles were posted on www.univision.com. In today's world, many newspapers and news entities, regardless of size and distribution, post at least some of their stories on the Internet. To ignore this reality would be to render the "major media" requirement meaningless. However, we are not persuaded that international accessibility by itself is a realistic indicator of whether a given website is "major media." The petitioner has not demonstrated that www.univision.com is considered as major media.

Accordingly, the petitioner failed to establish that he meets this criterion.

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

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.

At the time of the filing of the petition, the petitioner claimed eligibility for this criterion based on the previously mentioned membership card from TRA. The director found that the petitioner failed to establish eligibility for this criterion. On appeal, the petitioner argues:

The Service erred on this element again because [it] doesn't recognize my participation as a voting judge for the world famous GRAMMY Awards. The Service underrates the importance and honor of been a voting member of the Recording Academy . . . even though the regulation establishes only to prove my participation as a Judge: As the Service may notice; only the very best artists/entertainers qualify to be a voting member of the GRAMMY and LATIN GRAMMY AWARDS.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires "[e]vidence 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 this case, the petitioner only submitted a membership card from TRA reflecting that the petitioner is a "Voting Member." The petitioner failed to establish that he has ever voted for anything, let alone "as a judge of the work of others." Furthermore, we note that the documentation reflects that the petitioner has only been a voting member since January 2007, a period of six months prior to the filing of the petition. Merely submitting documentation reflecting that the petitioner has the ability to vote is insufficient to establish eligibility for this criterion without documentation reflecting that the petitioner has actually judged the work of others.

Moreover, we are not persuaded that submitting documentation reflecting voter membership also demonstrates that the petitioner also judges the *work* of others. The petitioner failed to establish the duties and responsibilities of a voting member so as to establish that he judges the work of others. For example, an individual who votes on the administrative functions of the association, such as voting on the day the awards ceremony will take place, cannot be considered to have judged the work of others. However, if the individual votes on musical performers, such as judging the best group of the year, then the petitioner would satisfy the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). In this case, the petitioner failed to establish that he has participated as a judge of the work of others consistent with the plain language of the regulation.

Accordingly, the petitioner failed to establish that he meets this criterion.

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

At the time of the original filing of the petition, the petitioner claimed eligibility for this criterion by stating:

Singers and musicians contribution in the field has to be judged by the number of songs being recorded, published and singed solo or as part of group and the musical hits those have become in which the artist has a leading participation. . . . I enclose relevant documentation of my participation on records of different bands including my participation in Orequesta brava, Grupo Sarao, Nueva Energia, fruko y sus Tesos, etc. on all of them I have a leading participation as arranger, musician and/or musical director.

In support of the petition, the petitioner submitted a list reflecting that the petitioner participated as a trombone player, arranger, and/or studio director for ten artists along with copies of CD covers. We note that the petitioner failed to submit full and certified translations of the CD covers. In the director's decision, he found that the petitioner's participation on songs and albums failed to reflect original contributions of major significance to the field.

On appeal, the petitioner argues:

I don't understand how the Service can say that "Musical Director" is a small participation in a recording. As proved in my application I participated in a very important role such as the described in all the recordings attached; I can say that my contribution for the success has been very important without unknowing the work developed by others; thus, the Service should recognize that I qualitatively satisfy this element.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." In compliance with *Kazarian*, the AAO must focus on the plain language of the regulatory criteria. 596 F.3d at 1121. Here, the evidence must be reviewed to see whether it rises to the level of original artistic-related "contributions of major significance in the field."

In this case, the documentary evidence submitted by the petitioner fails to establish that he has made original contributions of major significance to the field. While the CD covers reflect that the petitioner performed on the CD or participated in the arranging of the songs, the petitioner failed to demonstrate that his performances or participation were of *major significance* to the field. This regulatory criterion not only requires the petitioner to make original contributions, but also requires those contributions to be of major significance. Merely submitting documentation reflecting the petitioner's participation as a musician or producer on several CDs is insufficient to establish eligibility for this criterion without evidence reflecting that the petitioner's work has influenced or impacted the field of music to a degree that is consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(v). The lack of supporting

documentary evidence gives the AAO no basis to gauge the significance of the petitioner's contributions.

Without additional, specific evidence showing that the petitioner's work has been unusually influential or has otherwise risen to the level of contributions of major significance, we cannot conclude that he meets this criterion.

Accordingly, the petitioner failed to establish that he meets this criterion.

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

At the time of the original filing of the petition, the petitioner claimed eligibility for this criterion by stating:

Will find flyers, posters, ads and newspapers articles announcing some of my concerts as part of different orchestras including resent [*sic*] presentations I had with the "Orchestra Brava," Claudia Diez y Tono 40 and Fruko y sus Tesos. I also included some photos of myself during some presentations including the participation in the world famous Calle * Festival in Miami Fl.

While the petitioner submitted flyers and posters for various venues, including non-certified translations as well as photographs, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at artistic exhibitions or showcases." This criterion relates to the visual arts. It is inherent to the field of music and entertaining to perform on stage or in public. Therefore, not every stage performance is an artistic exhibition or showcase.

For this reason, the regulations establish separate criteria, especially for those whose work is in the performing arts. We find that the petitioner's performances and concerts are far more relevant to the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x) and will be discussed under that criterion.

Accordingly, the petitioner failed to establish 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.

The petitioner claimed eligibility for this criterion based on his "participation on a very important musical organization called 'Julymar productions' on which I have a leading role; I am the Musical Director of the producer and the leading musician." The director determined that the documentary evidence, a letter from [REDACTED] submitted by the petitioner failed to establish that he performed in a leading or critical role. On appeal, the

petitioner failed to contest the decision of the director or offer additional arguments. Therefore, we will not further discuss this criterion on appeal.

Accordingly, the petitioner failed to establish 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.

At the time of the filing of the petition, the petitioner submitted uncertified translations of royalty payments from several entities such as Codiscos, Disco Tienda Latina, and Col Music for his participation on CDs. The director found that the documentary evidence submitted by the petitioner failed to establish eligibility for this criterion.

On appeal, the petitioner argues:

The Service doesn't recognize as significant the payments for royalties I received by different record companies including "Codiscos" the biggest and more important record Company in Colombia because of my participation in different productions; the Service just called them "small royalty payments." Musician's remuneration is always shown in royalties, and the amount depends exclusively in the record sales. With those evidences I shown sufficiently that I comply with the qualitatively requirements of the element, thus the Service should recognize them.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires "[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, *in relation to others in the field* [emphasis added]." While the documentary evidence submitted by the petitioner reflects that he has received royalty payments, the petitioner failed to submit any documentary evidence comparing his royalty payments to others in the field so as to establish that the petitioner has commanded "other significantly high remuneration for services." Merely submitting documentation that reflects a salary or remuneration for services without evidence establishing that the petitioner has commanded significantly high remuneration for services compared to others in the field is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix). The petitioner failed to establish that his remuneration in the form of royalty payments was significantly high in relation to others in the field.

Accordingly, the petitioner failed to establish 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.

At the time of the original filing of the petition, the petitioner claimed eligibility for this criterion based on "some billboard or box office and radio spins, which are fully understandable where the song 'Eres Tu' of the 'Group Sarao' remained on the top of the US charts from December 2001 to

November 2002." In support of this criterion, the petitioner submitted chart statistics from [REDACTED] regarding [REDACTED]." Specifically, the documentation reflected the following:

1. Number 6 – Top 50 Salsa – December 1, 2001;
2. Number 3 – Top 50 Salsa – January 21, 2002;
3. Number 11 – Top 40 Salsa – January 21, 2002;
4. Number 21 – Top 40 Radio and Musica – September 29, 2002; and
5. Number 34 – Top 50 Salsa – November 18, 2002.

The director found that the petitioner failed to establish that he was "a leading or defining player in the production and release of the record" or that [REDACTED] was a commercial success. On appeal, the petitioner claimed:

The Service recognized the success of [REDACTED] which remained on the top of the US charts from December 2001 to November 2002. . . . In my application I enclosed evidences of my participation in the record: I was the arranger, the musical director and the trombonist. I am attaching printout of the web page called: www.artistdirect.com, proving the importance of my participation.

We acknowledge that the documentation submitted by the petitioner on appeal reflects that the petitioner is credited as the trombone player, arranger, and musical director with [REDACTED]. However, while "Eres Tu" reached as high as number three on the top 50 salsa charts, we are not persuaded that such evidence demonstrates commercial successes consistent within the meaning of the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) which requires "[e]vidence of commercial successes in the performing arts, as shown by *box office receipts* or record, cassette, compact disk, or video *sales* (emphasis added)."

This regulatory criterion requires evidence of commercial successes in the form of "box office receipts" or "sales." However, the petitioner's submission of top 40 and 50 radio spins of a single song does not equate to evidence of "box office receipts" or "sales." There is no evidence showing his box office receipts for performances or the sales of his songs or compact disks.

Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires the petitioner to demonstrate more than one commercial success. Even if we were to find that "Eres Tu" was a commercial success, which we do not, the petitioner would have established only one commercial success. As such, the petitioner failed to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x).

Accordingly, the petitioner failed to establish that he meets this criterion.

B. Comparable Evidence

At the time of the original filing of the petition, the petitioner submitted recommendation letters and claimed eligibility pursuant to comparable evidence under the regulation at 8 C.F.R. § 204.5(h)(4). The director found:

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the criteria specified by the regulation.

We agree with the findings of the director. The regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the following regulation categories. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. We further acknowledge that the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish the [petitioner's] eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation as a musician or entertainer cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner submitted documentary evidence claiming eligibility for nine of the ten criteria at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Moreover, the petitioner provided no documentation demonstrating that the regulatory criteria would not be appropriate to the profession of a musician or entertainer.

While the petitioner submitted numerous uncertified translations of letters of recommendation at the time of the original filing of the petition, as well as additional letters of recommendation in response to the director's request for additional evidence, the letters generally referred to the petitioner's participation in various groups, orchestras, and cultural organizations and praised the petitioner for his talents as a trombone player. However, where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

C. 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*, 596 F.3d at 1115. The petitioner failed to establish eligibility for any of the criteria, of which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many of the 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).

In evaluating our final merits determination, we must look at the totality of the evidence to conclude the petitioner's eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner has demonstrated that he has participated in various musical groups in the roles as a trombone player, arranger, and musical director. The petitioner's biggest accomplishment as a musician was as the trombone player and arranger for [REDACTED] who achieved the number three song, "Eres Tu," in the top 50 salsa category. However, the accomplishments of the petitioner fall far short of establishing that he "is one of that small percentage who have risen to the very top of the field of endeavor" and that he "has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." See 8 C.F.R. § 204.5(h)(2), 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 regulation at 8 C.F.R. § 204.5(h)(3) provides that "[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." The petitioner's evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). Again, while we did not find that the song, "Eres Tu," was a commercial success pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x), we note that the song was on the charts from December 2001 to November 2002. The petitioner failed to submit any documentary evidence reflecting any other songs that were included on the charts since 2002, a period of approximately five years before the filing of the petition. We are not persuaded that a single song on the top 50 salsa charts occurring five years before the filing of the petition is sufficient to establish the level of sustained national or international acclaim required for this highly restrictive classification.

Similarly, while the petitioner failed to establish eligibility under the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the petitioner's documentary evidence reflects that the petitioner became a voting member of TRA in January 2007, approximately six months prior to the filing of the petition. Moreover, as stated previously in our decision, the petitioner claimed eligibility for the published material criterion pursuant to the regulation at 8

C.F.R. § 204.5(h)(3)(iii) based on articles that were not about him. In fact, only one article mentioned his name one time. We find that for a musician and entertainer, like the petitioner, that the lack of published material about him relating to his work demonstrates that he has not achieved sustained national or international acclaim.

We cannot ignore that the statute requires the petitioner to submit "extensive documentation" of the petitioner's sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act 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). In this case, the record of proceeding reflects uncertified translations, partial translations, and foreign language documents without any English translations. Furthermore, the petitioner claimed eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) based on his participation in a performance at the 2007 Latin Billboard Music Awards without offering any evidence of nationally or internationally recognized awards. Even if we considered this as evidence of an award, which we did not, the petitioner only claimed eligibility based on one award, of which the plain language of the regulation requires more than one. Likewise, even though the petitioner failed to establish eligibility under the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the petitioner only claimed eligibility with one association, of which the plain language of the regulation requires membership in more than one association. In addition, the petitioner failed to comply with the basic regulatory requirements such as providing the title, date, and author of the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, while the petitioner submitted documentary evidence reflecting that he is a voting member of TRA, he failed to demonstrate that he has ever voted. Further, the petitioner claimed eligibility for the salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(ix) without offering any comparison of salaries or significantly high remuneration for services. Also, the petitioner claimed eligibility for the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(x) without offering any evidence of box office receipts or sales. Even if we found that the petitioner established commercial success with "Eres Tu," which he did not, the petitioner only claimed eligibility for one commercial success, of which the plain language of the regulation requires more than one commercial success. We note that while the petitioner did not contest the decision of the director on appeal regarding the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the petitioner claimed eligibility based on his role with [REDACTED], of which the plain language of the regulation requires more than one leading or critical role. An individual with sustained national or international acclaim should be able to submit extensive evidence of his accomplishments; the documentation submitted in support of this petition does not equate to "extensive documentation."

Moreover, the petitioner claimed eligibility for the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v) based on his participation with various groups and bands. However, the petitioner failed to submit any documentation demonstrating original contributions that have significantly impacted the music field as a whole and not limited to the few groups in

which he has worked and participated. As the petitioner is a musician, the petitioner is expected to perform with other artists and create and market songs and albums. However, the petitioner failed to submit documentary evidence that distinguishes him from other trombone players or arrangers. The petitioner failed to demonstrate that he contributed to the performances or musical projects beyond the routine duties of a musician or producer.

Finally, while the petitioner failed to establish eligibility for comparable evidence pursuant to the regulation at 8 C.F.R. 204.5(h)(4), the petitioner submitted self-serving letters of recommendation that generally praise the petitioner as a musician and mention the petitioner's performances. Such letters cannot form the cornerstone of a successful extraordinary ability claim. Further, USCIS may, in its discretion, use as advisory opinion 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 of support from the petitioner's personal contacts 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.

The petitioner failed to submit evidence demonstrating that he "is one of that small percentage who have risen to the very top of the field." In addition, the petitioner has not demonstrated his "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).

The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. 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.

IV. O-1 Nonimmigrant Admission

On appeal, the petitioner argues:

The decision is contradictory to Services' past decisions. As established in my application, I was holding on O1 non-immigrant visa at the moment. The legal requirements are similar, if not equal. 8 CFR 214.2(o)(i) vs. 8 CFR 204.5(h)(3) the criteria is similar and the legislator intention was clear in both regulatory requirements. The legislator was establishing a unified Criteria in order to prove the "Extraordinary Ability" as defined in both sections as: On 8 CFR 214.2(o)(i)(3)(ii): "*Extraordinary ability in the field of arts means distinction. 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*". And on 8 CFR 204.5(h)(2): "*Extraordinary ability*

means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." Even though, the wording is slightly different the meaning is exactly the same; thus, if the Service recognized my "Extraordinary Ability" in past cases [it] should recognize it in this Matter also.

The record of proceeding reflects that the petitioner was last admitted to the United States as an O-1 nonimmigrant in the arts on November 23, 2006. Although the words "extraordinary ability" are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states that "[t]he term 'extraordinary ability' means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction." The O-1 regulation reiterates that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(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 be decided on a case-by-case basis upon review of 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 an 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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

V. 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 and 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 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.