

Application related to  
[redacted]  
[redacted]

**PUBLIC COPY**

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]

B2

DATE: JUN 15 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:  
[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 with the field office or service center that originally decided your case by filing a 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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on December 20, 2010, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of sustained national or international acclaim.

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

On appeal, counsel claims that the petitioner received a one-time achievement and meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

## I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101<sup>st</sup> 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.<sup>1</sup> 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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<sup>1</sup> 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. One-Time Achievement

At the time of the original filing of the petition and in response to the director's notice of intent to deny the petition pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the petitioner failed to claim eligibility based on a one-time achievement. However, on appeal, counsel claims:

[The petitioner] was nominated for a Latin Grammy, as the best artist in his field, only nominees who have achieved a level of achievement such as [the petitioner] are nominated for a Grammy, furthermore he worked for Juanes an artist who has won the most Grammy of any other artist, Juanes, is an international singer, from Colombia. [The petitioner] was hired for the remix of the Camisa Negra, a [G]rammy winner song, from Juanes. This alone is a one-time achievement as only accomplished individuals are selected to work together with Juanes or are selected for a Grammy nomination. These two events are sufficient to classify [the petitioner] as an alien of "extraordinary ability". His achievement has awarded him recognition to be nominated for a Latin Grammy and selected among thousands to produce a remix for Juanes.

Regarding the purported Latin Grammy nomination, a review of the record of proceeding reflects that the petitioner submitted a forwarded self-asserting email that stated:

Hey bro,

Good news. I was inscribed for best alternative album for the Latin Grammy.

Peace,

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The original email, dated August 3, 2009, was from Rafael Sanchez. However, the email is in a foreign language, and the petitioner failed to submit a full and certified translation as required pursuant to the regulation at 8 C.F.R. § 103.2(b) that provides:

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

The petitioner failed to submit any other any documentary evidence demonstrating his Latin Grammy nomination. 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, petitioner failed to submit any documentary evidence demonstrating that primary evidence and secondary evidence do not exist or cannot be obtained. Regardless, a self-asserting email is insufficient evidence reflecting the petitioner's purported Latin Grammy nomination. 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)).

Regarding the petitioner's collaboration with Juanes, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3) requires that "[s]uch evidence shall include evidence of a one-time achievement (that is, a *major, international[ly] recognized award*) [emphasis added]." Given Congress' intent to restrict this category to "that small percentage of individuals who have risen to the very top of their field of endeavor," the regulation permitting eligibility based on a one-time achievement must be interpreted very narrowly, with only a small handful of awards qualifying as major, internationally recognized awards. See H.R. Rep. 101-723, 59 (Sept. 19, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 1990 WL 200418 at \*6739. Given that the House Report specifically cited to the Nobel Prize as an example of a one-time achievement, examples of one-time awards which enjoy major, international recognition may include the Pulitzer Prize, the Academy Award, and (most relevant for athletics) an Olympic Medal. The regulation is consistent with this legislative history, stating that a one-time achievement must be a *major, internationally recognized award*. 8 C.F.R. § 204.5(h)(3). The selection of Nobel Laureates, the example provided by Congress, is reported in the top media internationally regardless of the nationality of the awardees, is a familiar name to the public at large and includes a large cash prize.

While an internationally recognized award could conceivably constitute a one-time achievement without meeting all of those elements, it is clear from the example provided by Congress that the award must be global in scope and internationally recognized in the alien's field as one of the top awards in that field. While the petitioner's collaboration with Juanes may be a personal achievement for the petitioner, it clearly does not equate to a one-time achievement defined at the regulation at 8 C.F.R. § 204.5(h)(3) as a major, internationally recognized *award*. Counsel failed to demonstrate that remixing a song is equivalent to an award, let alone a major, internationally recognized award. Similarly, even if the petitioner submitted sufficient documentary evidence reflecting a Latin Grammy nomination, which he clearly did not, counsel failed to establish that being *nominated* for a Latin Grammy equates to being *awarded* a Latin Grammy. Moreover, counsel failed to establish that receiving a Latin Grammy is comparable to a major, internationally recognized award. For these reasons, counsel failed to demonstrate that the petitioner received a one-time achievement pursuant to the regulation at 8 C.F.R. § 204.5(h)(3).

## B. Evidentiary Criteria<sup>2</sup>

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

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

In the director's decision, he determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel claims that articles from *d-mode* and [www.residentadvisor.net](http://www.residentadvisor.net) meet this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought." In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.<sup>3</sup> Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that "[s]uch evidence shall include the title, date, and author of the material, and any necessary translation."

Regarding *d-mode*, the petitioner failed to include the title and author of the material. Moreover, the petitioner provided a partially certified translation for the beginning of the material but submitted an uncertified handwritten translation for a caption accompanying a photograph of the petitioner and failed to submit a translation for the rest of the material. Again, the regulation at 8 C.F.R. § 103.2(b)(3) requires that "[a]ny document containing foreign language submitted to USCIS shall be accompanied by a *full* English language translation which the translator has *certified* as complete and accurate." Nonetheless, it appears that the material simply lists at least 16 disc jockeys from a survey for the 2004 Winter Music Conference (WMC). The petitioner is merely pictured with a caption that indicates his name and age. There is no published material about the petitioner relating to his work consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In other words, the material does not reflect journalist coverage that discusses the petitioner relating to his work. Furthermore, the petitioner failed to submit any documentary evidence demonstrating that *d-mode* is a professional or major trade publication or other major media.

Regarding [www.residentadvisor.net](http://www.residentadvisor.net), the website reflects an interview with the petitioner and Oliver Berger whose answers are simply recorded in the submitted material. The author does not discuss the petitioner, and the material does not qualify as published material about the petitioner relating to his work. In addition, the petitioner submitted a screenshot from [www.residentadvisor.net](http://www.residentadvisor.net) indicating that it is "[o]ne of the world's largest independent electronic online music magazines." However, the petitioner failed to submit independent, objective evidence reflecting that

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

www.residentadvisor.net is major media. See *Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9<sup>th</sup> 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). Furthermore, the AAO is not persuaded that articles posted on the Internet from a printed publication or from an organization are automatically considered major media. The petitioner failed to submit impartial documentary evidence demonstrating that the website is major media. In today's world, many 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 discussed above, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought." In this case, the petitioner's documentary evidence fails to reflect published material about him relating to his work in 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 original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.*

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)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." In compliance with *Kazarian*, the AAO must focus on the plain language of the regulatory criteria. 596 F.3d at 1121. Here, the evidence must be reviewed to see whether it rises to the level of original artistic-related contributions "of major significance in the field." 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 (3<sup>rd</sup> Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2<sup>nd</sup> Cir. Sep 15, 2003).

On appeal, counsel claims the petitioner's eligibility for this criterion based on the previously discussed Latin Grammy nomination. Specifically, counsel claimed:

It seems unlikely that a person who has not achieved and/or contributed to a major significance in the field be nominated to such a prestige award. Only those who have succeeded in the music field are nominated. Only the top in each field can compete for this award, especially when it comes to the Grammy's.

Once again, the petitioner failed to submit primary evidence of his purported Latin Grammy nomination pursuant to the regulation at 8 C.F.R. § 103.2(b)(2). Instead, the petitioner submitted a self-serving and non-translated email. 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)). 8 C.F.R. § 103.2(b)(3). Even if there was sufficient documentary evidence submitted reflecting that the petitioner's Latin Grammy nomination, which there clearly was not, counsel failed to submit any documentary evidence to show how the petitioner's purported nomination has impacted or influenced the field in a significant manner. The AAO is not persuaded by counsel's claim that every Latin Grammy nomination equates to a contribution of major significance in the field. 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).

Counsel further claims the petitioner's eligibility for this criterion based on his collaboration with Juanes for the remix of the song *La Camisa Negra*. Specifically, counsel claims:

It seems unlikely that such a famous artist as Juanes and a company as Universal Music, would ask a person with no recognition and artistic significance to be in charge of a remix project for his successful song "Camisa Negra". In addition, no major record company would hire someone for a remix without having reviewed other remix talents and artist[s]. [The petitioner] was hired for the remix version because of his talent and because he is the best remix artist.

The petitioner submitted a contract, dated April 29, 2005, reflecting an agreement with Universal Music to remix the song, *La Camisa Negra*, for Juanes. Furthermore, the petitioner submitted background information regarding Juanes, including that he is a 17-time Latin Grammy winner. In the director's decision, he stated that the petitioner failed to demonstrate that the petitioner's "remixed version of the song was the version that made it to the #1 spot on the Billboard chart listing." On appeal, the petitioner submitted a website article entitled, "Juanes Rocks With Calamaro, Campino on New CD" that stated:

"Me Enamora" will be available to mobile providers and digital retail simultaneously. The song is the first new material from Juanes since 2004's "Mi Sangre" album, which has sold more than 659,000 copies in the United States, according to Nielson SoundScan.

That set's single "La Camisa Negra," became a No. 1 hit in Germany, France, Italy, Spain, Austria and Switzerland.

The article refers to Juanes' original version of *La Camisa Negra* rather than Juanes' remixed version. Moreover, the petitioner also submitted documentary evidence from *Latin Billboard* reflecting that *La Camisa Negra* charted number one on "Hot Latin Songs" and "Latin Airplay" for the week of May 7, 2005. Again, as the petitioner signed the contract to remix *La Camisa Negra* with Universal Music on April 29, 2005, the documentary evidence reflects the charting of Juanes' original version rather than the remixed version. The petitioner failed to demonstrate that the remixed version charted number one, let alone enjoyed any form of success. While collaborating with a Latin Grammy winner is a noteworthy personal achievement for the petitioner, it does not demonstrate an original contribution of major significance in the field. The petitioner failed to

establish that his contractual obligation of remixing a song has impacted or influenced his field, so as to reflect an original contribution of major significance.

Moreover, a review of the record of proceeding reflects that the petitioner submitted several recommendation letters that were dated in 2005. It is noted that the petition was filed on October 22, 2010. In this case, 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, the petitioner submitted a letter from John Westley, Executive Director at Womb/Krib TV Broadcasting, who stated that the petitioner "has been a resident DJ performing weekly on our global broadcasts networks" and "is one of our most requested performers and a valuable part of our artist roster." However, Mr. Westley failed to indicate how the petitioner's contributions as a disc jockey can be considered of major significance in the field as a whole rather than limited to Womb/Krib TV. There is no evidence beyond Womb/Krib TV to reflect the significant contributions of the petitioner to the field.

Similarly, the petitioner submitted a letter from Karen Lempert, General Manager of the Whitelaw Hotel and Lounge (WHL), who recognized the petitioner's "outstanding performances" and "is an essential element to the continuing success of our weekly parties." Again, Ms. Lempert made no indication of the petitioner's original contributions of major significance of the field as a whole. Instead, Ms. Lempert limited her opinion to the petitioner's performance and role at the hotel and lounge. There is no evidence indicating that the petitioner's contributions at the Whitelaw Hotel and Lounge have somehow impacted or influenced the field as a whole, so as to demonstrate original contributions of major significance in the field.

The petitioner also submitted letters from Rodrigo Vieira, Universal Music, and Laura Mojia Cruz, Estefan Enterprises, Inc., who summarized the petitioner's education, skills, abilities, and productions. However, they made no indication how the petitioner's personal skills and abilities are original contributions of major significance in the field. Moreover, 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 certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm'r 1998). Without evidence reflecting that the petitioner has made original contributions of major significance in the field, the submission of letters that praise the petitioner's personal characteristics is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

While those familiar with the petitioner's work generally describe it as "outstanding," "valuable," and "successful," 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. Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115

(9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the AAO's conclusion that the "letters from physics professors attesting to [the petitioner's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. The letters considered above primarily contain bare assertions of the petitioner's status in the field without specifically identifying contributions, explaining how they are original and providing specific examples of how those contributions rise to a level consistent with major significance in 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.

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.*

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 based on his participation as a disc jockey at the Winter Music Festival. 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 remix artist and disc jockey. When he is performing before an audience as a disc jockey, he is not displaying his work in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing his work, he is not displaying his work. In addition, to the extent that the petitioner is a performing artist, it is inherent to his occupation to perform. Not every performance is an artistic exhibition designed to

showcase the performer's art. If the AAO was to accept that a performance artist like the petitioner meets this criterion, it would render the regulatory requirement that the petitioner meet at least three criteria meaningless as this criterion would effectively be collapsed into the criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

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 (D. Nev. Sept. 8, 2008) (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).

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

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

The director determined that the petitioner failed to establish eligibility for this criterion. On appeal, counsel claims the petitioner's eligibility for this criterion based on his participation at festivals, night clubs, and similarly-related venues. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a *leading or critical role* for organizations or establishments that have a distinguished reputation [emphasis added]." In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment.

A review of the record of proceeding reflects that the petitioner submitted promotional material from a few venues such as WMC, the Ultra Music Festival (UMC), and Penthouse 180°. However, the documentary evidence fails to indicate that the petitioner performed in a leading or critical role. Instead, the promotional material simply lists the petitioner as one of numerous performers. For instance, at the 2003 UMC, there were over 200 performers. The petitioner failed to submit any documentary evidence that distinguished the petitioner's role from the other performers, so as to demonstrate that he performed in a leading or critical role. In fact, the petitioner is listed at the end of the promotional material that is not indicative of a leading or critical role as opposed to the performers that were highlighted at the beginning of the material. Similarly, the petitioner submitted a flyer from the 2004 WMC in which the petitioner is listed as one of over 200 performers. Again, the flyer merely lists the petitioner as a performer and does not differentiate the petitioner from the other performers that may reflect a leading or critical role. Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires that the leading or critical role be "for organizations or establishments." However, the petitioner failed to establish that conferences and festivals equate to organizations or establishments.

The petitioner also submitted a letter from Sam Lambert, Director of Mean-Dream, who briefly stated that the petitioner joined his agency in 2006 as his exclusive Colombian disc jockey and has performed in various venues. However, Mr. Lambert failed to provide sufficient information demonstrating that the petitioner's role is leading or critical. The submission of a letter that simply indicates the job title and generally claims that the petitioner performs in a leading or critical role is insufficient to establish eligibility for this criterion. In other words, it cannot be determined from the petitioner's job title alone that his role is leading or critical. It appears that the petitioner performs in a subordinate role when compared to the role of Mr. Lambert. Furthermore, the petitioner submitted screenshots from Mean-Dream's website that provided background information but do not reflect the distinguished reputation of Mean-Dream. Nonetheless, the petitioner failed to submit independent, objective evidence demonstrating the distinguished reputation of Mean-Dream. *See Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL at 604888 (concluding that the AAO did not have to rely on self-promotional material).

Similarly, the petitioner submitted the previously discussed letter from Ms. Lempert who indicated that the petitioner "is an essential element" to the weekly parties at WHL. Again, Ms. Lempert's brief statement does not reflect that the petitioner's role was leading or critical to WHL as whole. There is no supporting evidence to demonstrate that the petitioner's weekly "resident DJ" role is leading or critical. Moreover, the petitioner failed to submit any documentary evidence establishing that WHL has a distinguished reputation pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." The burden is on the petitioner to establish that he meets every element of this criterion. Without documentary evidence demonstrating that the petitioner has performed in a leading or critical role for organizations or establishments that have a distinguished reputation, the AAO cannot conclude that the petitioner meets this criterion.

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

*Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.*

In the director's decision, he determined that the petitioner failed to establish eligibility for this criterion. In counsel's brief, he did not contest the findings of the director for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

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

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

The director determined that the petitioner failed to establish eligibility for this criterion. Specifically, the director stated:

As evidence, the petitioner submitted chart track listings of songs remixed by the [petitioner]. Yet, the mere existence of recorded materials cannot solely meet the criterion. Further, the mere fact that the [petitioner] has CDs or album recordings is not evidence of commercial success. The petitioner must establish commercial success through documentary evidence or record/album sales, concert tour receipts, etc. The petitioner did not provide any of this information as evidence.

The deficiency with the evidence submitted was noted in the Notice of Intent to Deny letter. The petitioner's response contained actual CD's produced and remixed by the [petitioner], along with music download listings from various websites (i.e. Amazon, ODJtunes, junorecords, digital-tunes, etc.). However, the additional evidence that was submitted did not address the criterion as requested. Evidence of record/album sales, concert tour receipts, etc. was not submitted.

On appeal, counsel claims:

[The petitioner] has presented commercial success, he has reached several top ten listing in several charts and is [sic] most internet sites to download, he is in amazon.com and most important in several sites that host top DJ's and remix artists, indicating that he has reached commercial success in his field. Once again we highlight the fact that as a DJ and Remix artist he will not appear in the usual sites, and billboard listings, furthermore he is featured in night clubs, music festivals and radio.

The AAO agrees with the director's original decision. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires "[e]vidence of commercial successes in the performing arts, as shown by *box office receipts* or record, cassette, compact disk, or video *sales* [emphasis added]." In other words, this regulatory criterion requires evidence of commercial successes in the form of "box office receipts" or "sales." However, the record of proceeding fails to reflect that the petitioner submitted any documentary evidence regarding the box office receipts of his performances or the sales of his compact disks. For example, there is no evidence showing that the petitioner's performances consistently drew record crowds, were regular sell-out performances, or resulted in greater audiences than other similar performances that did not feature him.

As the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) specifically requires "box office receipts" and "sales," the submission of documentary evidence simply reflecting performance venues is insufficient to meet this regulatory criterion.

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

### B. Summary

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

### III. O-1 NONIMMIGRANT

The AAO notes that the petitioner was previously approved for O-1 nonimmigrant status. However, while 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. 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 has approved a nonimmigrant petition on behalf of the alien, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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

### IV. CONCLUSION

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

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.<sup>4</sup> Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent 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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<sup>4</sup> 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).