

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B2

DATE: JUL 29 2011 OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on January 27, 2010, 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. 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, counsel claims that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. Request for Evidence

On appeal, counsel argues that the director “deprived [the petitioner] of his procedural right to submit additional evidence in support of his Form I-140 petition” by failing to request any evidence regarding the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv) and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) when the director requested additional evidence regarding the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix), and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x). The regulation at 8 C.F.R. § 103.2(b)(8) provides in pertinent part:

(ii) Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) Other evidence. If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant

or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

The regulation at 8 C.F.R. § 103.2(b)(8) does not require the director to request additional documentation every time that the petitioner fails to establish eligibility for an immigration benefit. Instead, the director has the discretion to deny, request additional information or evidence, or notify the petitioner of its intention to deny. In this case, as the petitioner is seeking classification as an alien of extraordinary ability, the petitioner is required to meet at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). In the director's determination, as will be discussed below in the AAO's evaluation of the evidentiary criteria, he found that the petitioner established eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), and that the petitioner failed to meet the judging criterion and the leading or critical role criterion, as well as the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v) and the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii). However, the director, in his discretion, specifically requested additional documentary evidence or information regarding the membership criterion, the published material criterion, the high salary criterion, and the commercial successes criterion. The director is not required to notify the petitioner of every deficient element of the requested immigration benefit, especially when in the director's determination that any additional evidence or information would not overcome the deficiencies. For example, athletes generally do not author scholarly articles and thus would not be eligible for the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi). As such, there would be no meaningful purpose for the director to issue a request for additional evidence to afford the athlete another opportunity to submit additional evidence or documentation when the record already demonstrates that that he or she does not meet the regulatory requirement.

Again, the regulation at 8 C.F.R. § 204.5(h)(3) only requires the petitioner to meet three out of the ten criteria rather than meeting all ten criteria. As in the case here, at the initial filing of the petition, the director determined that the petitioner met the awards criterion but there was insufficient documentation or information that established the petitioner's eligibility for the membership criterion, the published material criterion, the high salary criterion, or the commercial successes criterion. The fact that the director does not address every issue in the request for additional evidence, as well as in a notice of intent to deny, does not necessarily mean that the petitioner meets or does not meet those other issues. In this case, the director exercised his discretionary authority and only issued a request for additional evidence or information on the specific criteria in which the petitioner submitted documentary evidence that related but did not fully establish eligibility. For these reasons, the AAO is not persuaded by counsel's argument that the director erred in his decision regarding this matter.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence for all of the criteria, it is not clear what remedy would be appropriate beyond the

appeal process itself. The petitioner had the opportunity to submit any evidence in response to the request for additional evidence even without the director's specific request. On appeal, the petitioner has, in fact, supplemented the record and made further arguments regarding his eligibility. Therefore, it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence. Regardless, the AAO will review the record in its entirety based on the petitioner's appellate arguments regarding his eligibility. *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).

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.

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

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).

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).

III. Analysis

A. Evidentiary Criteria

This petition, filed on December 9, 2009, seeks to classify the petitioner as an alien with extraordinary ability as a music director and conductor. 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.

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

The director found that the petitioner established eligibility for this criterion based on the petitioner's receipt of a single award, "The Honored Artist of Russia" from the President of the Russian Federation. 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 [plural emphasized]." While the AAO agrees with the director that "The Honored Artist of Russia" is a lesser nationally recognized award for excellence in the field of endeavor, the petitioner's receipt of this single award is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). As such, the AAO must withdraw the findings of the director for this criterion.

Section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires more than one prize or award. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the AAO 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

A review of the record of proceeding reflects that the petitioner also submitted a letter from [redacted] of [redacted] who stated:

In June, 2008 [the petitioner] participated in International Masterclass of Conductors in Moscow under my direction. . . . By results of competition [the petitioner] has been named by the winner of Masterclass.

In addition, the petitioner submitted a letter from [redacted] of the [redacted] who stated:

[The petitioner] has very successfully taken part in the [redacted] for [redacted] with [redacted] and the [redacted], 09 – 14 June, 2008, Moscow, Russia. As the being the best conductor of the Masterclass, he has the honour to be invited as a guest conductor with the [redacted] [redacted] in the concert season 2009/2010.

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).

Notwithstanding that [redacted] referred to the award as the [redacted] of [redacted] in [redacted] and [redacted] referred to the award as the [redacted] for [redacted],” assuming that they are the same award, the petitioner failed to demonstrate that it is nationally or internationally recognized for excellence in the field of endeavor. While the petitioner submitted a screenshot entitled, “[redacted] for [redacted],” from www.philharmonie.com, the screenshot is about [redacted] and provides no information regarding the award or class, so as to establish that it is nationally or internationally recognized for excellence in the field of endeavor.

More importantly, the petitioner failed to submit primary evidence of his receipt of the award. The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. In this case, while the petitioner submitted letters, the petitioner failed to submit any documentary evidence demonstrating that primary evidence and secondary evidence do not exist or cannot be obtained. Regardless, the letters that have been provided are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. *See also INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980) (finding that unsworn statements made in support of a motion are not affidavits and thus are not entitled to any evidentiary weight).

The record of proceeding further reflects that the petitioner submitted a diploma entitled, “[redacted]” reflecting that the petitioner was “awarded for participation in final round of the competition.” The petitioner also submitted a letter from [redacted] who stated:

While still a mere student, [the petitioner] received his first internationally recognized award for excellence in conducting, when he was one of six finalists out of the 150 competitors participating in the [redacted] of [redacted] named after [redacted].

The AAO is not persuaded that a diploma that reflects the petitioner's participation in the final round in a competition is equivalent to a prize or award. Rather, the diploma acknowledges the petitioner's participation but does not indicate that the petitioner received a prize or award. In addition, as the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires that the prize or award be for “excellence,” the AAO is not persuaded that being a finalist equates to “excellence in the field of endeavor.” Moreover, while [redacted] stated that it was an “internationally recognized award,” he failed to provide any explanation as to why he considers

it to be internationally recognized, especially when the petitioner competed in the first ever competition. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.⁴ The petitioner failed to submit any other documentary evidence demonstrating that the diploma is a nationally or internationally recognized prize or award for excellence in the field. The lack of specific details gives the AAO no basis to gauge the recognition of the purported award.

Again, 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." The burden is on the petitioner to establish every element of this criterion. As the petitioner only demonstrated that he won a single nationally recognized award for excellence, he failed to meet the plain language of this regulatory criterion requiring more than one prize or award. Therefore, the AAO withdraws the findings of the director for this criterion.

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.

In the director's decision, he found that the petitioner's membership with the [REDACTED] of [REDACTED] failed to demonstrate the petitioner's eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence demonstrating that he has been a member of [REDACTED] since 2000. In addition, the petitioner submitted several screenshots from <http://www.stdrf.ru> regarding the [REDACTED], as well as short biographies for members under the Secretariat and Central Auditing Commission. Furthermore, the petitioner submitted screenshots from <http://stdrf.ru> regarding [REDACTED] charter reflecting that members of [REDACTED] can be Russian citizens who have reached 18 years of age and are creative professionals in the field of theatrical art and meet the following requirements:

1. Recognize the Charter of the [REDACTED]
2. Interested in the joint achievement of the goals and objectives of the [REDACTED]
3. Have at least three years of experience in the field of performing arts – with the possession of a specialized theatrical education;

⁴ *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

4. Have at least five years of experience in the field of performing arts – in case of the absence of a specialized theatrical education;
5. Representatives of theater professions, who with their creative efforts have made a significant contribution to the development of theater art and have been widely recognized by theatrical community; and
6. If foreign nationals – figures of theater and of creative professions, that provides an eligibility for membership in the [REDACTED], who have made a significant contribution to the development of theater art in Russia, who recognize the Charter of the [REDACTED] and those who actively promote the realization of its goals and objectives.

Moreover, in order to become a member of [REDACTED], an applicant must present the following:

- A. Personal application of a sample established by the Union;
- B. Recommendations by two members of the Union with the experience of membership in the Union of not less than five years;
- C. Recommendations by professional creative section, which reviews the application of the entrant and gives him a recommendation only with the presence of references of two Union members;
- D. Copies of documents verifying educational credentials;
- E. Copies of documents confirming the professional experience; and
- F. Two passport size photographs.

Finally, the screenshots reflect:

Acceptance as a member of the Union is carried out by a decision of the Board of the Sectors of the Union, carrying out their activities on the territory of the given regions. Questions of admission to the Union in Moscow and Moscow region are considered by the Central Commission of the Union for the acceptance and exclusion of members of the Union (hereinafter – the Central Commission).

Decisions of the Board of the Sectors of the Union and recommendations of the Central Commission for the membership acceptance to the Union shall come into effect after approval by the Secretariat of the Union, which examines the admission to the Union, not less than twice a year, and in the year of the Congress – no less than once a year.

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.

On appeal, counsel argues:

[T]he Charter (or “by-laws”) itself make it clear that it requires outstanding achievement of their members, its members must be “representatives of theater professions, who with their creative efforts have made a significant contribution to the developments of theater arts and have been widely recognized by theatrical community” and possesses “specialized theatrical education.” While similar to “charter” and “by-laws,” “outstanding” and “significant” are not the exact same word, but convey the same concept. Merriam-Webster Online Dictionary defines “outstanding” as “standing out,” “standing out from a group,” and “marked by eminence and distinction.” Similarly, Merriam Webster Online Dictionary defines “significant” as “having or likely to have influence or effect.” An achievement or contribution that stands out does or is likely to have influence or effect on others, and vice versa. As such, the [REDACTED] does require outstanding achievements of its members, and for USCIS to expect all foreign associations to select its preferred terminology in creating their rules and regulations membership is overly restrictive. Thus, [the petitioner] has established he is a member of an organization that requires outstanding achievements of its members.

The AAO is not persuaded by counsel’s argument that a “significant contribution,” as required by [REDACTED] charter, is similar to “outstanding achievements,” as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii). Even the screenshots from Merriam Webster Online Dictionary submitted by and referred by counsel make a distinction between “significant” and “outstanding.” Clearly, “significant” (having or likely to have influence of effect) is a lower standard than the much higher standard of “outstanding” (standing out, standing out from a group, or, marked by eminence and distinction).” In other words, an individual who demonstrates a (significant) contribution that has or is likely to have influence does not equate to an individual who demonstrates an (outstanding) achievement that stands out or is prominent from others. Furthermore, the other requirements of membership with [REDACTED], such as education and experience, are not reflective of outstanding achievements even when considered in the aggregate. The AAO notes that while the petitioner failed to establish that membership with [REDACTED] requires outstanding achievements, the petitioner submitted sufficient documentary

evidence reflecting that membership is judged by recognized national experts in their disciplines or fields.

Even if the petitioner demonstrated that his membership with [REDACTED] meets the elements of this criterion, which he has not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires membership in more than one association. In this case, the petitioner claimed and submitted documentary evidence relating to membership in only one association.

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.

The director found that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted the following documentation:

1. An article entitled, "Its All In Your Hands, [REDACTED]" March 6 – 12, 2009, [REDACTED]
2. An article entitled, "No Good Can Be Created Without Love," 2008, unidentified author, *Operettaland*;
3. An article entitled, "We Are Waiting for a Fool," 2006, [REDACTED];
4. An article entitled, "The New Fair Lady," June 30, 2005, [REDACTED]
5. An article entitled, "'My Fair Lady' Has Been Staged in the Moscow Operetta," May 3, 2005, [REDACTED] and
6. An article entitled, "Again There, Where is a Sea of Light," 2008, [REDACTED].

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 general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. 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.⁵

Regarding item 1, a review of the article reflects that it is published material about the petitioner relating to his work. However, the petitioner failed to establish that [REDACTED] is a professional or major trade publication or other major media. While the petitioner submitted a screenshot from [REDACTED] website, the petitioner failed to submit any independent, objective evidence beyond [REDACTED]. See *Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). It is noted that the website claims that there are 2,100,000 Russian speaking people in the New York and tri-state areas, as well as 86,000 Russian speaking people in selected counties in Pennsylvania, 480,000 Russian speaking people in selected cities in California, and 100,000 Russian speaking people in Chicago, Illinois. However, the website fails to indicate how many of those people actually subscribe to [REDACTED] so as to reflect that it is "other major media."

Regarding item 2, the article fails to reflect published material about the petitioner relating to his work. Instead, the article reflects an interview conducted with the petitioner in which he simply responds to the author's questions. As the author does not write about or discuss the petitioner relating to his work, it fails to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Furthermore, the petitioner failed to submit any documentary evidence demonstrating that *Operettaland* is a professional or major trade publication or other major media.

Regarding item 3, a review of the article reflects that it is about the operetta, "The Parisian Life," performed at the Moscow Operetta rather than about the petitioner relating to his work. Articles that are not about the petitioner do not meet this regulatory criterion. See, e.g., *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). Although the article mentions the petitioner one time as being the musical director, the fact remains that the article is not about the petitioner relating to his work. In addition, while the petitioner submitted a screenshot from *Moscovichka*, the petitioner failed to submit any independent, objective evidence establishing that it is a professional or major trade publication or other major media. It is noted that the website claims that *Moscovichka* has a weekly circulation of 110,000. Simply citing a circulation figure with no basis for comparison is not persuasive evidence that the publication is considered "major media."

Regarding item 4, the article is about the show, "My Fair Lady," rather than about the petitioner relating to his work. In fact, the petitioner is mentioned only one time as being the conductor for the show and is not indicative of published material about the petitioner relating to his work. Moreover, the petitioner submitted a screenshot from www.mondotimes.com reflecting that

⁵ 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.

Parlamentskaya Gazeta is one of several Russian national social media publications. In addition, the petitioner submitted screenshots from *Parlamentskaya Gazeta's* website reflecting a circulation of 45,000 copies. Although counsel argues on appeal that www.mondotimes.com "specifically list[s] *Parlamentskaya Gazeta* as major media," a review of the website reflects that "Mondo Times is the worldwide media directory, covering thousands of newspapers, magazines, radio stations, television stations, networks and news agencies around the world."⁶ In fact, the website indicates that a user can search "31,250 media outlets in 212 countries." Further, a visitor to the website may add a media outlet by completing three steps. The fact that a website contains a listing for media outlets around the world is not persuasive evidence that the publication is "major media." Moreover, the website lists 86 other media outlets in Russia, including *Parlamentskaya Gazeta*. The petitioner failed to submit any documentary evidence distinguishing *Parlamentskaya Gazeta* from the other 86 media outlets, so as to establish that it is "major media."

Regarding item 5, similar to item 4, a review of the article reflects that it is about the show, "My Fair Lady," rather than about the petitioner relating to his work. Furthermore, although the petitioner submitted screenshots from *Metro's* websites in the United States and Russia, the petitioner failed to submit any independent, objective evidence demonstrating that *Metro* is a professional or major trade publication or other major media.

Regarding item 6, the article is not about the petitioner relating to his work rather it is about the show, [REDACTED]. In fact, the petitioner is only mentioned one time at the end of the article as being the conductor and musical director of the show. In addition, the petitioner failed to submit any documentary evidence establishing that *Musicalnaya Zhizn* is a professional or major trade publication or other major media.

Again, 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." The burden is on the petitioner to establish that he meets every element of this criterion. In this case, the petitioner submitted one article that was published material about him relating to his work but failed to demonstrate that *Russkaya Reklama*, as well as any of the other publications, are major media. Even if the petitioner established that the article in *Russkaya Reklama* meets every element of this criterion, which he has not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires published material in more than one publication.

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

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

⁶ See <http://www.mondotimes.com/about/index.html>. Accessed on July 12, 2011, and incorporated into the record of proceeding.

In the director's decision, he found that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted a letter from [REDACTED] at the Theatrical Institute named after [REDACTED] who stated that the petitioner "was a member of [the] selection committee and has taken part in selection of applicants to the, Department of Musical Theatre, during the summer 2008." The AAO notes that the letter from [REDACTED] contained no other information.

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 letter fails to establish that the "selection of applicants" equates to evidence of the petitioner's participation as a judge of the work of others. [REDACTED] failed to indicate, for example, who the petitioner evaluated, what was involved in the selection process, or that the petitioner otherwise served in the role as a judge. The lack of specific details gives the AAO no basis to establish that the petitioner participated as a judge of the work of others consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

On appeal, the petitioner submitted a letter from [REDACTED] of the [REDACTED] who stated that "Stage Entertainment *invited* [the petitioner] to be an expert at the auditions for our productions of 'Cats' and 'Mamma Mia' produced in Moscow in 2005 and 2006 [emphasis added]." As the plain language of this regulatory criterion specifically requires "the alien's participation . . . as the judge of the work of others," the mere invitation to serve as an expert at the auditions without evidence of actually judging is insufficient to meet the plain language of the regulation. Moreover, [REDACTED] failed to indicate that being "an expert" involved "judging" the auditions. [REDACTED] failed to specify the petitioner's role as an expert, so as to demonstrate that he participated as a judge. Finally, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires the petitioner to participate "as a judge of the work of others in the same or an allied field of specification for which classification is sought." [REDACTED] failed to indicate that the petitioner's participation as an expert was in the same or an allied field of specification. In other words, [REDACTED] failed to demonstrate whether the petitioner judged musicians, which is in his field, or actors and performers, which is not the same or an allied field of specification. Again, the lack of specific information provides the AAO no basis to conclude that the petitioner meets this criterion.

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.

The director found that the petitioner failed to establish eligibility for this criterion. In counsel's brief on appeal, she did not contest the decision of the director or offer additional arguments. The AAO, therefore, considers this issue to be abandoned and will not further discuss this criterion on appeal. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005).

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.

In the director's decision, he concluded that the petitioner failed to establish eligibility for this criterion. On appeal, counsel argues that "ample evidence that [the petitioner's] work had been displayed in artistic exhibitions or showcases, more than 100 times, in that he works during the performances of musical, operetta and opera productions as well as during orchestra concerts."

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." The petitioner is a conductor and music director. When he is conducting or directing music 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. The petitioner is performing his work, he is not displaying his work. In addition, to the extent that the 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 the AAO was to accept that a performance artist like the petitioner meets this criterion, it would render the regulatory requirement that the petitioner meet at least three criteria meaningless as this criterion would effectively be collapsed into the criterion at the regulation 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. Okin*, 2:07-CV-820-ECR-RJJ at 8-9 (finding that the AAO did not abuse its discretion in finding that a performance artist should not be considered under the display criterion). While the AAO acknowledges that a 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 the regulation at 8 C.F.R. § 204.5(h)(3)(viii) and the "commercial successes in the performing arts" criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(x), they will be discussed separately within the context of those criteria.

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 director found that the petitioner failed to establish eligibility for this criterion. On appeal, counsel argues that the petitioner demonstrated that he performed in a leading or critical role for the [REDACTED]. The plain language of the regulation at 8 C.F.R.

§ 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.” In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment. A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence establishing that he performed in a leading or critical role for the [REDACTED] Academic Theatre of Operetta. However, the burden is on the petitioner to establish that he meets every element of this criterion. In this case, the petitioner failed to demonstrate that the [REDACTED] Academic Theatre of Operetta has a “distinguished reputation” pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

On appeal, the petitioner submitted a screenshot from <http://travel.nytimes.com> that listed the theater as part of Moscow’s nightlife and stated that “it’s well worth a visit – the performances are quite strong.” Moreover, the petitioner submitted a document from [REDACTED] and [REDACTED] of [REDACTED] who stated that conferring the title of “academic” is “for outstanding merits in the field of culture to the concert organizations, theatres, and creative collectives which brought valuable contribution into the development of the cultural life of the society, were a great success, and won a genuine love of the audience for their creative works.” The documentation submitted by the petitioner on appeal is not persuasive evidence that the [REDACTED] Academic Theatre of Operetta has a distinguished reputation. Although the website gave the theater a brief and favorable review, there is no indication from the screenshot that the theater has a distinguished reputation. Moreover, while the theater had “academic” conferred to its title, the petitioner failed to submit any supporting documentary evidence to demonstrate the valuable contribution that the theater brought, so as to demonstrate that it has a distinguished reputation. The petitioner failed to submit, for example, any evidence that differentiates the theater from other theaters or similar venues.

Even if the petitioner established that the [REDACTED] had a distinguished reputation, which he did not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires the petitioner to demonstrate his leading or critical role in more than one organization or establishment. At the initial filing of the petition and on appeal, the petitioner only claimed eligibility for his role at the [REDACTED] Academic Theatre of Operetta.

Notwithstanding the above, the record of proceeding reflects that the petitioner submitted several posters and performances by the [REDACTED] named after [REDACTED] reflecting that the petitioner was the conductor for the selected performances. In addition, the petitioner submitted a letter from [REDACTED] and [REDACTED] who stated:

Starting from 1997 [the petitioner] has been offered a permanent position with the Orchestra of the [REDACTED] Philharmonic. During two seasons, he conducted multiple various in repertoire programs. . . . [The petitioner] conducted programs

for the children audience and had concerts with young performers with great success and constant full house.

While the documentary evidence reflects that he was a conductor for the Orchestra of the Philharmonic, the petitioner failed to submit any other documentary evidence establishing that he performed in a leading or critical role. Furthermore, the petitioner failed to submit any documentary evidence establishing that the of the Philharmonic has a distinguished reputation.

Likewise, the record of proceeding reflects that the petitioner submitted a letter from who stated:

[The petitioner] has been invited into the State Ryazan Regional Musical Theatre to the position of the Chief Conductor in 2007.

* * *

Throughout the time of his work at our theater he demonstrated himself as a great musician, demanding at work professional, responsive and insightful interpreter respectful to the composer's intention, requesting from the performing cast of soloists, choir and the orchestra their full output to the creative process. Singers of the theatre always attended his conducting classes with great pleasure and enthusiasm. [The petitioner] effortlessly predisposes people toward him through his ability to open up the essence of the problem and the ways to its resolution in an informal conversation.

Although praised the petitioner, there is no indication that the petitioner performed in a leading or critical role. failed to establish how the petitioner's skills or personal traits are evidence that the petitioner performed in a leading or critical role. The lack of specific information regarding the role of the petitioner at the State Ryazan Regional Musical Theatre provides no evidence that the petitioner has performed in a leading or critical role. Moreover, the petitioner failed to submit any documentary evidence establishing that the State Ryazan Regional Musical Theatre has a distinguished reputation.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." Here, the petitioner failed to demonstrate that he meets every element of this criterion.

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.

In the director's decision, he found that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted a certificate, dated August 8, 2008, from [REDACTED] for the [REDACTED] Academic Theatre of Operetta stating that the petitioner has been employed as the conductor since January 30, 1999, and "[t]he monthly average wage is 74 812 – 86 (Seventy four thousand eight hundred twelve rubles 86 cop.)."⁷ However, the petitioner failed to submit primary evidence of his salary, such as earning statements or tax documents. Regardless, 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]." In this case, the petitioner submitted certificates reflecting:

1. A salary of Chief Conductor of the [REDACTED] Symphony Orchestra is 12,400 rubles per month;
2. A salary of the Conductor of the Symphony Orchestra of [REDACTED] Philharmonic is 6,800 rubles per month;
3. A salary of the Chief Conductor of the [REDACTED] Theatre named after [REDACTED] is 45,590 rubles per month;
4. A salary of the Chief Conductor of the [REDACTED] Symphony Orchestra of [REDACTED] Philharmonic is 60,514 rubles per month; and
5. A salary of the Chief Conductor of the [REDACTED] Regional Philharmony named after [REDACTED] is 7,505 rubles per month.

In addition, the petitioner submitted job vacancy announcements reflecting:

- A. A salary for Chief Conductor at an unidentified place in Moscow, Russia is 15,000 rubles;
- B. A salary for a Conductor at an unidentified place in [REDACTED] Region, Russia is from 27,000 rubles;
- C. A salary for a Conductor and Music Director for the [REDACTED] Symphony and Chorale is up to \$25,000; and
- D. A salary for a Music Director/Conductor for the [REDACTED] Symphony is up to \$25,000.

⁷ On August 8, 2008, the exchange rate for 74,812.86 Russian rubles equaled 2,653.88 United States dollars. See <http://www.xe.com/ucc/convert/?Amount=74812.86&From=RUB&To=USD>. Accessed on July 12, 2011, and incorporated into the record of proceeding.

The AAO is not persuaded that the petitioner's submission of salaries from a limited and specific selection demonstrate that the petitioner has commanded a high salary when compared to others in his field. While the documentary evidence reflects that the petitioner purportedly earns a higher salary than the submitted few samples, the petitioner failed to demonstrate that he has commanded a high salary when compared to others in his field as a whole rather than a selective list of positions with salaries that are lower than the petitioner's salary. In fact, according to the Bureau of Labor Statistics within the U.S. Department of Labor, the mean income for music directors and composers in the United States is \$45,970, with the top 10% earning \$85,020.⁸ Clearly, the record fails to reflect that the petitioner's purported salary is high in relation to others in his field.

Again, 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." For the reasons discussed, the petitioner failed to submit sufficient documentary evidence establishing the amount of his salary, and that he has commanded a high salary in relation to others in the field consistent with the plain language of this regulatory criterion.

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.

The director found that the petitioner failed to establish eligibility for this criterion. A review of the record of proceeding reflects that the petitioner submitted box office receipts for the following productions at the [REDACTED] Academic Theatre of Operetta in which the petitioner conducted:

1. "Silva" – February 22, 2004 – 12:00 PM – 1609 tickets sold out of 1613;
2. "Silva" – February 22, 2004 – 6:00 PM – 1606 tickets sold out of 1607;
3. "Silva" – March 27, 2004 – 7:00 PM – 1600 tickets sold out of 1607;
4. "Violet of Montmante" – 7:00 PM – 1607 tickets sold out of 1607;
5. "My Fair Lady" – March 15, 2007 – 7:00 PM – 1603 tickets sold out of 1607;
6. "Great Cancan" – March 17, 2007 – 6:00 PM – 1607 tickets sold out of 1607;

⁸ See <http://www.bls.gov/oes/current/oes272041.htm>. Accessed on July 12, 2001, and incorporated into the record of proceeding.

7. [REDACTED] – May 1, 2007 – 6:00 PM – 1607 tickets sold out of 1607;
8. [REDACTED] – May 1, 2007 – 7:00 PM – 1607 tickets sold out of 1607;
9. [REDACTED] – January 7, 2007 – 6:00 PM – 1607 tickets sold out of 1607;
10. [REDACTED] – January 30, 2008 – 7:00 PM – 1605 tickets sold out of 1605;
11. [REDACTED] – June 7, 2008 – 6:00 PM – 1607 tickets sold out of 1607; and
12. [REDACTED] – July 18, 2008 – 7:00 PM – 1607 tickets sold out of 1607.

The petitioner also submitted the previously discussed letter from [REDACTED] and [REDACTED] who stated that the “[a]udience highly prized the mastership of [the petitioner] and his concerts had constant full house (the hall of the [REDACTED] Philharmony has 524 seats).” In addition, the petitioner submitted a document from [REDACTED] who attached an extraction regarding the methodic directions about the rules of record keeping, storage, and destruction reflecting that copies of receipts, tickets, and subscriptions are destroyed after five years of storage time.

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).” According to *Merriam-Webster*, a commercial success is defined as “viewed with regard to profit” and “designed for a large market.”⁹ Although items 1 – 12 reflect that the productions either sold out or nearly sold out for the selected dates and times, the documentary evidence fails to reflect evidence of the petitioner’s commercial successes consistent with the meaning of the regulation at 8 C.F.R. § 204.5(h)(3)(x). In this case, the petitioner’s performances at the [REDACTED] Academic Theatre of Operetta are not indicative of a large market. The size and reputation of the venues are important factors in determining commercial successes. The AAO is not persuaded that the attendance capacity of approximately 1600 seats is reflective of commercial successes. Here, the petitioner only submitted box office receipts for several productions occurring at a single venue, the [REDACTED]. While the AAO previously discussed the reputation of the theater, there is no indication from the documentary evidence that selling out or nearly selling out 12 shows at a local theater is indicative of commercial successes. Similarly, although the petitioner’s submission of a letter indicating that the [REDACTED] Philharmony Hall has 524 seats fails to comply with primary evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the petitioner failed to submit any documentary evidence demonstrating that having a “constant full house” at the [REDACTED]

⁹ See <http://www.merriam-webster.com/dictionary/commercial>. Accessed on July 12, 2011, and incorporated into the record of proceeding.

Philharmony Hall is reflective of commercial successes pursuant to 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. Final Merits Determination

In accordance with the *Kazarian* opinion, the AAO 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 that he met the plain language of the regulation for any of the criteria, in 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 the preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating the final merits determination, the AAO 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 was awarded the “Honored Artist of Russia” and was the conductor and musical director for several shows at the [REDACTED] Academic Theatre of Operetta. However, the accomplishments of the petitioner fall 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 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).

Moreover, the AAO cannot ignore that the statute requires the petitioner to submit “extensive documentation” of his 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).

Although the AAO found that the petitioner’s award, “Honored Artist of Russia,” was a nationally recognized award for excellence in the field of endeavor pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the AAO found that the petitioner’s other two awards failed to meet the plain language of the awards criterion. Specifically, regarding the diploma for participating at the International Competition of Young Conductors, awards derived from competitions restricted by age or non-professional status do not reflect that “small percentage who have risen to the very top of the field of endeavor.” See 8 C.F.R. § 204.5(h)(2). USCIS has long held that even athletes performing at the major league level do not automatically meet the statutory standards for immigrant classification as an alien of “extraordinary ability.” *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm’r 1994); 56 Fed. Reg. at 60899.¹⁰ Likewise, it does not follow that the petitioner who was a finalist in a competition reserved for young conductors should necessarily qualify for approval of an extraordinary ability employment-based visa petition. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for “that small percentage of individuals that have risen to the very top of their field of endeavor.”

Moreover, although the AAO found that the petitioner failed to meet the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the petitioner only claimed eligibility based on his membership with one association. Further, the petitioner failed to establish that his single membership with the ██████ reflects that he “has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” See 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).

In addition, while the AAO found that the petitioner failed to meet the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the petitioner only submitted one article that was about him relating to his work but failed to demonstrate that it was published in a professional or major trade publication or other major media. Regardless, the petitioner

¹⁰ The AAO notes that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine’s ability with that of all the hockey players at all levels of play; but rather, Racine’s ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court’s reasoning indicates that USCIS’ interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

failed to demonstrate that a single article published approximately nine months prior to the filing of the petition is consistent with the sustained national or international acclaim for this highly restrictive classification.

Further, although the AAO found that the petitioner failed to meet the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), an evaluation of the significance of the petitioner's judging experience is sanctioned under *Kazarian*, 596 F. 3d at 1121-11 to determine if such evidence is indicative of the extraordinary ability required for this highly restrictive classification. In this case, the petitioner based his eligibility on judging auditions for "Cats" and "Mamma Mia" for Stage Entertainment and as a member of the selection committee for the Department of Musical Theatre at the Theatrical Institute named after [REDACTED]. Without evidence pre-dating the filing of the petition that sets the petitioner apart from others in his field, such as evidence that he has served as a judge of acclaimed conductors or of a national or international competition rather than aspiring students or amateurs, the petitioner failed to demonstrate that he "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). *Cf.*, *Matter of Price*, 20 I&N Dec. at 954; 56 Fed. Reg. at 60899 (USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard).

Also, while the AAO found that the petitioner failed to meet the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the petitioner only claimed eligibility based on his role with the [REDACTED] which the petitioner failed to demonstrate has a distinguished reputation. Evidence of the petitioner's leading or critical role as a conductor or musical director for a nationally or internationally acclaimed orchestra is far more indicative that he is one of "that small percentage of individuals that have risen to the very top of their field of endeavor."

Furthermore, although the AAO found that the petitioner failed to meet the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix), the petitioner based his salary on selected job vacancies and positions rather than the field as whole. Again, the record clearly reflects that he has commanded a salary far less than the average salary of conductors, let alone conductors at the top of the field. Likewise, while the AAO found that the petitioner failed to meet the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x), the petitioner based his claim on 12 performances at the [REDACTED]. The petitioner failed to demonstrate that this venue is of such caliber that the petitioner's performances there are consistent with or indicative of sustained national or international acclaim. While the petitioner established that his 12 performances were either sold out or nearly sold out, there is no evidence indicating, for example, that they drew a significant level of attendance compared to other concerts in a manner consistent with sustained national or international acclaim.

In this matter, the evidence of record falls short of demonstrating the petitioner's sustained national or international acclaim as a professor of economics. The regulation at 8 C.F.R. § 204.5(h)(3) requires "[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and this his or her

achievements have been recognized in the field of expertise.” While the petitioner submitted documentation demonstrating that he has performed as a conductor and musical director and has been recognized one time as being the “Honored Artist of Russia,” the petitioner failed to submit any documentation consistent with or indicative of sustained national or international acclaim.

The conclusion the AAO reaches by considering the evidence to meet each category of evidence at 8 C.F.R. § 204.5(h)(3) separately is consistent with a review of the evidence in the aggregate. Ultimately, the evidence in the aggregate does not distinguish the petitioner as one of that small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields. In this case, the petitioner has not established his achievements at the time of filing the petition were commensurate with sustained national or international acclaim, or that he was among that small percentage at the very top of the field of endeavor.

IV. 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.

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).

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.