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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

B2

[REDACTED]

DATE: **APR 04 2012** Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined that the petitioner had not established the requisite extraordinary ability 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 the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. See section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserts that the petitioner meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3). For the reasons discussed below, the AAO will uphold the director's decision.

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.*; 8 C.F.R. § 204.5(h)(2).

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

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.* at 1121-22.

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

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 this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

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. ANALYSIS

A. Evidentiary Criteria

This petition, filed on March 15, 2010, seeks to classify the petitioner as an alien with extraordinary ability as a professional musician and composer. The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(h)(3).²

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

The petitioner submitted documentation showing that his five-member music group [REDACTED] received a World Academy of Arts, Literature, and Media (WAALM) Persian Golden Lioness Award for Traditional Persian Music in 2008. The petitioner also submitted a December 26, 2008 article entitled “Barbat nearly lost in cultural upheaval” published in *North Shore News*, his local community newspaper in North Vancouver, British Columbia. The article states:

North Vancouver’s [the petitioner] is leaving behind a piece of history for future generations to enjoy.

* * *

As for himself, [the petitioner] has two additional barbats from Ghanbari Mehr, which he can use while performing solo and with the Dastan Ensemble.

The five-member group was established in 1991 and has toured all over the world.

This year, the men picked up a Persian Golden Lioness Award for best Persian classical ensemble at the third World Academy of Arts, Literature and Media Awards held in London in October.

While [REDACTED] 2008 WAALM Persian Golden Lioness Award is briefly mentioned in his local community newspaper, the petitioner did not submit evidence of the national or international *recognition* of the award. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner’s award be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this case, there is no documentary evidence demonstrating that the petitioner’s ensemble’s WAALM award for best Persian classical ensemble is recognized beyond the presenting organization or his local community and therefore commensurate with a nationally or internationally recognized prize or award for excellence in the field.

² On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

The petitioner submitted a printout from www.jpfolks.com indicating that his album "From Stone to Diamond" placed second among the albums entered in the "Middle Eastern" music category at the 2009 Just Plain Folks (JPF) Music Awards. The AAO notes that more than three hundred other recipients in various musical genres were similarly recognized as winners of JPF "Album" awards.³ The AAO cannot conclude that selection for an award that is annually conferred upon such a large number of entries is indicative of national or international recognition for excellence in the field of music. The petitioner also submitted a December 15, 2009 e-mail from the petitioner to counsel discussing the selection process for the 2009 JPF Music Awards. The e-mail states: "In the category of Middle Eastern music, among the final 10 nominees for Best Album was [the petitioner] and his album 'From Stone to Diamond.' . . . When the final votes were tabulated, [the petitioner's] album finished in second place overall." The closing of the e-mail includes an unsigned valediction from [REDACTED] but the e-mail was sent from the petitioner's yahoo.com e-mail address (as provided in Part 8 of Form I-140, Immigrant Petition for Alien Worker) rather than from Mr. [REDACTED] aol.com e-mail address.⁴ Accordingly, the AAO cannot determine whether or not the full content of the message was prepared by Mr. [REDACTED]. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Regardless, the petitioner did not submit evidence of the national or international *recognition* of his album's JPF award for second place in the Middle Eastern music category. There is no documentary evidence demonstrating that the petitioner's second place JPF award is recognized beyond the presenting organization and therefore commensurate with a nationally or internationally recognized prize or award for excellence in the field.

The petitioner submitted an extensive list of more than one thousand "2009 Just Plain Folks Music Awards Song Nominees" printed from [REDACTED] indicating that his song "Diamond" was among 23 "nominees" in the "Middle Eastern Song" category. There is no documentary evidence showing that the petitioner's song "Diamond" ultimately received a JPF "Song" award. The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires evidence of "the alien's receipt" of nationally or internationally recognized "prizes or awards" for excellence in the field of endeavor. Earning a nomination does not equate to receipt of a prize or an award. Regardless, the petitioner has not established that being included among more than four hundred JPF "Song Winners" constitutes receipt of a nationally or internationally recognized prize or award for excellence in the field.⁵

In response to the director's request for evidence, the petitioner submitted a certificate from the Académie Charles Cros issued in the French language. The preceding certificate was not

³ See <http://www.jpfolks.com/09albumwinners.html>, accessed on March 21, 2012, copy incorporated into the record of proceeding.

⁴ Although the closing of the e-mail identifies Mr. [REDACTED] e-mail address as [REDACTED] the information about the 2009 JPF Music Awards was clearly sent from the petitioner's yahoo.com e-mail address.

⁵ The AAO notes that more than four hundred recipients in various musical genres were recognized in 2009 as JPF "Song Winners." [REDACTED] accessed on March 21, 2012, copy incorporated into the record of proceeding.

accompanied by a certified English language translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that 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. *Id.* The petitioner also submitted information about the Académie Charles Cros from *Wikipedia*, an online encyclopedia. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.⁶ See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008). Accordingly, the AAO will not assign weight to information for which *Wikipedia* is the source. There is no documentary evidence showing that the non-translated certificate from the Académie Charles Cros reflects the petitioner's receipt of a nationally or internationally recognized prize or award for excellence in the field.

In counsel's February 25, 2010 letter accompanying the petition, she asserts that the petitioner received a "First Order of Arts" from the "Iranian Ministry of Culture" in 2003. The petitioner, however, failed to submit evidence of his receipt of the award. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). On appeal, the petitioner submits a September 23, 2010 printout from <http://www.cdbaby.com/cd/behroozinia1> indicating that his album "From Stone to Diamond" is available for purchase online. The "Album Notes" section of the submitted internet printout states: "Countless distinguished members of our cultural society regard [the petitioner] as a leading figure in the preservation of Iran's traditional music. Consequentially in 2003 the Ministry of Culture decorated him with its highest honor, the 'First Order of Arts.'" The author of the "Album Notes" section is not specified, but it is likely that the petitioner himself prepared and submitted the content posted on the cdbaby.com website.⁷ The

⁶ Online content from *Wikipedia* is subject to the following general disclaimer:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . **Wikipedia cannot guarantee the validity of the information found here.** The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on March 21, 2012, copy incorporated into the record of proceeding.

⁷ "Artist Services" information posted on the cdbaby.com website states: "Your musician website is where you have complete control. . . . HostBaby provides all the tools and designs you need to create an awesome and professional website." See <http://members.cdbaby.com/websites-for-bands.aspx>, accessed on March 21, 2012, copy incorporated into the record of proceeding.

petitioner also submitted a copy of his four-page résumé listing the 2003 First Order of Arts award. Rather than submitting primary evidence of his 2003 First Order of Arts award from the Iranian Ministry of Culture, the petitioner instead submitted material from a website promoting his album and a copy of his résumé mentioning the award. The self-serving claim in the petitioner's résumé and posted on the cdbaby.com website that the petitioner received a First Order of Arts award is not sufficient to meet the burden of proof for this regulatory criterion. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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. Where a record does not exist, the petitioner must submit an original written statement on letterhead from the relevant authority indicating the reason the record does not exist and whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii). The claim in the petitioner's résumé and posted on the cdbaby.com website that the petitioner received 2003 First Order of Arts award does not comply with the preceding regulatory requirements. Regardless, there is no supporting documentary evidence showing that the First Order of the Arts award equates to a nationally or internationally recognized prize or award for excellence in the field.

In light of the above, the petitioner has not established that he meets the plain language requirements of this regulatory 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.

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.⁸

The petitioner submitted an article about him entitled "Persian Melodies" in the January/February 2009 issue of *The Walrus*. The petitioner also submitted general information about *The Walrus* posted on the magazine's website. USCIS need not rely on self-promotional

⁸ 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.

material. 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). There is no circulation evidence showing that *The Walrus* qualifies as a form of major media in Canada or any other country.

The petitioner submitted articles about him in *North Shore News*, a local community newspaper distributed in North and West Vancouver, entitled "Barbat nearly lost in cultural upheaval" (December 26, 2008), "Realms of Eloquence Dastan Ensemble" (January 30, 2004), "Ava Ensemble opens tour in Vancouver" (May 2, 2008), and "Dastan join Sima Bina back on tour" (November 26, 2004). There is no circulation evidence showing that this local community newspaper qualifies as a form of major media in Canada or any other country.

The petitioner submitted an article in *The Atlanta Journal-Constitution* entitled "This authentic music of Iran luring listeners in America," but the date of the article was not identified as required by the plain language of this regulatory criterion. Further, the article is not about the petitioner as it only briefly mentions him. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about the alien." See, e.g., *Accord Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1,*7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). Moreover, there is no circulation evidence showing that *The Atlanta Journal-Constitution* qualifies as a form of major media.

The petitioner submitted a January 31, 2008 article in *Munstersche Zeitung* entitled "Music aus dem Morgenland," but he failed to submit a certified English language translation of the article as required by this regulatory criterion and the regulation at 8 C.F.R. § 103.2(b)(3). Further, the author of the article was not identified and there is no circulation evidence showing that *Munstersche Zeitung* qualifies as form of major media.

The petitioner submitted a direct mail concert announcement from the World Music Institute, "a not-for-profit concert presenting organization founded in 1985," promoting an upcoming concert for the [REDACTED] Ensemble and Salir Aghili at the Peter Norton Symphony Space in New York. The petitioner also submitted the World Music Institute's February-April 2000 "Calendar" that lists a March 3, 2000 concert of the Dastan Ensemble at Symphony Space. The petitioner's initial evidence also included an event program from the San Francisco World Music Festival Presentation "at St. John's Presbyterian Church" that includes two sentences about the petitioner. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "published material about the alien in professional or major trade publications or other major media" including "the title, date and author of the material." A promotional mailer, an event calendar, and an event program from a performance at a church that only briefly mention the petitioner do not meet the requirements of this regulatory criterion.

In response to the director's request for evidence, the petitioner submitted his biographical entry appearing on the Kodoom website, an online "information hub" dedicated to Iranian/Persian culture and media. The date and author of the online material were not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Further, there is no documentary

evidence (such as online readership data) showing that the Kodoom website qualifies as a professional or major trade publication or some other form of major media.

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

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

The petitioner submitted material posted at oud.eclipse.co.uk that includes a profile of the petitioner and his music. The material refers to the petitioner as "the greatest living barbat player from Iran." The petitioner also submitted the monthly program for the Orange County Performing Arts Center dated May 2003. The "About the Artist" page in the Center's monthly program profiles "Parissa and [REDACTED] Ensemble" and includes only two sentences about the petitioner. The material states that the petitioner "has played a key role in restoring Persian musical identity to the ancient Persian barbat." The petitioner's evidence also included the event program for the WAALM 3rd Persian Golden Lioness Awards (2008) that includes four sentences about the [REDACTED] Ensemble and refers to the ensemble as "the most prominent classical Iranian music group of today." The preceding materials do not specify how the petitioner's work was original, nor do they provide specific examples of how his work has impacted the field such that his work rises to the level of artistic contributions of "major significance in the field."

As previously discussed, the petitioner submitted a direct mail concert announcement from the World Music Institute promoting an upcoming concert for the [REDACTED] Ensemble and Salir Aghili at the Peter Norton Symphony Space in New York. The promotional material includes four sentences about the [REDACTED] Ensemble stating that the group is comprised of "virtuoso instrumentalists." The petitioner also submitted the World Music Institute's February-April 2000 "Calendar" that lists a March 3, 2000 concert of the [REDACTED] Ensemble at Symphony Space. The paragraph about the [REDACTED] Ensemble in the promotional calendar includes a partial quote from the *New York Times* stating that "the [REDACTED] Ensemble found an elegance and rhythmic swing that made the music levitate." The record, however, does not include a copy of the original *New York Times* article mentioning the [REDACTED] Ensemble. The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner also submitted an event program from the San Francisco World Music Festival Presentation "at St. John's Presbyterian Church" that includes two sentences about the petitioner. The material states that the petitioner "is the world's greatest Persian barbat player, teacher, concert musician and improviser of traditional Iranian music." The preceding materials praise the petitioner's musical skills and performances, but they do not provide specific examples of how the petitioner's original work has significantly impacted the field at large or otherwise constitutes original contributions of major significance in the field.

On appeal, the petitioner submits a September 23, 2010 printout from <http://www.cdbaby.com/cd/behroozinia1>. The "Album Notes" section of the submitted internet printout includes information about the petitioner's accomplishments stating:

Integrated amongst the aforementioned accomplishments are publications of two etudes for the Barbat and numerous recorded works encompassing: Barbat, Kouhestan, Yadestan, Vajd, Dastan Trio and scores of accompaniments on: Bamdad, Booy-e-Norouz, Ofogh-e-Mehr, Sarv-e-Simin, Sfar Be digar Sou, Saz-e-Nou Avaz-e-Nou, Hanaee, Shab Sokoot Kavir, Shourideh and Gol-e Behehsht.

The petitioner, however, failed to submit copies of his two etude publications. As previously discussed, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Further, the regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). The AAO will not presume that evidence relating to the scholarly articles criterion is presumptive evidence that the petitioner meets this criterion. Publication and presentations are not sufficient evidence under 8 C.F.R. § 204.5(h)(3)(v) absent evidence that they were of “major significance.” *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff’d in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reaffirmed its holding that the AAO did not abuse its discretion in finding that the alien had not demonstrated contributions of major significance. 596 F.3d at 1122. Thus, there is no presumption that every publication is an original contribution of major significance in the field; rather, the petitioner must document the actual impact of his published work. In this instance, there is no documentary evidence showing the extent to which the petitioner’s two etude publications are utilized by music schools or evidence indicating that his publications are widely viewed by independent music scholars as majorly significant to the field.

The petitioner also submitted letters of support praising his talents as a musician and discussing his activities in the field.

[REDACTED], Owner, 7/8 Music Productions, San Francisco, states:

[The petitioner] is a unique musician not only because he plays an ancient and rare instrument, barbat, but also because of his mastery of the traditional music of Iran. His improvisational skills, technique, and performance with deep feelings are a joy to listen and learn. I strongly believe that he will enrich the musical culture of this great country with his presence, and concerts, both live and on the radio.

[REDACTED] does not provide specific examples of how the petitioner’s work has significantly impacted the music industry or otherwise equates to original artistic contributions of major significance in the field. Talent and experience in one’s field are not necessarily indicative of original artistic contributions of major significance in the musical field. Assuming the petitioner’s musical skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Dep’t. of Transp.*, 22 I. & N. Dec. 215, 221 (Comm’r 1998). It is not enough to be skillful and knowledgeable and to have others attest to those talents. An alien must have demonstrably impacted his field in order to meet this regulatory criterion. Vague, solicited

letters from colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d at 1036 *aff'd in part* 596 F.3d at 1115. In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. The record lacks documentary evidence showing that the petitioner has made original musical contributions that have significantly influenced or impacted his field.

██████████ Chief Financial Officer and Producer, Nima Entertainment Inc., Fremont, California, states: "[The petitioner] is an extremely talented artist in the field of traditional Persian music. He is known to be the most prestigious Barbat (lute) player in the world; he holds the highest ranking possible for this instrument according to the public and historical eye." While Mr. ██████████ describes the petitioner as a talented Barbat player, there is no documentary evidence demonstrating that his work equates to original contributions of major significance in the field.

██████████ Chief Executive Officer, Persian Arts Group of Atlanta, states:

One type of art that we present is Persian traditional music concerts among others. In this line of work I contract entertainers to perform Persian concerts in various locations of the United States.

* * *

[The petitioner] is one of the artists that I have worked with for nearly two decades from the time he resided in Iran and now that he lives in Vancouver, Canada. He is an extremely talented artist in the field of traditional music. In fact he is known to be the utmost best musician at playing the Barbat; the instrument that he is most commonly known for. He is known as a Barbat virtuoso and one can see his name on the best traditional music CD's produced in Iran and abroad. He is a team player and has been able to work with the best musicians and vocalists throughout the years. In fact he has been a part of absolutely the best Persian traditional music concerts that have ever been produced and performed in the U.S., Canada, European countries and many other countries worldwide.

There is no evidence showing that the petitioner's music recordings and performances have significantly influenced or impacted his field, or otherwise equate to original contributions of major significance in the field. The AAO notes that the regulations include a separate criterion for "commercial successes in the performing arts" at 8 C.F.R. § 204.5(h)(3)(x). Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for commercial successes in the performing arts and original contributions of major significance, USCIS clearly does not view these criteria as being interchangeable. To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria. The AAO will fully

address the petitioner's musical recordings and performances under the regulatory criterion at 8 C.F.R. §§ 204.5(h)(3)(x).

Fazi Riahi, President of M&D Marketing and Executive Producer of Chicago Persian Events, states:

[The petitioner] is an extremely talented artist in the field of traditional Persian music, not only in Iranian community, but very well known in American traditional music lovers. He is well in the top of his colleagues in the field and has been for the past 10 years. [The petitioner] is the greatest living Barbat player from Iran and noted for his brilliant compositions and powerful improvisations on this ancient lute. He has also performed and collaborated with many of the prominent music ensembles in Iran including Aref and Mowlana and joined Dastan Ensemble in 1992.

praises the petitioner's talent as a traditional Persian musician, compositions, improvisations, and performances, but Mr. does not provide specific examples of how the petitioner's original music has influenced the field at large. There is no supporting documentary evidence demonstrating that the petitioner has made original contributions of major significance in the field.

Director, Persian Language Program, Arlington, Virginia, states:

I have had the pleasure of working with [the petitioner], manager of Ava Ensemble for the past two years. My organization was responsible for organizing concerts in the Washington Metropolitan area wherein [the petitioner] performed.

The first concert performance was on May 30, 2008 at the George Mason Center for the Arts in Fairfax, Virginia. [The petitioner] performed along with Ensemble and this concert was very well attended and received.

The second performance took place on March 7, 2009 at the John C. Albohm Auditorium in Alexandria, Virginia. At this concert [the petitioner] performed with the group," one of the leading musical ensembles in Kurdistan and Iran today. This concert was sold out and we expect to feature this ensemble with [the petitioner] in the near future.

Finally on May 8, 2009 we had the pleasure of working with [the petitioner] again at the George Mason Center for the Arts in Fairfax, Virginia, this time with the Ensemble. As always this performance drew a large crowd and was very well received.

There is no evidence showing that the petitioner's performances at the George Mason Center for the Arts and at the John C. Albohm Auditorium of T. C. Williams High School have significantly influenced or impacted his field, or otherwise constitute original artistic contributions of major significance in the field. Regardless, the regulations include a separate

category of evidence for “commercial successes in the performing arts” at 8 C.F.R. § 204.5(h)(3)(x) where the petitioner’s performances will be further addressed.

██████████ Programming Director, World Music Institute, New York, states:

Our concerts take place in the City’s most prestigious venues including Carnegie Hall, Lincoln Center and City Center. In addition, WMI organizes a series of major tours and other cultural and educational activities of visiting artists throughout the United States.

In my professional capacity, I can confirm that I am familiar with [the petitioner’s] work, and I can attest to his significant cultural achievements.

██████████ letter does not indicate that the petitioner has performed at Carnegie Hall, Lincoln Center, or City Center. Moreover, she does not provide specific examples of the petitioner’s “significant cultural achievements.”

██████████ Executive Director, Small World Music Society, Toronto, Canada, states:

This testimonial is written to confirm that the Canadian-Iranian musician [the petitioner] is an artist of extraordinary artistic ability.

As Executive Director of Small World Music Society, a non-profit presenter of culturally diverse music, I have had the pleasure of working with [the petitioner] on numerous occasions. I can attest to his significant cultural achievements and wish him well in his endeavors.

██████████ asserts that the petitioner “is an artist of extraordinary artistic ability,” but USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990). Further, ██████████ does not specifically identify the petitioner’s “significant cultural achievements” or explain how they equate to original artistic contributions of major significance in the field.

██████████, a writer and author and a contributor to *The Walrus*, states:

I recently had the pleasure of interviewing [the petitioner] for a feature which will appear in the January issue of *Walrus*. I was impressed by his musical skills and his vast knowledge of Persian music, as well as by his interest in crossing musical borders and working with classical Western musicians.

In my professional capacity, I can confirm that I am familiar with [the petitioner’s] work and his status as one of the most famous players of Persian lute or barbat in the world. I can attest to his prowess as a soloist and to his significant cultural achievements.

██████████ praises the petitioner for his music skills, knowledge, and prowess as a soloist, but she does not provide specific examples of how the petitioner’s original work has influenced the

field at a level indicative of contributions of “major significance.” According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien’s contributions must be not only original but of “major significance” in the field. The phrase “major significance” is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003). While the petitioner has earned the admiration of his references, there is no documentary evidence demonstrating that he has made original artistic contributions of major significance in the field. For example, the record does not indicate the extent of the petitioner’s influence on other musicians working in the field, nor does it show that the field has significantly changed as a result of his work.

The opinions of the petitioner’s references are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm’r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien’s eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to “fact”). Thus, the content of the references’ statements and how they became aware of the petitioner’s reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a musician and composer who has made original contributions of major significance in the field. 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, the AAO cannot conclude that he meets this regulatory criterion.

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

The petitioner did not initially claim eligibility for this regulatory criterion or submit specific documentation and arguments addressing this criterion in response to the director’s request for evidence. On appeal, the petitioner submits an unsigned letter from [REDACTED] Artistic Managing Director, Caravan World Rhythms Society, stating:

I have known [the petitioner] for over three years, and he is considered one of the top Persian “oud” (Persian lute) soloists of traditional Persian music in the world. . . . Caravan has presented [the petitioner] in the past as featured soloist with the [REDACTED] Ensemble, and as accompanist for world-renown Iranian singer [REDACTED] [REDACTED] in May 2008 at the prestigious Orpheum Theatre in Vancouver.

The petitioner also submits information about “Caravan World Rhythms” from www.oscillations.ca, an online “source for new music events and performances in Vancouver and the surrounding region,” stating: “Caravan presents exciting and unique world music and

dance events, featuring international and Canadian artists, performing at various venues in Vancouver and the Sunshine Coast regions.”

With regard to the above evidence submitted for this regulatory criterion for the first time on appeal, where a service center has requested specific evidence in a request for evidence, and the petitioner failed to comply with the request, that particular evidence will not be considered on appeal. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal or on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner seeks evidence to be considered, he must submit the documents in response to the director's request for evidence. *Id.* Regardless, the unsigned letter from [REDACTED] and the information posted at www.oscillations.ca fail to demonstrate that the petitioner has performed in a leading or critical role for Caravan World Rhythms and the [REDACTED] Ensemble, and that they have a distinguished reputation in the music industry. Accordingly, the petitioner has not established that he meets this regulatory criterion.

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

This regulatory criterion focuses on volume of sales and box office receipts as a measure of the petitioner's commercial success in the performing arts. Therefore, the mere fact that a petitioner has recorded and released musical compilations or performed before an audience would be insufficient, in and of itself, to meet this criterion. The evidence must show that the volume of sales and box office receipts reflect the petitioner's commercial success relative to others involved in similar pursuits in the performing arts.

The petitioner submitted a November 30, 2009 letter from [REDACTED] stating:

The attendance to our concerts ranges from 500 to 2000 people, depending on the Persian population of the location and the capacity of the venue rented.

* * *

In the past 20 years that we have produced concerts featuring [the petitioner], his concerts have mostly been sold out with average of 1200 attendees. Each concert has generated at least \$20,000

[REDACTED] states that the attendance for Persian Arts Group of Atlanta concerts ranges upward to 2,000 people, but he indicates that the petitioner's concerts averaged only 1,200 attendees. Further, the petitioner failed to submit documentary evidence of sales or box office receipts for any particular concert to support Mr. [REDACTED]'s assertions. The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The petitioner also submitted a letter from Fazi Riahi stating:

Our concert are averaged at 300 to 1500 of persons, depending on the Persian population of the location and the capacity of the premises rented.

* * *

In the past 10 years that we have produced concerts featuring [the petitioner], once a year the concerts were most of the time sold out with average 500 of people. Each concert had revenue at least \$15,000 dollars”

states that the average attendance for Chicago Persian Events concerts ranges upward to 1,500 persons, but he indicates that the petitioner’s concerts averaged only 500 attendees. Further, the petitioner failed to submit documentary evidence of sales or box office receipts for any particular concert to support assertions. The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The petitioner’s evidence also included a November 17, 2009 letter from stating:

Our concert are averaged at 700 to 3000 number of persons, depending on the Persian population of the location and the capacity of the premises rented.

* * *

In the past 14 years that we have produced concerts featuring [the petitioner], most of the concerts were sold out with numbers averaging to 800 people. Each concert has revenues of at least 5000 dollars and in turn benefited our economy.

states that the average attendance for Nima Entertainment Inc. concerts ranges upward to 3,000 persons, but he indicates that the petitioner’s concerts averaged only 800 attendees. Further, the petitioner failed to submit documentary evidence of sales or box office receipts for any particular concert to support assertions. The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) 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 the petitioner submitted the preceding documentation indicating that he participated in concerts averaging from 500 to 1,200 attendees and that the concerts generated minimum revenues ranging from \$5,000 to \$20,000, the documentary evidence fails to demonstrate the petitioner’s commercial successes consistent with the meaning of the regulation

⁹ See <http://www.merriam-webster.com/dictionary/commercial>, accessed on March 22, 2012, copy incorporated into the record of proceeding.

at 8 C.F.R. § 204.5(h)(3)(x). In this case, the petitioner has not established that the size and attendance of the venues where he performed are indicative of commercial success relative to other concerts in the music industry. Further, there is no documentary evidence of compact disc or record sales for the petitioner's music recordings showing that he has achieved commercial successes in the performing arts. Accordingly, the petitioner has not established that he meets this regulatory criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence.

C. Prior O-1 Nonimmigrant Visa Status

The record reflects that the petitioner was the beneficiary of an approved O-1 nonimmigrant visa petition for an alien of extraordinary ability in the arts. 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, "The 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, the AAO does not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each petition 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 (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'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of the alien, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, *1, *3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

III. CONCLUSION

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

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be 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" 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." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.¹⁰ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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

¹⁰ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).

ORDER: The appeal is dismissed.