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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

DATE: **FEB 21 2012** OFFICE: TEXAS 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:

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 May 14, 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 as a tabla performer and teacher in Indian classical music. The director determined that the petitioner had not established the requisite extraordinary ability, failed to submit extensive documentation of his sustained national or international acclaim, and failed to establish his intention to continue to work in the United States in his area of expertise.

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) and will continue to work in the United States in his area of expertise pursuant to section 203(b)(1)(A)(ii) of the Act and 8 C.F.R. § 204.5(h)(5).

I. Oral Argument

On appeal, counsel states:

I would also request oral argument as it is difficult and will also take up a great deal of the [AAO's] time and resources to review the voluminous material that needs to be presented to establish table playing as an esoteric area of specialty that does not fall neatly into the criteria established in 8 C.F.R. §204.5(h)(3).

The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, U.S. Citizenship and Immigration Services (USCIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Further, the AAO is not persuaded that the reasons for counsel's request are sufficient to demonstrate the necessity for an oral argument. Moreover, the written record of proceeding, including counsel's brief submitted on appeal, fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 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:

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).

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 April 16, 2010, seeks to classify the petitioner as an alien with extraordinary ability as a tabla performer and teacher in Indian classical music. The petitioner has submitted evidence pertaining to the following criteria under the regulation at 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.

In the director's decision, he determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel claims that the petitioner is eligible for this criterion based on the following:

1. Taal Mani Award;
2. Grade “A” Artist of All India Radio;
3. Scheme for Scholarship to Young Artist in Different Cultural Fields; and

² On appeal, the petitioner does not claim to meet any criteria not discussed in this decision.

4. Gold Medal from the Sangeet Natak Academy.

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.” Moreover, it is the petitioner’s burden to establish eligibility for every element of this criterion. Not only must the petitioner demonstrate his receipt of prizes and awards, he must also demonstrate that those prizes and awards are nationally or internationally recognized for excellence in the field of endeavor. In other words, the petitioner must establish that his prizes and awards are recognized nationally or internationally for excellence in the field beyond the awarding entities.

Regarding item 1, on appeal, the petitioner submitted a letter from [REDACTED] for [REDACTED], who stated:

[REDACTED] is a non-profit public trust found in 1947 by [REDACTED]. Its mission is the promotion of Indian classical music and musical artists. Since 1961, [REDACTED] has been conducting, a more than 10 days long, annual music festival [REDACTED] where top performer[s] from all over India and the world are invited to perform their genre of music in the presence of a distinguished panel of judges and experts in the field. Next year we are planning to celebrate our Golden Jubilee year by this music festival conducting a 50 day long musical extravaganza.

During this National event, our panel of judges will observe more than 1000 invitees, basically upcoming artists, and from this pool selects around 100 performers as finalists. This group will then be further reviewed, and the absolute best performers from these finalists are awarded with the title “Taal Mani” for best percussionist, [REDACTED] for best Vocalist and instrumentalist, and [REDACTED] for best dancer.

Although [REDACTED] provided background information regarding the history and selection process for the festival and award, [REDACTED] failed to indicate or provide any information reflecting that the award is nationally or internationally recognized for excellence. There is no evidence indicating the national or international recognition for excellence of the award beyond [REDACTED]. Moreover, the petitioner failed to submit any independent, objective evidence demonstrating that “Taal Mani” is a nationally or internationally recognized prize or award for excellence in the field of endeavor. *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).

Regarding item 2, at the initial filing of the petition, the petitioner submitted a letter, dated November 24, 1998, to the petitioner from [REDACTED], who stated:

This is with reference to your audition by the Music Audition Board, held on the basis of your recording of [REDACTED] recorded earlier at this station.

We are glad to inform you that you have been found successful and placed in A (H) grade offering our a fee of [200 rupees] only. It may be added however that broadcast engagement can be offered to you only as and when programme exigencies permit.

It is noted that the document appears to be altered with white-out where the "A" grade is indicated. Regardless, on appeal, counsel asserts:

[REDACTED] established in 1936, is one of the largest radio networks in the world. It is a division of the [REDACTED] [sic], an autonomous arm of the [REDACTED] and [REDACTED] boasts of millions listeners all across India, Southeast, Middleast [sic], African nations, Fiji, England and [REDACTED] its programs in 41 languages ad 146 dialects. [REDACTED] selects musicians for their music programs based on their stature and ability and grades them according to their talent and ability, the highest grade being A. Almost all of the top musicians of India still are or have been graded artists of [REDACTED].

To be graded as an artist of [REDACTED] is a notable national achievement as it offers broadcast time over the radio to national and international audiences and immediate exposure and invitations to perform all over the country and abroad.

Counsel failed to submit any documentary evidence to support her assertions. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). The petitioner failed to demonstrate that the "A" grade status equates to a prize or award, let alone a nationally or internationally recognized prize or award for excellence in the field. Furthermore, the petitioner failed to submit any documentary evidence beyond the awarding entity of All India Radio to reflect that "A" grade is a nationally or internationally recognized prize or award for excellence consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

Regarding item 3, on appeal, the petitioner submitted a screenshot from [REDACTED] reflecting that "[t]his scheme seeks to give assistance to young artists of outstanding promise for advanced training within India in the field of Indian Classical Music, Indian Classical Dance, Theatre, Visual art, Mime Folk, Traditional and Indigenous Arts and Light Classical Music." However, academic study is not a field of endeavor, but training for a future field of endeavor. As such, academic scholarships, student awards, postdoctoral fellowships, and financial aid awards cannot be considered nationally or internationally recognized prizes or awards in the petitioner's field of endeavor. Moreover, financial aid awards in the form of scholarships are reserved for students in need of financial assistance to pay for tuition and not based on excellence in the field. Therefore, the petitioner failed to establish that his scholarship is a nationally or internationally recognized prize or award for excellence in the field. Moreover, the

petitioner failed to submit any documentary evidence beyond the awarding entity to demonstrate that the scholarship is recognized nationally or internationally for excellence in the field of endeavor. Finally, while they may be prestigious, scholarships, fellowships, and other sources of competitive financial support are not nationally or internationally recognized prizes or awards because only other students – not recognized experts in the field – compete for such funding. The AAO cannot conclude that receiving funding for one's academic training constitutes receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor. Such support funding is presented not to established musicians or artists with active professional careers, but rather to students seeking to further their training and experience. Academic awards and honors received while preparing for a vocation fall substantially short of constituting a national or international prize or award for recognition in the field.

Regarding item 4, counsel asserts:

[The petitioner] is also the recipient of a gold medal awarded by the [redacted] cultural arm of [redacted] as the best percussionist in a competition of over 400 contestants.

In support of counsel's assertions, the petitioner submitted a self-serving declaration at the initial filing of the petition and on appeal. The AAO notes that in the petitioner's first declaration, he made no mention of receiving "a gold medal awarded by the [redacted]" It is further noted that the petitioner claimed that his "parents' house was flooded" and his records are no longer available. Moreover, in the petitioner's second declaration submitted on appeal, the petitioner briefly claimed that he was "the winner of a Gold Medal for the best tabla artist in the year 1977." The petitioner failed to indicate the entity, establishment, or organization that issued the medal. Regardless, 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)). Furthermore, the petitioner failed to submit primary evidence of his receipt of the gold medal. 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, the petitioner's self-serving declaration is insufficient to demonstrate that primary evidence and secondary evidence does not exist, as well as evidence of his receipt of the gold medal.

The AAO notes that while not contested on appeal, the record of proceeding reflects that the petitioner submitted a certificate from [redacted] reflecting that the petitioner was recognized for "Best Teacher of the Year" in 2006. However, the petitioner failed to submit any documentary evidence establishing that such recognition equates to a nationally or internationally recognized prize or award for excellence in the field. There is no evidence reflecting that the acknowledgement is recognized beyond [redacted] as a nationally or internationally recognized prize or award for excellence.

As discussed, the plain language of this regulatory criterion specifically requires that the petitioner's prizes or awards be *nationally or internationally recognized* for excellence in his field. In this case, the petitioner failed to demonstrate that his documentary evidence is tantamount to nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

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

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

At the initial filing of the petition, the petitioner did not claim eligibility for this criterion. On May 4, 2010, the director issued a request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) and informed the petitioner that "[t]he record is not supported by evidence of [his] membership in any association in the field that requires outstanding achievements of their members." In addition, the director informed the petitioner of the eligibility requirements and afforded the petitioner the opportunity to submit documentation regarding this criterion. However, in response to the director's request, the petitioner did not claim eligibility for this criterion and did not submit any additional documentation that pertained to this criterion. In the director's decision, he determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel claims:

[The petitioner] could not provide any evidence to claim membership in any professional associations in the field, because there are no such associations in India or in the U.S. or anywhere else that Appellant is aware of, in the field for which he is seeking classification and for which outstanding achievements are required to apply for membership.

Comparable evidence of accomplishments and achievements as authorized by 8 C.F.R. 204.5(h)(4), [the petitioner] submits, includes a series of concerts where [the petitioner] was requested by maestros and experts in the field . . . to accompany them on the table at major festivals, others events and also on concert tours.

* * *

Since no evidence of [the petitioner's] membership in any professional association which requires recognition of outstanding achievements to apply for membership, the Director concluded that [the petitioner] did not satisfy this criterion. This seems to be a circular argument. This criterion is one of those applied to prove extraordinary ability. To require recognition of outstanding achievements (extraordinary ability) to prove extraordinary ability does not lead

to any logical conclusion. This criterion which apparently was designed for scientists and academicians is not applicable to table artists whose achievements do not fit into this pigeon hole. [The petitioner] submits that this [is] one of those "one size fits all" propositions. Other types of comparable evidence such as those presented in the proceeding and subsequent sections should be considered instead.

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

On appeal, the only evidence that was submitted to support the assertions of counsel regarding that "there are no such associations in India or in the U.S. or anywhere else that Appellant is aware of," is the previously mentioned declaration of the petitioner who stated that "there are no professional associations to which one belongs or has to belong in order gain recognition and thus no criteria for admission or application exist." 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). As such, the petitioner failed to demonstrate that the regulation at 8 C.F.R. § 204.5(h)(3)(ii) does not apply to his occupation as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(4).

Moreover, there is no indication that eligibility for visa preference in the petitioner's occupation as a tabla performer and teacher cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, counsel mentions evidence in his brief that specifically relates to five of the ten criteria at the regulation at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Moreover, although the petitioner failed to claim these additional criteria, the AAO finds that a tabla performer and teacher could perform in a leading or critical role pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) and could have commercial successes in the performing arts pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x). Counsel provided no documentation as to why these provisions of the regulation would not be appropriate to the profession of a tabla performer and teacher.

Even if the petitioner established that he was eligible for the provisions of the regulation at 8 C.F.R. § 204.5(h)(4), which he clearly did not, the petitioner failed to establish that performing with other musicians, even noteworthy musicians, is *comparable* to the regulation at 8 C.F.R. § 204.5(h)(3)(ii) that requires “[d]ocumentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.” The regulation at 8 C.F.R. § 204.5(h)(4) is not a provision to simply allow an alien to circumvent the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) when an alien is unable to meet or submit documentary evidence of the criteria. In this case, instead of submitting evidence that is comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), counsel attempts to diminish the plain language of this criterion by claiming that performing with other musicians is comparable to being a member of associations that require outstanding achievements, as judged by recognized national or international experts.

Where an alien is simply unable to meet or submit documentary evidence of three of the criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3), the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. The AAO notes that the petitioner’s performances will be considered under the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v).

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 determined that the petitioner failed to establish eligibility for this criterion. Moreover, the director stated that “[i]n order to meet this criterion, published materials must be primarily about the petitioner, and be printed in professional or major trade publications or other major media.” On appeal, counsel claims:

The regulations contain no such requirement and the Director has not cited any authority for this requirement that the publication **must be primarily** about the petitioner and be **printed** in professional or major trade publications or other major media. The regulations merely require that that [sic] published material be **about the alien** in professional or major trade publications or other major media **relating to the alien’s work** and does not require that it must be primarily about the alien or that the publication has to be printed. The regulations also permit “other major media”. That would include electronic media like the Internet, blogs, twitter, on line availability of newspapers and magazines etc. The living language of the regulations permit other types of media to be considered. [emphasis in original]

Based on the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) that 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 AAO is not persuaded by counsel’s argument that the director imposed an inappropriate restriction on the evidence presented in support of the petition. As the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be “about” the petitioner relating to his work in the field for which classification is sought, the director’s general statement that the material should be “primarily” about the petitioner is not beyond the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, the submission of evidence that simply mentions the petitioner’s name as one of the performers, quotes the petitioner, or is not otherwise about the petitioner fails to equate to published material about the alien relating to his work in the field. Furthermore, the AAO does not find that the director’s use of “primarily” means that the material must be solely or exclusively about the alien relating to his work. For example, an article that discusses multiple individuals regarding their work, in which one of those individuals is the petitioner, would generally meet the elements of this criterion. An article that is not about the petitioner does not meet this regulatory criterion. *See, e.g., 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). In the case here, which will be discussed in depth below, the petitioner submitted material that merely mentioned him as a performer or teacher but was not material about him relating to his work. It is insufficient to establish eligibility for this criterion based on any material that simply lists, mentions, or indicates the petitioner’s name without material that is about him relating to his work. The AAO is not persuaded that anytime an alien’s name is mentioned in the media the alien would automatically qualify for the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

Moreover, while the director indicated that the material must be “printed in professional or major trade publications or other major media,” the AAO is not persuaded that the director’s reference to “printed” reflected the director’s determination that articles posted on the Internet did not qualify for this criterion. Further, in today’s world, many newspapers and publications, regardless of size and distribution, post at least some of their stories on the Internet. To ignore this reality would be to render the “major media” requirement meaningless. However, the AAO is not persuaded that international accessibility by itself is a realistic indicator of whether a given website is “major media.” As the AAO is also not persuaded that all articles posted on Internet are automatically considered major media, the petitioner must demonstrate that the websites are major media regardless of the status of the printed publications.

On appeal, counsel claims the following documentation reflects the petitioner’s eligibility for this criterion:

1. An article entitled, [REDACTED]
2. An article entitled, [REDACTED]’ unidentified date, by [REDACTED]

3. A blurb entitled, [REDACTED]
4. An article entitled, [REDACTED]
5. An article entitled, [REDACTED] unidentified [REDACTED]
6. Screenshots entitled, [REDACTED] unidentified date, unidentified author, [REDACTED] and [REDACTED]
7. An article entitled, [REDACTED] unidentified author, [REDACTED]

Regarding item 1, the article reflects published material about the petitioner relating to his work. Regarding item 2, although counsel claimed on appeal that the article was published on December 4, 1990, a review of the document fails to indicate the date of publication. The AAO must look to the plain language of the documents executed by the petitioner and not to subsequent statements of counsel. *Matter of Izummi*, 22 I&N Dec. 169, 185 (Comm'r 1998). Nonetheless, the article is about a recital in which the petitioner is mentioned one time as playing the tabla. The article is not published material 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 *1, *7 (upholding a finding that articles about a show are not about the actor). Furthermore, at the initial filing of the petition or in response to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the petitioner failed to submit any documentary evidence regarding *Indian Express*. On appeal, counsel claims that it is "the third largest circulating daily national and international newspaper in India with a circulation of over 300,000 copies nationwide." Counsel failed to submit any documentation to support its assertions. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. at 188-89 n.6. Instead, counsel referred to a website from *Wikipedia* without submitting any documentation from the website. Regardless, as there are no assurances about the reliability of the content from this open, user-edited Internet site, the AAO will not assign weight to

information from *Wikipedia*. See *Laamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008).³

Regarding item 3, the blurb is about a lecture and demonstration in Tampa, Florida. While the petitioner is mentioned as one of the demonstrators, the blurb is not published material *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 *1, *7. Again, the petitioner failed to submit any documentary evidence regarding *India Today International* at the initial filing of the petition or in response to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8). On appeal, counsel claimed that *India Today International* "exceeds 1.1 million copies each week with a readership of over 15 million." Once again, counsel referred to the publication's website without submitting any documentation to support its assertions. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. at 188-89 n.6. Nevertheless, the petitioner failed to submit any independent, objective evidence regarding *India Today International*, so as to demonstrate that is a professional or major trade publication or other major media. 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).

Regarding items 4 and 5, the articles are about the [REDACTED] concerts rather than about the petitioner relating to his work. While the articles mention the petitioner a few times as being the teacher to students who performed at the concerts, the fact remains that the articles are not published material 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 *1, *7. The AAO notes that regarding item 5, the petitioner failed to include the author of the article as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Nonetheless, on appeal, counsel claimed that the "India Herald is a major Houston community newspaper published weekly and has a circulation of over 6,000 in Houston and more in the rest of the state." The unsupported statements of counsel on appeal or in a motion are not evidence

³ See also the online content from http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on February 14, 2012, and copy incorporated into the record of proceeding 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.

and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. at 188-89 n.6. Regardless, the AAO is not persuaded that a circulation rate of 6,000 per week is demonstrative of major media.

Regarding item 6, on appeal, counsel claimed:

An article dated [REDACTED] titled [REDACTED] played some incredible tabla!" authored by [REDACTED] newsmagazine, printed and published in New Orleans, Louisiana. (Exhibit 89 to the initial petition. A courtesy copy supplied.) The article also appeared on the Internet as a blog. It describes the table accompaniment of [REDACTED] and the dexterous interplay between the tabla player and the lead artist he was accompanying.

A review of the record of proceeding, specifically Exhibit 89, fails to reflect that the petitioner submitted the article at the initial filing of the petition. In fact, Exhibit 89 is a CD cover for *The Front Row Vol. 3* in which the petitioner is credited with performing on track number 13. On appeal, the "courtesy copy" is screenshots entitled [REDACTED] that contains a picture of the petitioner with a caption stating [REDACTED] played some incredible tabla!" from [REDACTED]. In fact, the screenshots are about a festival at Southern University of New Orleans, Louisiana that mentioned the petitioner one time as playing the tabla. Regardless, there is no evidence to support counsel's claims that the screenshot was published in [REDACTED] as well as any evidence to demonstrate that [REDACTED] or [REDACTED] is a professional or major trade publication or other major media. The AAO notes that the petitioner failed to include the date and author of the screenshot as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

Regarding item 7, the article was published after the filing of the petition. Eligibility must be established at the time of filing. Therefore, the AAO will not consider this item as evidence to establish the petitioner's eligibility. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Notwithstanding, the article is about a concert at the [REDACTED] rather than published material about the petitioner relating to his work. Once again, the petitioner failed to establish that [REDACTED] is a professional or major trade publication or other major media.

The AAO notes that the record of proceeding contains several newspaper articles and screenshots that were not contested on appeal by counsel. A review of the documentary evidence fails to reflect any published material about the petitioner relating to his work in professional or major trade publications or other major media consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The articles and screenshots briefly mention the

petitioner as one of several performers in concerts, festivals, and cultural events but do not reflect published material *about* the petitioner relating to his work. In addition, the petitioner failed to submit any documentary evidence to establish that the publications, such as [REDACTED] [REDACTED] are professional or major trade publications or other major media.

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.

The director determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel claims:

[The petitioner] has supervised and judged the work of his students in performances before large audiences, as a faculty member at the [REDACTED] [REDACTED], as [REDACTED] at the [REDACTED] in Tampa, Florida and [REDACTED] at the [REDACTED] for Indian Performing Arts] where he is currently employed. He is invited by local schools and other institutions to judge music and dance competitions.

He has also been invited to judge senior vocal and percussion students in music competitions nationwide, while on the faculty of the University of [REDACTED]. Students at the university came not only from different corners of the country but also from all over the world.

At the several music festivals he was invited to perform, he was also invited to judge the performance of young, upcoming artists for the award of prizes, sometimes as an individual judge and at other times as a member of a panel of judges.

In support of counsel's assertions, counsel refers to the previously mentioned declarations made by the petitioner. However, the petitioner failed to submit any documentation to support his assertions in his declarations. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Notwithstanding, the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires evidence that the petitioner has served as "a judge of the work of others." Serving as a teacher as part of one's job does not equate to participation as a judge of the work of others in the field. The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified at 8 C.F.R. § 204.5(h)(3)(iv). The regulation cannot be read to include every informal instance of teaching in a classroom setting. Furthermore, while counsel claimed that the petitioner was

invited to judge student competitions and music festivals, 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 a judge without documentary evidence of actually judging is insufficient to meet the plain language of the regulation.

For the reasons discussed above, the petitioner failed to demonstrate that he has served as a judge of the work of others in the same or an allied field of specification for which classification is sought consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

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.

In the director's decision, he determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." Here, the evidence must be reviewed to see whether it rises to the level of original artistic-related contributions "of major significance in the field." 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).

A review of the record of proceeding reflects that the petitioner claims eligibility for this criterion based on recommendation letters. While the recommendation letters praise the petitioner for his work, they fail to indicate that his contributions are of *major significance* in the field. The letters provide only general statements without offering any specific information to establish how the petitioner's work has been of major significance. For instance, ██████████ stated that the petitioner's "extraordinary ability in developing new techniques or embellishing old techniques developed by his guru . . . is truly astounding." However, ██████████ failed to identify the "new techniques" and how they are of major significance in the field. ██████████ failed to discuss the impact or influence of the petitioner's work on the field, so as to demonstrate original contributions of major significance in the field.

Moreover, the majority of the petitioner's recommendation letters briefly discussed the petitioner's "rare," "versatile," and "diverse" talents and experience. For example, ██████████ stated that the petitioner's experience in forms of Indian classical music "has given him a diverse skill set which places him apart from other regular Tabla players." Further, ██████████ stated that the petitioner "is one of the very, very few percussionists who can play the broad-head tabla." In addition, ██████████ stated that the petitioner's "talents are versatile." However, none of the letters indicated how the petitioner's skills, experience, or personal traits are original contributions of major significance to the field. Merely having a diverse skill set is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the petitioner has already used those unique skills to impact the field at a

significant level in an original way. Furthermore, assuming the petitioner's 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 labor certification process. See *Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm'r 1998).

The petitioner also submitted letters from [REDACTED] who made general statements regarding the petitioner's contributions to the Houston, Texas area such as "[p]rior to [the petitioner] moving to Houston, there was little opportunity to listen to and especially learn about Indian music, and now we have access to his exceptional performances." While the petitioner has demonstrated that he has performed and taught students, there is no documentary evidence to reflect the significance of the petitioner's contributions beyond the Houston area, let alone that his contributions have been of major significance in the field.

While those familiar with the petitioner's work generally describe it as "invaluable," "irreplaceable," and "extraordinary," there is insufficient documentary evidence demonstrating that the petitioner's work is of major significance. This regulatory criterion not only requires the petitioner to make original contributions, the regulatory criterion also requires those contributions to be of major significance. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the petitioner's contributions have already influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. See *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.). The lack of supporting evidence gives the AAO no basis to gauge the significance of the petitioner's present contributions.

Further, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. See *id.* at 795; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008). Thus, the content of the writers' 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 of original contributions of major significance.

The record of proceeding also reflects that the petitioner submitted numerous concerts, programs, and other documentation reflecting that the petitioner performed and accompanied other artists at various concerts, festivals, and events. However, as the petitioner is a tabla player, it is expected that the petitioner will perform on stage or in front of an audience. However, merely performing, even if the performance is considered noteworthy, does not equate to original contributions of major significance in the field. The petitioner failed to submit any evidence showing that the

petitioner's performances have considerably influenced the field or have otherwise significantly impacted the field. Again, while the petitioner's performances demonstrate that his work may be original, the AAO is not persuaded that such performances are sufficient evidence establishing that they have been of major significance to the field as a whole rather than limited to the events or engagements in which they were performed.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of *major significance in the field* [emphasis added]." Without additional, specific evidence showing that the petitioner's work has been unusually influential, widely applied throughout his field, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that he meets this criterion.

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

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

The director determined that the petitioner failed to establish eligibility for this criterion. 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 tabla player. When he is performing or playing his tabla 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. The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *7 (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). The AAO notes that the petitioner's performances were considered under the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v).

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 determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel claims the petitioner's eligibility for this criterion based on the following documentation:

1. 2009 Form 1040 along with Schedule C (Profit Loss From Business) reflecting a net profit of \$66,325;
2. 2008 Form 1040 along with Schedule C reflecting a net profit of \$65,287;
3. A letter, dated May 6, 2010, from [REDACTED] who stated:

The average remuneration for an accompanying percussionist varies from \$200 to \$400 per show. Since [the petitioner] is an extraordinary artist possessing rare talent and drawing large audiences for his concerts, he is paid \$1000 to \$1200 per concert, which is 3 to 4 times what is typically paid to other musicians;

4. A letter, dated February 12, 2007, from [REDACTED] who praised the petitioner for his work as a tabla player and teacher;
5. The previously discussed letter from [REDACTED] and
6. Screenshots from [REDACTED] regarding the Occupational Outlook Handbook (OOH) reflecting that the highest ten percent for singers and musicians earned more than \$59.92 per hour, and the highest ten percent for salaried music directors and composers earned more than \$107,280.

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].” Regarding items 1 and 2, a review of the Schedule Cs reflect that the petitioner operates a music school. However, the petitioner is seeking classification as an alien of extraordinary ability as a tabla performer and teacher rather than as a proprietor. *See Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002) (upholding a finding that competitive athletics and coaching are not within the same area of expertise). Regardless, the petitioner failed to submit any documentary evidence that shows his earnings as a proprietor is high when compared to other music school proprietors.

Regarding items 3 – 5, counsel claimed:

All three letters from three different organizations who employ tabla players for their performances, state that the average remuneration they offer and have offered to tabla players is in the range of \$200 to \$400, and that [the petitioner] routinely receives upwards of \$1000 to \$1200 per concert, which is substantially

higher than the going rate for Indian tabla players all over the U.S., which averages \$200-400. Such statistics are, however, are not in the public domain and are not freely available. Music and concert presenters generally keep the salaries paid to their musicians strictly confidential because it gives them an advantage in the salary negotiation process.

Contrary to counsel's assertions, all three letters do not reflect the average remuneration for tabla players. As demonstrated above, items 4 and 5 make no reference to average remuneration for tabla players, nor do they indicate the remuneration that has been commanded by the petitioner. Moreover, counsel failed to submit any documentation to support his assertions regarding the non-availability of musicians' salaries from music and concert presenters. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. at 188-89 n.6.

Furthermore, the letter from [REDACTED] is not primary evidence, such as evidence reflecting payment, paystubs, or income tax documentation, of his salary or remuneration for services as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(8). Moreover, while [REDACTED] indicated that the petitioner is paid \$1000 to \$1200 per concert, the petitioner's income tax documentation does not support [REDACTED] letter. According to the petitioner's 2008 and 2009 income tax documentation, the petitioner's yearly income was based entirely as a proprietor of a music school. The petitioner's income tax documentation does not reflect any wages earned as a performer at the time of filing of the petition. In addition, the AAO is not persuaded that the petitioner's submission of a sole letter that only refers to a single organization's payment for performances demonstrates that the petitioner has commanded a significantly high remuneration for services when compared to others in his field as a whole.

The AAO notes that the record of proceeding contains a job offer letter, dated January 5, 2007, from [REDACTED] who indicated that the petitioner would be paid \$35,000 per year. Notwithstanding that the petitioner failed to submit any documentary evidence demonstrating that he is employed by [REDACTED] and has earned the offered salary, the \$35,000 salary is substantially smaller than the top ten percent of salaries from the OOH.

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 that he has commanded a high salary or other significantly high remuneration for services compared to others in the field.

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 meet the plain language 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 AAO's preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating the AAO's final merits determination, the AAO must look at the totality of the evidence to determine the petitioner's eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner has garnered some locally recognized awards, has had his name mentioned in articles as being a participant at various local and regional festivals and concerts, and has taught students in the Tampa, Florida and Houston, Texas area. However, the personal accomplishments of the petitioner fall far short of establishing that he "is one of that small percentage who have risen to the very top of the field of endeavor" and that he "has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." See 8 C.F.R. § 204.5(h)(2), section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

The regulation at 8 C.F.R. § 204.5(h)(3) provides that "[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." The petitioner's evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2)

The AAO cannot ignore that the statute requires the petitioner to submit "extensive documentation" of the petitioner's sustained national or international acclaim. See section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). In this case, counsel makes several assertions on appeal without any supporting documentary evidence. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. at 188-89, n.6. Moreover, counsel makes numerous references to the petitioner's self-serving declarations without submitting any documentation to support the petitioner's claims. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Furthermore, the petitioner failed to submit primary evidence for several of the criteria as required pursuant to the regulation at 8 C.F.R. § 103.2(b)(8). In addition, it must be emphasized that the favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim. Again, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. at 795. However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from individuals, especially when they are colleagues of the petitioner without any prior knowledge of the petitioner's work, 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. at 500, n.2. The AAO is not persuaded that such evidence equates to "extensive documentation" and is demonstrative of this highly restrictive classification. The truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) citing *Matter of E-M-* 20 I&N Dec. 77, 80 (Comm'r 1989).

The evidence of record falls short of demonstrating the petitioner's sustained national or international acclaim as a tabla player or teacher. 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 that his or her achievements have been recognized in the field of expertise." While the petitioner submitted documentation demonstrating that he has participated in numerous concerts and has been briefly mentioned in publications, the documentary evidence is not consistent with or indicative of sustained national or international acclaim.

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. In *Matter of Racine*, 1995 WL 153319 at *1, *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 [redacted] ability with that of all the hockey players at all levels of play; but rather [redacted] 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.

The court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable. Likewise, it does not follow that the petitioner who has not offered any evidence that distinguishes him from others in his field, 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."

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 at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. In this case, the petitioner has not established that 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. Intent to Continue to Work in the Area of Expertise in the United States

The director determined that the petitioner failed to establish his intent to continue to work in his area of expertise as a tabla performer and teacher. On appeal, counsel claims:

[The petitioner] respectfully submits that he has, by clear evidence submitted, that he is a tabla player and teacher and has continued in that field for more than thirty years and has not worked in any other field. He continues to work in that field and will continue to work in that field. He is currently employed as the Director of Percussion on a permanent basis with the [REDACTED] and has plans to continue in that capacity and, if and when his petitioner for immigrant visa petition is granted, plans to establish his own school of tabla and Indian percussion based on the age-old guru-sishya parampara geared not only towards students who live with and learn from the guru on a full time basis but also to part-time students who are employed in other fields to make a living.

The regulation at 8 C.F.R. § 204.5(h)(5) states:

Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

While the petition was filed on April 16, 2010, the petitioner submitted the previously discussed job offer letter, dated January 5, 2007, offering employment at [REDACTED] as the "director of percussion." However, as discussed under the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix), the petition has been operating a music school as a proprietor since at

least from 2008. *See Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002) (upholding a finding that competitive athletics and coaching are not within the same area of expertise). Moreover, while the job letter indicates that the petitioner will earn \$35,000 per year, the petitioner's profit from his music school is almost twice that amount. Furthermore, the petitioner failed to submit an updated job letter evidencing that he intends to pursue employment with [REDACTED] or that he is actually employed by [REDACTED]. Finally, the record of proceeding fails to support counsel's assertions on appeal. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. at 188-89, n.6. There is no evidence indicating that the petitioner is currently employed by [REDACTED] and the record reflects that the petitioner is already operating his own music school rather than he "plans to establish his own school of tabla and Indian percussion [emphasis added]" as claimed by counsel. Again, operating a music school is not in the petitioner's field of expertise.

For the reasons discussed above, the petitioner failed to establish that he will continue in his area of expertise in the United States under section 203(b)(1)(A)(ii) of the Act and the regulation at 8 C.F.R. § 204.5(h)(5).

V. Conclusion

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