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

[redacted]

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DATE: DEC 0 4 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner seeks classification as an "alien of extraordinary ability" in the arts, specifically as a musician, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

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

On appeal, counsel submits a brief and additional evidence. Counsel asserts that the petitioner submitted sufficient qualifying evidence under five of the ten regulatory categories. Considering the evidence in the aggregate, the petitioner has not established eligibility for the benefit sought by a preponderance of the evidence.

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.*

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

II. ANALYSIS

A. Prior O-1 Visa

While U.S. Citizenship and Immigration Services (USCIS) has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. First, the regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts* are dramatically different. 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) as simply "distinction," which is further defined as follows:

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

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

Moreover, it must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner'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 had approved the nonimmigrant petitions on behalf of the petitioner, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

B. Evidentiary Criteria[2]

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 204.5(h)(3)(i).

The director determined that the petitioner did not satisfy the requirements for this criterion. On appeal, counsel, on behalf of the petitioner, maintains that the majority of the competitions in the music field have age and or other limitations. Along with the appeal brief, in an effort to substantiate this claim, counsel attached information about three separate music competitions. The information is not probative, as the petitioner does not allege that he has won any of the competitions and three examples are insufficient to represent the field. Moreover, in assessing the submitted evidence to establish this criterion, the AAO's ultimate finding is based on whether or not the petitioner met the plain language requirements of the regulation. The petitioner submitted the following evidence:

1. Evidence of participation in the Young Austrian Philharmonic;
2. Evidence of participation in the International Youth Orchestra Academy;
3. Inclusion of a piece in the Millennial Masters II CD;
4. Evidence indicating the petitioner was a finalist for a fellowship in the Sundance Composers Lab;
5. Polish National Jazz Musicians Meeting – winner of the national jazz competition;
6. National Solfege Competition – Honorable Mention for excellence in musical hearing; and
7. Jazz Department competitive audition for admission into the Academy of Music in Katowice

Items 1, 2, 3, 4, and 7 are not prizes or awards. While this subset of the numbered evidence tends to demonstrate that the petitioner was involved in various competitive processes, which resulted in various types of achievements, those achievements are not awards or prizes.

Acceptances into the Jazz Department of the Academy of Music in Katowice, the Young Austrian Philharmonic, or the International Youth Orchestra Academy, as well as an inclusion for the CD project, while potentially selective, constitute admission to training programs and employment opportunities. They are not awards or prizes for excellence. Similarly, to be a finalist for a fellowship

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

for the Sundance Composers Lab, is insufficient. The only document in the record related to item 4 was an email from a purported organizer who states that the petitioner was a finalist. There is insufficient background information to determine whether the fellowship would qualify as a prize or award. The fact that the petitioner was merely a finalist for a fellowship fails to substantiate that the petitioner received a prize or award for purposes of the regulation.

In addition, to qualify under the regulation, the prize or award must also be nationally or internationally recognized. For above items numbered 5 and 6, it appears from the record that they could be deemed as prizes or records. However, as evidence for item 5, the petitioner only submitted a letter from attesting to the petitioner's win. The AAO finds that where the regulations require specific, objective evidence of achievements, such as awards, the primary evidence of such awards would be copies of the awards themselves. Secondary evidence might be newspaper reports of the competition results. Affidavits attesting to awards, therefore, would need to "overcome the unavailability of both primary and secondary evidence." The petitioner has not demonstrated that the required evidence is unavailable or cannot be obtained, and therefore the petitioner is presumed ineligible pursuant to 8 C.F.R. § 103.2(b)(2). Furthermore, while the record contains a translated copy of a certificate of award for item 6, there is no supporting documentary evidence showing that either item 5 or 6 is an award that is nationally recognized. The AAO will not presume the national recognition of an award or prize from the name of the competition; the petitioner must document that the field, nationally or internationally, recognizes the award. Consequently, the AAO concludes that the petitioner failed to meet the plain meaning requirements of the regulation and affirms the director's decision in this regard.

> *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.* 8 C.F.R. § 204.5(h)(3)(iii).

The AAO affirms the director's finding that the petitioner satisfied this criterion.

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.* 8 C.F.R. § 204.5(h)(3)(v).

The director determined that the petitioner failed to meet this criterion. On appeal, counsel, in asserting that the petitioner established his eligibility as an alien of extraordinary ability, refers to a series of unpublished AAO decisions sustaining other petitioners' claims. While 8 C.F.R. § 103.3(c). provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decision. *See* 8 C.F.R. § 103.10(b). Moreover, most of the decisions relate to individuals who are in completely different fields of endeavor than the petitioner and are neither relevant nor probative to the current appeal. Counsel, in his appeal brief, identifies an unpublished decision approving the petition of another violinist and observes that that alien submitted over fifty letters of support. Moreover, counsel asserts that like the officer in *Muni v. Immigration and*

Naturalization Service, 891 F. Supp. 440 (N.D. Ill. 1995), the director in this instance did not give sufficient weight to the testimonial evidence in the record. Upon a thorough review of the testimonial evidence, the AAO finds that the director properly weighed the evidence. The petitioner in this instance submitted over twenty letters from experts and colleagues attesting to, *inter alia*, his original artistic contributions. However, USCIS determines the truth not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) citing *Matter of E-M*, 20 I&N Dec. 77, 80 (Comm'r 1989).

While the petitioner in this instance submitted a great deal of evidence relating to the original contributions criterion in terms of quantity, the AAO observes that the evidence is not of sufficient probative value to the issue of the significance of the petitioner's contributions to satisfy the plain language requirements of the regulation.

For instance, while the letters of support from [redacted] complimentary of the petitioner's talents and work, they fail to detail the significance of the petitioner's work in the field as a whole or the impact that the petitioner's work has had on the field. The letters from [redacted] discuss the importance of petitioner's contribution to particular projects, but also fail to sufficiently discuss the petitioner's impact in the field at large such that his work constitutes a contribution of major significance in the field. The letters of support from [redacted] are vague and conclusory. 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). In evaluating the above reference letters, the AAO notes that letters containing mere assertions of widespread acclaim and vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field.

As for the letters from [redacted] the petitioner appears to have specifically solicited their letters to review a selection of his work or a specific project. Letters of independent references who were previously aware of the petitioner through his reputation and who have been influenced by his work are more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae or work and provide an opinion based solely on this review. Ultimately, evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submissions with the petition.

In addition, in the appeal brief, counsel maintains that the petitioner's work is "being implemented by others" and generally refers to testimonies and documentary evidence. Critically, counsel does not indicate which specific letters or documents substantiate this claim. A thorough review of the record does not indicate that there are individual testimonies or other documents attesting to broader implementation of the petitioner's work. The unsupported assertions of counsel do not constitute

evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Inasmuch as counsel asserts that the petitioner's contracts with various companies constitutes evidence of "implementation," they appear to be standard artist or recording contracts and the companies do not indicate that they are offering a contract to "implement" the petitioner's methodologies for other artists in their company.

Counsel also asserts that the documentary evidence from the U.S. Copyright Office showing that during the last 2 years the petitioner composed and copyrighted over 250 pieces of music helps satisfy this regulatory criterion. While the evidence of copyrights does illustrate that the petitioner's work is original, the copyrights, in and of themselves, do not necessarily demonstrate impact in the field. This office has previously stated that patents are not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See, e.g., Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215, 221 n.7, (Comm'r 1998). In the same way that a patented device's impact must be documented, a copyrighted piece of music, in addition to the evidence of copyright, should be accompanied by supplemental documentation showing its impact. The record includes some favorable reviews of some of the petitioner's individual musical work, but the reviews are insufficient to establish impact in the field.

For all of the above reasons, the AAO concludes that the petitioner failed to satisfy the requirements of this criterion and affirms the director's findings in this regard.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.* 8 C.F.R. § 204.5(h)(3)(vii).

Upon a thorough review of all of the evidence of record supporting this criterion as it relates to the petitioner's multimedia (music and image) project "Hello," the AAO is satisfied that the petitioner submitted evidence that meets this criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role's matching duties. A critical role should be apparent from the petitioner's impact on the organization or the establishment's activities. The petitioner's performance in this role should establish whether the role was critical for organizations or establishments as a whole. The petitioner must demonstrate that the organizations or establishments (in the plural) have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-Webster's online dictionary defines distinguished as, "marked by eminence, distinction, or excellence."[3] Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U.S. at 306. Therefore, it is the petitioner's burden to demonstrate that

[3] *See* http://www.merriam-webster.com/dictionary/distinguished, accessed on November 6, 2012.

the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or a similar reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director determined that the petitioner failed to satisfy the requirements of this criterion. The AAO observes that on appeal, counsel largely advances the same arguments and refers to the same evidence that the director considered under this criterion.

Initially, the AAO agrees with the director that much of the evidence submitted under this criterion does not qualify as work for an organization or an establishment. Work for individual art projects, music projects, or theatrical projects such as and one-time work for the Oak Studio Session are not equivalent to a leading or critical role for an *organization* or *establishments*. For some of the above mentioned projects, the petitioner notes that some of the sponsors of the projects have distinguished reputations, and some of those sponsors constitute an organization or an establishment. For instance, the Polish Theatre, the sponsoring theatre behind 'Ja w podrozy' is an organization and even if the AAO accepts, *arguendo*, that the theatre enjoys a distinguished reputation, the petitioner has failed to submit evidence showing that his role for one performance was a critical one for the theatre. The petitioner's individual projects associated with and can be disqualified for purposes of this criterion for the same reasons.

As for the petitioner's work in while it is plausible that a television series can constitute an organization or an establishement, depending on specific facts and circumstances, the petitioner has failed to submit evidence showing that the show is an organization or an establishment. Again, even accepting, *arguendo*, that is an organization, the petitioner has failed to include evidence demonstrating that the show has a distinguished reputation.

Similarly, the petitioner has failed to esatablish that the various musical groups that he participated in or led, including enjoyed a distinguished reputation. The record is bereft of any documentation relating to the reputation of 'Redline.' The record includes biographical information on the individual artists who play for the but there is no similar information available in the record for the groups, instead of the individual members. Also, the testimonial from refers to as "the legendary Baltimorean jazz fusion formation." However, without additional documentary evidence substantiating this claim, this one assertion is insufficient to demonstrate a distingushed reputation for this organization. The AAO reiterates that USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. at 9, 15.

Therefore, the AAO affirms the decision of the director and concludes that the petitioner failed to meet the requirements of 8 C.F.R. § 204.5(h)(3)(viii).

B. Summary

The petitioner has failed to submit sufficient relevant, probative evidence to satisfy the regulatory requirement of three types of evidence.

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.

Had the petitioner 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.[4] Rather, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types 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.

ORDER: The appeal is dismissed.

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[4] 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).