

(b)(6)

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



U.S. Citizenship  
and Immigration  
Services

DATE: APR 30 2013

Office: TEXAS SERVICE CENTER FILE:

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected, or in the alternative 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 professional violinist.<sup>1</sup> The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of her sustained national or international acclaim.

Form I-140, Immigrant Petition for Alien Worker, was electronically submitted to U.S. Citizenship and Immigration Services on September 22, 2011. Part 1 of the Form I-140 identifies [REDACTED] as the petitioner. In Part 8 of Form I-140, under "Petitioner's Signature," counsel signed and certified the petition electronically. Form I-140 was not signed by the petitioner, as required by regulation, but instead by the petitioner's attorney. The only signatures on the form are those of counsel. The AAO notes that the regulations do not permit an individual who is not the petitioner to sign Form I-140.

The regulation at 8 C.F.R. § 103.2(a) provides:

*Filing. (1) Preparation and submission.* Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. . . .

*(2) Signature.* An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on a benefit request that is being filed with the USCIS is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

Form I-140 Instructions state:

If the petitioner is an individual, then that individual, or that individual's legal guardian if he or she is incompetent or under 14 years of age, must personally sign the petition. If the petitioner is a corporation or other legal entity, only an individual who is an officer or employee of the entity who has knowledge of the facts alleged in the petition, and who has authority to sign documents on behalf of the entity, may sign the petition.

---

<sup>1</sup> According to her Form I-94, Arrival/Departure Record, the petitioner was last admitted to the United States on January 9, 2010 as an F-1 nonimmigrant student.

There is no regulatory provision that waives the signature requirement for a petitioner to designate an attorney or accredited representative to sign the petition on behalf of the petitioner. In this instance, the petition has not been properly filed because the petitioner did not sign the petition. Pursuant to the regulation at 8 C.F.R. § 103.2(a)(7)(i), a benefit request which is not signed must be rejected. In addition, a benefit request which is rejected will not retain a filing date. 8 C.F.R. § 103.2(a)(7)(iii). While the service center did not reject the petition, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, \*1, \*3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The regulation at 8 C.F.R. § 103.2(a)(7)(i) is binding on USCIS employees in their administration of the Act, and USCIS employees do not have the authority to ignore it. An agency is not entitled to deference if it fails to follow its own regulations. *See, e.g. Morton v. Ruiz*, 415 U.S. 199 (1974) (Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures); *U.S. v. Heffner*, 420 F.2d 809, (CA 4 1969) (Government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down); *Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C.,1979) (An agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (An agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

In the present matter, counsel signed Form I-140 petition both on behalf of the petitioner and as the preparer. The signature line on Form I-140 for the petitioner provides that the petitioner is certifying, “under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct.” To be valid, 28 U.S.C. § 1746 requires that declarations be “subscribed” by the declarant “as true under penalty of perjury.” *Id.* In pertinent part, 18 U.S.C. § 1621, which governs liability for perjury under federal law, mandates that: “Whoever in any declaration under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true is guilty of perjury.” 18 U.S.C. § 1621.

The probative force of a declaration subscribed under penalty of perjury derives from the signature of the declarant; one may not sign a declaration “for” another. Without the petitioner’s actual signature as declarant, the declaration is completely robbed of any evidentiary force. *See In re Rivera*, 342 B.R. 435, 459 (D. N.J. 2006); *Blumberg v. Gates*, No. CV 00-05607, 2003 WL 22002739 (C.D.Cal.) (not selected for publication).

The AAO notes that Part 8 of Form I-140 specifically requires the “Petitioner’s Signature” and states: “*Read the information on penalties in the instructions before completing this section. If someone helped you prepare this petition, he or she must complete Part 9.*” [Emphasis added.] An entirely separate line exists on Form I-140 for the signature of the preparer (Part 9) declaring that the form is “based on all information of which [the preparer has] knowledge.” Thus, Form I-140 petition acknowledges that a preparer who is not the petitioner cannot attest to the contents of the petition and supporting evidence. Rather, the preparer may only declare that the information provided is all the information of which he or she has knowledge.

Because the underlying petition was not properly filed with the petitioner's signature as required by the regulation at 8 C.F.R. § 103.2(a)(2), further action on the petition cannot be pursued, and the appeal must be rejected.

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

On appeal, counsel asserts that the petitioner meets at least three of the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3) and that the petitioner submitted comparable evidence of her eligibility pursuant to 8 C.F.R. § 204.5(h)(4). The AAO acknowledges that the standard of proof is preponderance of the evidence, as noted by counsel on appeal. The "preponderance of the evidence" standard, however, does not relieve the petitioner from satisfying the basic evidentiary requirements required by the statute and regulations. Therefore, if the statute and regulations require specific evidence, the petitioner is required to submit that evidence. 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)(2) and (3). The most recent precedent decision related to the preponderance of the evidence standard of proof is *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). This decision, and this standard, focuses on the factual nature of a claim; not whether a claim satisfies a regulatory requirement. *Id.* at 376. The preponderance of the evidence standard does not preclude USCIS from evaluating the evidence. The truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* The *Chawathe* decision also stated:

[T]he "preponderance of the evidence" standard does not relieve the petitioner or applicant from satisfying the basic evidentiary requirements set by regulation. There are no regulations relating to a corporation's eligibility as an "American firm or corporation" under section 316(b) of the Act. Had the regulations required specific evidence, the applicant would have been required to submit that evidence. *Cf.* 8 C.F.R. § 204.5(h)(3) (2006) (requiring that specific objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability).

25 I&N Dec. at 375 n.7. The final determination of whether the evidence meets the plain language requirements of a regulation lies with USCIS, not with counsel. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988) (finding that the appropriate entity to determine eligibility is USCIS in a scenario whereby an advisory opinion or statement is not consistent with other information that is part of the record). Ultimately, the truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. at 376 citing *Matter of E-M-*

20 I&N Dec. 77, 80 (Comm'r 1989). In the present matter, the documentation submitted by the petitioner fails to demonstrate by a preponderance of the evidence that she meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3) or that she has submitted qualifying comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4).

For the reasons discussed below, the AAO will uphold the director's decision.

## I. LAW

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

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

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

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

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

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

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101<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*, 580 F.3d 1030 (9<sup>th</sup> Cir. 2009) *aff'd in part* 596 F.3d 1115 (9<sup>th</sup> 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>2</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.*

## II. ANALYSIS

### A. Evidentiary Criteria<sup>3</sup>

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

The petitioner submitted the following:

1. A certificate from the [REDACTED], where the petitioner earned her Bachelor of Music degree; stating that she achieved "a perfect grade point average of 4.0 while completing at least twelve semester hours" and "was entered on the President's List for the Fall 2005 Semester";
2. A January 10, 2006 letter from the President of [REDACTED] stating that the petitioner "achieved a perfect grade point average for the 2005 fall semester" and that her name was "placed on the President's List";
3. A May 25, 2006 letter from the Associate Dean for Academic Affairs at [REDACTED] stating that the petitioner was "named to the Dean's Honor Roll of Scholars at the [REDACTED]. Only students who have earned a 3.5 grade point average on a course load of 12 or more hours during the past semester earn the distinction of the Dean's Honor Roll";

<sup>2</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).

<sup>3</sup> On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

4. A July 12, 2004 letter from the Dean of the College of Music at [REDACTED] congratulating the petitioner for her "achievement as a 3.5 honor roll student for the Spring 2004 semester";
5. A June 24, 2003 letter from the Dean of the College of Music at [REDACTED] congratulating the petitioner for her "achievement as a 3.5 honor roll student for the Spring 2003 semester";
6. A letter from the Coordinator, Learning Success Programs, Volunteer Tutor Program, [REDACTED] Learning Center, congratulating the petitioner for "being an outstanding student at the [REDACTED] based on her "3.5, or better, semester grade point average for Spring 2003" and inviting the petitioner "to participate in the Volunteer Tutor Program";
7. A Certificate of Achievement from [REDACTED] stating that the petitioner received the "Outstanding Undergraduate Student in Strings Award" on April 21, 2006;
8. An April 7, 2006 letter from the Co-Chairs of the [REDACTED] Honors and Recognition Committee stating that the petitioner would receive the "Outstanding Undergraduate Student in Strings Award" to be presented at the [REDACTED] Honors Day Convocation on April 21, 2006;
9. An April 8, 2004 article in the [REDACTED] (a local newspaper published in [REDACTED] Texas where [REDACTED] is located) stating that the petitioner won "second place" in the [REDACTED] "annual concerto contest" and would perform with five other student finalists in [REDACTED] College of Music;
10. A certificate issued by the President of [REDACTED] stating: "This is to certify that [the petitioner] has been named the [REDACTED] for 2007 in recognition of outstanding achievement as a Music Major at this Institution";
11. A May 13, 2007 article in the "[REDACTED]" section of [REDACTED] stating: "[REDACTED] College of Music recently named student violinist [the petitioner] the 2007-08 [REDACTED]. The award is a \$4,500 scholarship. The winner is nominated and selected by [REDACTED] music faculty and receives the award from the [REDACTED], which awards annual scholarships, grants and funds for the furthering of music education . . . .";
12. A letter from the [REDACTED] Associate Dean for Admissions and Scholarship Services offering the petitioner a "violin scholarship in the amount of \$4500 for the 2007-2008 academic year," which was "awarded on the basis of . . . talent and desire to participate in the College of Music Programs at [REDACTED]";
13. Two May 2007 [REDACTED] news releases stating: "[REDACTED] College of Music has named [the petitioner] . . . the 2007-2008 [REDACTED] and the recipient of the . . . [REDACTED]. The award is presented annually to a student entering his or her senior year who has shown extraordinary musical and academic accomplishments";
14. Information about the [REDACTED] from the website of the National Endowment for the Arts stating that the [REDACTED] was the recipient of a [REDACTED] National Medal of Arts and that the [REDACTED] provides approximately \$2 million in awards annually to help *needy music students*, educators, and music institutions" [emphasis added];

15. A July 7, 2006 letter from the Dean of the College of Music at [REDACTED] congratulating the petitioner as being among the group of [REDACTED] students that received a scholarship from [REDACTED];
16. A letter from the [REDACTED] Associate Dean for Admissions and Scholarship Services offering the petitioner a “[REDACTED] scholarship in the amount of \$2000 for the 2005-2006 academic year,” which was “awarded on the basis of . . . talent and desire to participate in the College of Music Programs at the [REDACTED]”;
17. An April 25, 2002 news release issued by [REDACTED] announcing that “[REDACTED] of Dallas have given the [REDACTED] College of Music \$1.2 million to fund student scholarships and faculty excellence”;
18. A concert schedule (April 10, 2010) from the [REDACTED] School of Music Chamber Music Festival [REDACTED] (where the petitioner earned her Master of Music degree) reflecting that the petitioner performed at her school’s free concert along with numerous other students;
19. A letter from the Director of Development, [REDACTED] [REDACTED] stating that the petitioner received a [REDACTED] Scholarship and information from the website of the [REDACTED] of Texas stating that the foundation provides a scholarship in violin at [REDACTED] School of Music;
20. A February 25, 2011 letter from Dr. [REDACTED] Director of the Center for Chamber Music Studies at [REDACTED] stating that the petitioner received a [REDACTED] and information from the website of the [REDACTED] stating that the foundation “supports classical music study for highly talented youth” and offers students “musical training and mentorship” through a variety of programs such as a violin master class;
21. A February 25, 2011 letter from Dr. [REDACTED] stating that the petitioner was “invited” to compete in the [REDACTED] as a member of the [REDACTED] Trio and information about the [REDACTED] “for non-professional musicians”;
22. A February 25, 2011 letter from Dr. [REDACTED] stating that the petitioner was “invited” to compete in the [REDACTED] as a member of the [REDACTED] Trio and information about the [REDACTED] stating that the association organizes “an annual competition for young chamber music performers,” that “the average age of the ensemble members must be under 28,” and that participants are “non-professional performers”;
23. Certificates from the [REDACTED] Chamber Music Competition stating that the petitioner performed in the competition as a member of the [REDACTED] Trio in May 2006 and as a member of the [REDACTED] Trio in May 2008;
24. Information from the website of the [REDACTED] Chamber Music Association stating that “the [REDACTED] is the largest chamber music competition in the nation and the world. Each year an average of 125 ensembles . . . enter in either the wind or string categories of three to six performers. [REDACTED] is the only national chamber music competition with both senior divisions (ages 18-35) and a junior division (18 and younger)”;

25. A March 7, 2006 letter from the Student Affairs Manager, [REDACTED] inviting the petitioner "to participate in the Instrumental Program (violin-[REDACTED]) at the [REDACTED]'s 2006 Summer School and Festival" and requesting the petitioner to "submit a non-refundable registration fee of \$150.00 . . . and refundable security deposit of \$150.00";
26. A "Certificate of Completion" from [REDACTED] stating that the petitioner "successfully completed studies in the 2006 Summer School and Festival Violin Program hosted June 17, 2006 through August 12, 2006" and information about the academy from its website;
27. A "Certificate of Participation" from Chamber Music [REDACTED] stating that the petitioner was the "1<sup>st</sup> Place Winner in the College Division" of the Second Annual [REDACTED] Chamber Music Competition on April 3, 2005;
28. A May 1, 2005 article in the [REDACTED] stating that the petitioner and two other [REDACTED] student members of the [REDACTED] Trio won the [REDACTED] Chamber Music Competition; and
29. Information from the website of [REDACTED], a nonprofit arts organization offering classical music through performances and musical education programs in [REDACTED] announcing the high school and college winners of the "[REDACTED] Chamber Music Competition" in April 2004.

With regard to items 1 – 9, the petitioner submitted a May 7, 2011 letter from [REDACTED], Associate Professor of Violin, [REDACTED] stating:

[The petitioner] came to further her violin skills under my tutelage at the [REDACTED]. She has immediately won all top awards at the College of Music. She received a first prize at the [REDACTED] Concerto Competition, where she selected as the only violinist from the two hundred of total number of applicants.

Ms. [REDACTED] asserts that the petitioner received "a first prize" at the [REDACTED] Concerto Competition, but the April 8, 2004 article in the [REDACTED] (item 9) states that the petitioner won "second place" in the [REDACTED] Concerto Competition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Regardless, the petitioner's student honors from UNT (items 1 – 9) reflect institutional recognition from her undergraduate alma mater rather than nationally or internationally recognized prizes or awards for excellence in the music field.

Regarding items 10 – 14, the submitted documentation fails to establish that the petitioner's [REDACTED] is a nationally or internationally recognized prize or award for excellence in the music field. For instance, the AAO notes that the petitioner's certificate (item 10) was issued by the President of [REDACTED] "in recognition of outstanding achievement as a Music Major at this

Institution” rather than by an officer of the [REDACTED] for excellence in the field of endeavor. In addition, the May 13, 2007 article in the [REDACTED] states: “The [REDACTED] College of Music recently named student violinist [the petitioner] the 2007-08 [REDACTED] . . . The winner is nominated and selected by [REDACTED] music faculty . . . .” In addition, the May 7, 2011 letter from Ms. [REDACTED] states: “The award is presented annually to a student entering their senior year who has shown extraordinary musical and academic accomplishments. . . . The winner is nominated and selected by the [REDACTED] music faculty . . . .” The AAO cannot conclude that being “selected by [REDACTED] music faculty” and garnering media coverage limited to a local newspaper published in [REDACTED] (where [REDACTED] is located) are indicative of national or international recognition in the petitioner’s field of endeavor. While the information submitted by the petitioner from the National Endowment for the Arts’ website (item 14) shows that the [REDACTED] is the recipient of a nationally recognized award, the [REDACTED] National Medal of Arts, there is no documentary evidence showing that the petitioner’s specific scholarship enjoys a comparable level of recognition or otherwise equates to a nationally recognized award for excellence in the field. The petitioner’s [REDACTED] reflects recognition conferred by her undergraduate alma mater rather a nationally or internationally recognized prize or award for excellence the field of endeavor. There is no documentary evidence demonstrating that the petitioner’s specific award was recognized beyond her alma mater, the locality of [REDACTED] and the [REDACTED] and therefore commensurate with a “nationally or internationally recognized” prize or award for excellence in the field.

In regard to items 15 – 17, the petitioner’s [REDACTED] Scholarship reflects institutional recognition from her undergraduate alma mater based on her “talent and desire to participate in the College of Music Programs at the [REDACTED]” There is no documentary evidence showing that the petitioner’s [REDACTED] Scholarship is a nationally or internationally recognized prize or award for excellence in the music field.

With regard to item 18, the [REDACTED] School of Music Chamber Music Festival “[REDACTED]” concert schedule, the petitioner has not established that performing in a free concert at her alma mater along with numerous other students from the [REDACTED] School of Music is a nationally or internationally recognized prize or award for excellence in the field of endeavor.

Regarding items 19 and 20, there is no documentary evidence showing that the petitioner’s [REDACTED] Scholarship and [REDACTED] Award are nationally or internationally recognized prizes or awards for excellence in the music field.

In regard to items 21 – 24, while the petitioner participated in the [REDACTED] Chamber Music Competition “for non-professional musicians,” the [REDACTED] Chamber Music Association’s “annual competition for young chamber music performers,” and twice entered the [REDACTED] Chamber Music Competition for those age 35 and under, there is no evidence showing that she won “nationally or internationally recognized prizes or awards” [emphasis added] at the competitions. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires evidence of the petitioner’s receipt of “prizes or awards,” rather than simply certificates or a letter acknowledging her participation as a competitor. For instance, the information submitted by the

petitioner indicates that the [REDACTED] Chamber Music Association awarded a \$5,000 grand prize, two \$2,000 first prizes, and \$500 honorable mentions. In addition, the submitted information states that the [REDACTED] Competition awards “three prizes totaling \$15,500.” There is no documentary evidence showing that the petitioner received any such awards in the [REDACTED], and Fischhoff competitions, and that her specific awards were nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

With regard to items 25 and 26, the petitioner’s admission to [REDACTED] constitutes her admission to a training program for musicians rather than a nationally or internationally recognized prize or award for excellence in the field. There is no documentary evidence showing that the petitioner’s music fellowship for “studies in the [REDACTED] and Festival Violin Program” is a nationally or internationally recognized prize or award in the field of endeavor. Moreover, the AAO notes that competition for the petitioner’s fellowship was limited to those seeking to further their musical education and training. Experienced violinists already employed in the field do not seek or compete for such training programs.

Regarding items 27 – 29, the submitted documentation fails to demonstrate that the petitioner’s 1<sup>st</sup> Place award in the “College Division” of the [REDACTED] Chamber Music Competition is a nationally or internationally recognized prize or award for excellence in the music field. The petitioner submitted a November 23, 2012 letter from Dr. [REDACTED] Regents Professor of Piano, [REDACTED] College of Music, stating:

[The petitioner] was . . . a winner of the [REDACTED] Chamber Music Competition, which draws worldwide participation from musician contestants and is adjudicated by renowned performing artists chosen by the board of Chamber Music International. Classical music competitions are by their nature international in scope unless specifically targeted to residents of specific states. It is not unusual anymore to have young artists fly from China or Korea to the U.S. for competitions. Chamber Music International provided [the petitioner] with important support and exposure as she started her chamber music career.

A music competition may be open to students from throughout a particular country or countries, but this factor alone is not adequate to establish that a specific prize from the competition is “nationally or internationally recognized.” The May 1, 2005 article in [REDACTED] (item 28) and the information submitted from Chamber Music International [REDACTED] (item 29) fail to demonstrate that the petitioner’s College Division award is nationally or internationally recognized in her field of endeavor. Moreover, regarding the information from Chamber Music International’s own website, USCIS need not rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO, *aff’d* 317 Fed. Appx. 680 (C.A.9) (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).

In regard to items 1 – 29, the petitioner failed to submit documentary evidence of the national or international *recognition* of her particular prizes and awards. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires the petitioner’s receipt of more than one prize or

award and that the prizes and awards be nationally or internationally *recognized* in the field of endeavor. It is the petitioner's burden to establish every element of this criterion. There is no documentary evidence demonstrating that the petitioner's specific prizes and awards were recognized beyond the presenting organizations, her university mentors and a local newspaper, and therefore commensurate with nationally or internationally recognized prizes for excellence in the field. Accordingly, the petitioner has not established that she meets this regulatory 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.*

The petitioner initially submitted her curriculum vitae, biography, Bachelor of Music degree from [REDACTED], Master of Music degree from [REDACTED] and an article in [REDACTED]; the official student newspaper at [REDACTED] entitled "[REDACTED] School of Music ranks high." Earning one's undergraduate and graduate degrees from educational institutions does not equate to holding "membership in associations in the field." None of the preceding documentation constitutes evidence of the petitioner'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 response to the director's request for evidence, counsel asserts that the petitioner has submitted comparable evidence for this regulatory criterion. Counsel states:

There is not necessarily one organization to which only elite violinists belong. "Membership" in the class of elite violinists is earned by performing extraordinarily well – so well that the others recognize one's talent and request that you lead the orchestra, accompany a pop or country music star in concert or are invited to play at a prestigious, internationally-known festival. The analogous entities to "associations" for musicians then would be playing in a highly ranked-orchestra, performing a masterclass with a world-renowned violinist or being asked to debut and [sic] entirely new composition in a major city.

On appeal, counsel further states:

What is "comparable," and is used in this field to measure extraordinary ability, is a musician's success in landing a position in an orchestra, a teaching position at a prestigious music school or placing in the top three at an important competition or festival. Additionally, the record does include the criteria under which and applicant for a festival or orchestra position must qualify.

Counsel asserts that "placing in the top three at an important competition or festival," "landing a position in an orchestra," serving in "a teaching position at a prestigious music school," accompanying "a pop or country music star in concert," and various other forms of public

performance are comparable evidence for the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii). As the preceding examples presented by counsel pertain directly to other regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(i), (viii) and (x), counsel's assertions are not persuasive. 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 her occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i) – (x).

Counsel asserts that "there are not formal associations like one would find among scientists, researchers or business professionals. Many of the 'associations' in the common use of the word are unions or organizations that merely require payment of dues for membership. Clearly, this is not the type of 'membership' that meets the requirement of this criterion." Without documentary evidence to support these claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As such, the petitioner has failed to demonstrate that the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ii) does not apply to her occupation as required by the plain language of regulation at 8 C.F.R. § 204.5(h)(4). Moreover, the AAO points to the example of a Voting member of the Recording Academy as an indication that there are associations in the music field that do not "merely require payment of dues for membership" and that 8 C.F.R. § 204.5(h)(3)(ii) may be applicable to musicians.<sup>4</sup>

In addition, there is no evidence that eligibility for visa preference in the petitioner's occupation as a violinist cannot be established by the ten categories of evidence specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, counsel asserts in her appellate brief that the petitioner

---

<sup>4</sup> "Celebrating music through the GRAMMY® Awards for more than 50 years, The Recording Academy is the premier organization for honoring achievements in the recording arts, and supporting the music community. Each year, our Voting members decide who receives a GRAMMY, the most prestigious and respected award in music." Voting members are admitted based on factors such as documented sales/music chart information, reviews of performances by print or online magazines, or being nominated for a GRAMMY® Award within the previous five years. See <http://www.grammy365.com/about> and <https://www.grammy365.com/join/membership-types>, accessed on April 8, 2013, copy incorporated into the record of proceeding.

“submitted evidence in five categories.” An inability to meet a criterion 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 petitioner has not established that the published material criterion at 8 C.F.R. § 204.5(h)(3)(iii), the judge of the work of others criterion at 8 C.F.R. § 204.5(h)(3)(iv), the authorship of scholarly articles criterion at 8 C.F.R. § 204.5(h)(3)(vi), the high salary criterion at 8 C.F.R. § 204.5(h)(3)(ix), and the commercial successes in the performing arts criterion at 8 C.F.R. § 204.5(h)(3)(x) are not readily applicable to violinists. The petitioner provides no evidence as to why these provisions of the regulation would not be appropriate to the occupation of violinist.

Even if the petitioner demonstrated that she was eligible for the provisions of the regulation at 8 C.F.R. § 204.5(h)(4), which she clearly did not, the petitioner failed to establish that performing with other musicians, even noteworthy musicians in a concert, festival, competition or masterclass, 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 is 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. Rather than submitting evidence that is comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), counsel’s examples that performing with other musicians in a university setting, supporting role, instructional environment, or age-restricted competition limited to young musicians are comparable to being a member of associations that require outstanding achievements, as judged by recognized national or international experts appear to be less restrictive than the plain language of the regulation. 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.

In light of the above, the petitioner has not established that she meets this regulatory 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 regulatory 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.” [Emphasis added.] Here, the evidence must be reviewed to see whether it rises to the level of original scholarly or artistic 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).

The petitioner submitted letters of support praising her talents as a musician and discussing her work.

states:

[The petitioner] came to further her violin skills under my tutelage at the . . . She was appointed the concertmaster of the Symphony Orchestra and Chamber Orchestra, performed in numerous orchestras and recitals. She quickly became one of the most sought-after performers in the

\* \* \*

As passionate orchestra player and chamber musician, [the petitioner's] appearances include performances with many great and world-renowned artists, such as Sarah Chang, a Gramophone "Young Artist of the Year" award, Three-time Grammy Award winner Edgar Meyer, Grammy Award winner Andre Watts, Peter Salaff (seven Grammy award nominations, and Grammy award winner, and Petronel Malan (Three-times Grammy award Nominee), to name a few.

[The petitioner] excels in every genre of music, performing for numerous most phenomenal artists who choose her over any competition. LeAnn Rimes invited her to perform at NFL Dallas Cowboys game at Irving, TX in 2002, which was televised by CBS (nearly 60,000 spectators). In 2005, she was re-hired by the three times GRAMMY nominee top selling western artist Dave Alexander to perform at another NFL Dallas Cowboys game - this time with Sheryl Crow, to sell-out crowds, and the televised audience of more than 60,000. Performance with world-class artist Willie Nelson in 2007 at Nokia Theatre in Grand Prairie, TX, drew more than 6,000 spectators. [The petitioner] was invited to play with the Fort Worth Symphony - one of the best orchestras in Texas and in the country.

\* \* \*

I know that [the petitioner] qualifies as a performing artist of extraordinary ability. She is a comprehensive artist-teacher and versatile performer in many genres. She is a most engaging soloist, fantastic organizer, and very rare human being – extraordinarily intelligent and yet completely accessible and down to earth.

asserts that the petitioner "qualifies as a performing artist of extraordinary ability," but merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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*, No. 95 civ 10729, 1997 WL 188942 at \*1, \*5 (S.D.N.Y.). Ms. also comments on the petitioner's performances in a university setting at and the petitioner's supporting roles as part of an ensemble for award-winning and well-known artists, but Ms. does not provide specific examples of how the petitioner's original work has influenced the field at a level indicative of contributions of "major significance." The AAO notes that having a diverse or unique skill set of music skills is not a scholarly or artistic contribution of major significance in and of itself.

Rather, the record must be supported by evidence that the petitioner has already used her unique skills to impact the field at a significant level in an original way. Furthermore, assuming the petitioner's violin 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 Dep't. of Transp.*, 22 I&N Dec. 215, 221 (Comm'r 1998).

Regarding the concerts and compact disc recordings performed by the petitioner (such as songs on the album [redacted] released by the indie rock band [redacted]), there is no documentary evidence showing that they equate to original contributions of major significance in the field. The AAO notes that the regulations include a separate criterion for "commercial successes in the performing arts" at 8 C.F.R. § 204.5(h)(3)(x).<sup>5</sup> Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for commercial successes in the performing arts and original contributions of major significance, USCIS clearly does not view these criteria as being interchangeable. To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria. While Ms. [redacted] notes the caliber of the musicians with whom the petitioner has shared the stage as a part of their supporting ensemble, Ms. [redacted] does not provide specific examples of how the petitioner's musical accomplishments have impacted the field in the same manner as those of Sarah Chang, Edgar Meyer, Andre Watts, Peter Salaff, or Petronel Malan, the influential artists specifically mentioned by Ms. [redacted] or of how the petitioner's works were otherwise majorly significant to the field. For example, there is no documentary evidence showing the extent of the petitioner's influence on other musicians in the field or that the field has somehow changed as a result of her original work, so as to demonstrate the major significance of her original contributions.

Dr. [redacted] states:

I was one of [the petitioner's] teachers at the [redacted] I have known and advised her for approximately eight years . . . . The [redacted] College of Music has an enrollment of more than 1,600 students from all over the world. Being one of the best students at [redacted] has established her worth. [The petitioner] was the first performer chosen for the Center for Chamber Music Studies and in many ways she was the person this program was designed to serve. The Center is made up of performers picked by the faculty to form a string quartet, a piano trio, a wind quartet and a brass quintet.

\* \* \*

---

<sup>5</sup> As the petitioner did not claim to meet the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(x) at the time of filing, in response to the director's request for evidence, or on appeal, the AAO makes no specific determination on this ground; only that the petitioner has failed to establish eligibility pursuant to 8 C.F.R. § 204.5(h)(3)(x).

When she arrived in this country she blossomed under the guidance of Ms. [REDACTED] her violin teacher. Most of her college career took place at the [REDACTED], two universities with sterling reputations. She was placed in the piano trio which members named [REDACTED] Trio. This group won first prize in the Chamber Music International competition and were invited to participate in the prestigious [REDACTED] and [REDACTED] Competitions. The trio was invited and toured the Czech Republic. While at the [REDACTED] she was the concertmaster and on two occasions the soloist with the orchestra. Her classroom studies never waned and she graduated cum laude.

\* \* \*

Her college experience was remarkable being listed on the President's List for Academic Excellence. . . . Among her performances during this period were invitations to perform in the [REDACTED] Festival, the [REDACTED] Music Festival and the [REDACTED] USA Festival.

Dr. [REDACTED] comments on the petitioner's music training at [REDACTED], but he fails to explain how the petitioner's work was both original and majorly significant in the field. In addition, while Dr. [REDACTED] also notes that the petitioner performed at the [REDACTED] Festival, the [REDACTED] Music Festival, and the [REDACTED] Festival, he does not provide specific examples of how the petitioner's performances have substantially impacted the field or otherwise constitute original contributions of "major significance" in the field.

[REDACTED], Professor of Music, [REDACTED] School of Music, [REDACTED] states:

I attract the finest violinists in the U.S. to my studio at [REDACTED] [The petitioner] earned her M.M. with me and is in the top 5% of recent graduates from our school and my studio. She is a fine violinist, an excellent ensemble player, and a truly gifted teacher, who has excellent rapport with her young students.

\* \* \*

Former students from my studio teach in colleges and universities as well as major schools of music (Juilliard, Yale), perform in major symphony orchestras (Boston, Chicago), perform in famous chamber music ensembles (Juilliard Quartet, Enso Quartet) and may be found performing and teaching music all over the world in public and private schools and in their own teaching studios.

[REDACTED] asserts that the petitioner "is in the top 5% of recent graduates from the [REDACTED] School of Music," but he does not specify how the petitioner's work was original or equates to original scholarly or artistic contributions of major significance in the field. In addition, while Mr. [REDACTED] states that the petitioner is "a truly gifted teacher, who has excellent rapport with her young students," he does not provide specific examples of how the petitioner's original teaching methodologies have influenced the field or otherwise qualify as original contributions

of major significance in the field. Mr. [REDACTED] notes that former students from his studio teach at “major schools of music (Juilliard, Yale), perform in major symphony orchestras (Boston, Chicago),” and “perform in famous chamber music ensembles (Juilliard Quartet, Enso Quartet),” but there is no indication that the petitioner has achieved a similar level of accomplishment subsequent to her graduation from [REDACTED] in May 2010.

[REDACTED] Artistic Director of the [REDACTED] Music Festival ([REDACTED]), states:

I have worked with [the petitioner] first-hand, first in an educational setting at the [REDACTED] as a faculty instructor and subsequently as a colleague who has seen her growth and development into a first-class artist. The program in which [the petitioner] participated was the 2005 [REDACTED] Young Artists Program, a six-week, full scholarship program of chamber music study open to only 14 string players. We receive hundreds of applications to fill these positions, so admission to the program is highly competitive to begin with. Once here, it was clear that [the petitioner] stood out among her excellent peers. Audiences returned week in week out to hear [the petitioner] perform on our Young Artists concert series, making it clear that their particular interest was in her extraordinary performing ability.

Secondly, I am a string player and conductor who works with the best musicians in the world for decades now. Among these and members of the Juilliard, Guarneri and Tokyo string quartets, The Shanghai and Jupiter quartets, violinist Jaime Laredo and cellist Sharon Robinson and a long list of others of similar, outstanding international reputation.

After leaving [REDACTED], [the petitioner] has kept in touch and I have seen nothing but praise and awards coming her way, including the highly coveted [REDACTED] Scholarship Award bestowed upon her during her time at the [REDACTED]. I cannot emphasize enough how difficult it is to attain such honors, and to my mind clearly and obviously demonstrates that [the petitioner] is a violinist of extraordinary ability.

Mr. [REDACTED] states that the petitioner participated was the 2005 [REDACTED] Young Artists Program of chamber music study and performed in the [REDACTED]’s “Young Artists concert series,” but there is no documentary evidence showing that the petitioner’s music has drawn unusually large audiences, generated substantial record sales, influenced the work of other professional violinists, or otherwise equates to original contributions of “major significance” in the field. Mr. [REDACTED] also comments on the “praise and awards” received by the petitioner, but he fails to explain how the petitioner’s work was both original and majorly significant in the music field. The AAO notes that the awards submitted by the petitioner (such as her [REDACTED] Scholarship) have already been addressed under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i). Once again, it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for awards and original contributions of major significance, USCIS clearly does not view the two as being interchangeable. To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria.

Professor Emeritus, states:

[The petitioner] is one of the best violinists I have had the pleasure of having in my orchestra. She is a wonderful player and a truly marvelous colleague. This is not a matter of having another musician enter the country to get a position in a symphony, but a special player of the highest quality that is so rare. Winning competitions is not the sole requisite of a truly great talent, but it is often an important step in making of a career. She has done that more than once. We need her. This is a gem among gems, and I am hoping that she will be allowed to remain here in this country.

Mr. praises the petitioner's talent as a violinist, but he fails to explain how the petitioner's original work was majorly significant to the field. Vague, solicited, letters from colleagues that do not specifically identify original contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian*, 580 F.3d at 1036. In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." *Kazarian*, 596 F.3d at 1122. The record lacks documentary evidence showing that the petitioner's work rises to the level of original artistic contributions of major significance in the field.

Director of String Chamber Music at the Institute of Music, states:

I taught [the petitioner] the violin at the in 2006. For 65 years the has trained the next generation of great classical musicians. Potential students apply internationally. Out of 1500 applicants, only 135 are accepted. Former students occupy important positions in major orchestras and chamber music groups throughout the USA. As one can see, it is a real honor to be chosen to participate in this festival.

I was very impressed with [the petitioner's] extraordinary talent as a violinist and as a musician. She performs with an outstanding technique, and at an artistic level that is head and shoulders above her peers. I also had the joy of performing a chamber work with her, and she did an incredible job.

Mr. praises the petitioner for her extraordinary talent and outstanding technique, but he fails to provide specific examples regarding how the petitioner's original work has significantly impacted the field or otherwise equates to original artistic contributions of major significance in the field. It is not enough to be a skilled violinist and to have others attest to one's talent. An alien must have demonstrably impacted his or her field in an original way in order to meet this regulatory criterion. As previously discussed, assuming the petitioner's musical skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221.

Orchestral Project Manager, Symphony Orchestra, states:

[The petitioner] has been employed with the Symphony Orchestra, Inc. in as a substitute musician in various performances since September 2012.

\* \* \*

More than 400 musicians, staff and volunteers make up the Symphony Orchestra, Symphony Chorus and the Symphony league, operating educational programs, organizing community engagement events and performing concerts.

\* \* \*

[The petitioner] has been playing with the Symphony since September 2012 and is always available to perform when the Symphony needs additional violinists. [The petitioner] performed with the in several very difficult concerts with Grammy Award winning artists, Booker T. Jones and Yo-Yo Ma, for which she had little time to prepare. The difference in the sound of the violin section was noticeable to her fellow musicians, Music Director, and audience, who all encouraged the administration to engage her for future performances. There are very few musicians in the Mid-South who possess [the petitioner's] extraordinary abilities.

The petitioner's work "as a substitute musician" for the "when the Symphony needs additional violinists" post-dates the September 22, 2011 filing of the petition. Eligibility must be established at the time of filing. 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. Accordingly, the AAO will not consider the petitioner's occasional performances with the MSO in 2012 in this proceeding.

Dr. states:

While [the petitioner] was a student at the College of Music I was privileged to coach the Trio of which she was a key member. We worked closely together on a weekly basis for two years; since that time, I have followed her career path closely and with pride. . . . Admission to the College of Music is achieved only through a rigorous audition process. Not everyone is invited to audition; and approximately 50% of those who do audition are not accepted.

\* \* \*

[The petitioner] is an extraordinary asset to the musical community in the United States.... Not only is she a superb violinist with an unusually broad range of concert experiences, from symphony orchestra member to chamber musician, to solo artist, but also she is a deeply gifted and committed budding music educator. In addition to her very real accomplishments in the strictly classical arena, she has taken the time to be trained and certified as a Texas Teacher as well as a Suzuki educator. This strikes me as particularly important as the education of future young musicians is vitally important, not only to the survival of the arts in this country, but also to the building of a well-rounded and cultivated population of music lovers.

Dr. [REDACTED] states that the petitioner completed a rigorous audition process to gain admission to [REDACTED] and that the petitioner performed as a member of the [REDACTED] Trio, but Dr. [REDACTED] fails to provide specific examples of how the petitioner's music was majorly significant to the field. While Dr. [REDACTED] describes the petitioner as a "budding music educator" who "has taken the time to be trained and certified as a Texas Teacher as well as a Suzuki educator," Dr. [REDACTED] does not explain how the petitioner's original teaching methodologies have influenced the field of music education or otherwise constitute contributions of major significance in the field. For instance, there is no documentary evidence showing the adoption of the petitioner's original methods of instruction by various music schools or universities, or that her work is otherwise recognized as majorly significant in the field.

Dr. [REDACTED] Professor of Viola and Chamber Music, [REDACTED] School of Music, [REDACTED] [REDACTED], asserts that the petitioner's "admission to [REDACTED] School of Music carries an enormous weight" based on the school's stature. Professor [REDACTED] also comments on the petitioner's exceptional ability, artistry, broad musical knowledge, and musical prowess as a violinist. However, he fails to explain how the petitioner's work was both original and majorly significant in the field. Once again, assuming the petitioner's musical skills and educational qualifications are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221.

The opinions of the petitioner's references are not without weight and have been considered above. The AAO notes the above letters are all from the petitioner's music instructors, educators, and supervisors. While such letters are important in providing details about the petitioner's music training and activities, they cannot by themselves establish the impact of the petitioner's work in the field beyond her immediate circle of colleagues. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the references' statements and how they became aware of the petitioner's

reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a professional violinist who has made original contributions of major significance in the field. Without additional, specific evidence showing that the petitioner's original work has been unusually influential, has substantially impacted her field, or has otherwise risen to the level of original contributions of major significance, the AAO cannot conclude that she meets this regulatory criterion.

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

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. The petitioner submitted documentary evidence of her various music performances as evidence for this criterion. Neither the petitioner nor counsel has explained how music performances equate to visual art exhibits. For instance, the petitioner's work as one of multiple violinists that perform for an orchestra is enjoyed for its sound, not its visual aspects. Such performances do not satisfy the regulatory requirements under 8 C.F.R. § 204.5(h)(3)(vii). 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 violinist. When she is playing with an orchestra or a chamber music group in concert, she is not displaying her music in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing her work, she is not displaying her work. In addition, to the extent that the petitioner is a performing artist, it is inherent to her occupation to perform. The AAO notes that 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 has not established that she meets this regulatory criterion.

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

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. The petitioner submitted the following:

1. A March 30, 2009 agreement between [REDACTED] and the petitioner engaging her services as a "violinist in the 2009 [REDACTED] Orchestra" from May 11, 2009 through June 7, 2009;
2. Information about [REDACTED] printed from its website;

3. A letter from the [REDACTED] Associate Dean for Admissions and Scholarship Services offering the petitioner a "College of Music Travel/Performance Scholarship" to assist her "in representing the [REDACTED] College of Music at the [REDACTED] Music Festival";
4. Information about the [REDACTED] Music Festival printed from its website;
5. A February 26, 2011 letter from Mr. [REDACTED] stating that the petitioner performed "in an educational setting" in the [REDACTED]'s Young Artists Program;
6. Information about the [REDACTED] printed from its website;
7. A May 7, 2011 letter from Ms. [REDACTED] stating that the petitioner "was appointed the concertmaster of the UNT Symphony Orchestra and Chamber Orchestra," that "LeAnn Rimes invited [the petitioner] to perform at NFL Dallas Cowboys game at Irving, TX in 2002," that the petitioner performed "at another NFL Dallas Cowboys game . . . with Sheryl Crow," that the petitioner performed "with world-class artist Willie Nelson in 2007 at Nokia Theatre in Grand Prairie, TX," and that the petitioner "was invited to play with the [REDACTED] Symphony";
8. Information about the [REDACTED] Symphony from its website and information about the music careers of LeAnn Rimes, Sheryl Crow, and Willie Nelson;
9. Documentation indicating that the petitioner performed with Peter Gabriel's New Blood Orchestra along with other "freelance musicians from Houston" in a concert at the Woodlands Pavilion in June 2011 and two local articles about the concert;
10. Documentation indicating that the petitioner performed in the "First Violins" section for [REDACTED];
11. Documentation indicating that the petitioner performed in the "First Violins" section for [REDACTED]; and
12. A [REDACTED] concert schedule for Il Divo at the Woods Pavilion in Houston.

With regard to items 1 – 6, the AAO is not persuaded that the [REDACTED] Festival, the [REDACTED] Music Festival, and the [REDACTED] equate to "organizations" or "establishments" rather than temporary music events or programs. Regardless, as the petitioner submitted information about the festivals originating from their own websites, the record lacks objective documentary evidence demonstrating that the aforementioned festivals have a distinguished reputation. Once again, USCIS need not rely on self-promotional material. Further, there is no documentary evidence showing that the petitioner performed in a leading or critical role for the festivals. 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. The letters from Dr. [REDACTED], Mr. [REDACTED], and the other references fail to adequately explain how the petitioner's role as a temporary or one-time participant in the festivals was leading or critical to the ongoing operation of festivals. Further, the references' letters lack specific information demonstrating the impact of the petitioner's performances relative to that of the numerous other performances at the festivals. While Mr. [REDACTED] asserts that the petitioner "stood out among her peers" in the educational "program of chamber music study" at the [REDACTED], the documentation submitted by the petitioner fails to demonstrate that her role was leading or critical to the [REDACTED] festival as a whole. With regard to the [REDACTED] Festival, the [REDACTED] Music Festival, and the [REDACTED] there is no evidence differentiating the petitioner's role from that of the festivals' organizers, artistic directors, and instructors so as to demonstrate her leading role, and the record fails to establish that she was

responsible for the festivals' success or standing to a degree consistent with the meaning of "critical role."

Regarding item 7, the letter from Ms. [REDACTED] states that the petitioner "was appointed the concertmaster of the [REDACTED] Symphony Orchestra and Chamber Orchestra." While the AAO finds that the petitioner's role as concertmaster equates to a leading role for her collegiate orchestras, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or a similar reputation. The petitioner, however, failed to submit objective documentary evidence showing that the [REDACTED] Symphony Orchestra and Chamber Orchestra have a distinguished reputation relative to other successful orchestras.<sup>6</sup>

In regard to items 7 – 9, the petitioner has not established that a performance as part of a large ensemble with LeAnn Rimes at a Dallas Cowboys game, with Sheryl Crow at a Dallas Cowboys game, with Willie Nelson at the Nokia Theatre (Grand Prairie, Texas), or with Peter Gabriel at the Woodlands Pavilion (Texas) equates to performing in a leading or critical role for those artists or their concert. Further, the record lacks letters of support from the preceding vocal artists explaining the leading or critical nature of the petitioner's one-time supporting violinist roles. Moreover, while the petitioner submitted information about LeAnn Rimes, Sheryl Crow, Willie Nelson, and Peter Gabriel, the petitioner has not explained how these renowned vocal artists equate to "organizations or establishments." Regarding Ms. [REDACTED]'s statement that the petitioner "was invited to play with the [REDACTED] Symphony," there is no documentary evidence showing that the petitioner's role was leading or critical for the symphony. In addition, the self-serving information submitted from the [REDACTED] Symphony's own website fails to demonstrate that the symphony has a distinguished reputation.

With regard to items 10 and 11, the petitioner submitted documentation indicating that she performed with multiple other violinists in the "First Violins" section for [REDACTED] and [REDACTED]. There is no documentary evidence showing that the petitioner's role for [REDACTED] and [REDACTED] was leading or critical. In addition, the record lacks objective documentary evidence demonstrating that the preceding music groups have a distinguished reputation.

In regard to item 12, the AAO notes that the petitioner's name does not appear on the Il Divo concert schedule. Regardless, the [REDACTED] Il Divo performance post-dates the September 22, 2011 filing of the petition. As previously discussed, eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider the [REDACTED] Il Divo performance in this proceeding.

---

<sup>6</sup> For comparison, some examples of orchestras with distinguished reputations include the Berlin Philharmonic, the London Symphony Orchestra, the Vienna Philharmonic, the Chicago Symphony Orchestra, the Cleveland Orchestra, the Los Angeles Philharmonic, the Boston Symphony Orchestra, and the New York Philharmonic. See article entitled "Chicago Symphony Tops U.S. Orchestras" at <http://www.npr.org/templates/story/story.php?%20storyId=97291390>, accessed on April 12, 2013, copy incorporated into the record of proceeding.

In addition, counsel asserts that the petitioner performed in a leading or critical role for [REDACTED], the [REDACTED] Symphony Orchestra, the [REDACTED] String Orchestra, and the [REDACTED] Symphony Orchestra, but the petitioner failed to submit objective documentary evidence showing that they have a distinguished reputation relative to other successful orchestras. Further, the record lacks documentary evidence from the preceding orchestras (such as contractual agreements or letters of employment) to support counsel's assertions regarding the nature of the petitioner's role. As previously discussed, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Moreover, the regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence of experience "shall" consist of letters from employers.

In light of the above, the petitioner has not established that she meets this regulatory criterion.

### B. Summary

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

### III. CONTINUING WORK IN THE AREA OF EXPERTISE IN THE UNITED STATES

Beyond the decision of the director, the statute and regulations require that the petitioner seeks to continue work in her area of expertise in the United States. *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the petitioner detailing plans on how she intends to continue her work in the United States. *Id.* On the Form I-140, in Part 5, the petitioner listed her "Occupation" as "Professional Violinist." In addition, under Part 6, "Basic information about the proposed employment," the petitioner listed the "Nontechnical Description of Job" as "Professional Violinist." Moreover, the documentary evidence submitted by the petitioner focused primarily on her achievements and expertise as a violin player.<sup>7</sup>

As evidence that she intends to continue work in her area of expertise, the petitioner initially submitted the following:

1. An April 4, 2011 letter from Ms. [REDACTED] Piano Instructor, [REDACTED] School District, stating that the petitioner is employed by the [REDACTED] School District "as a Texas Teacher Intern in an Alternative Certification Program" and that the petitioner "teaches Suzuki Violin for grades Pre-kindergarten through second" at [REDACTED] Elementary School;

---

<sup>7</sup> There is no documentary evidence showing, for example, that the petitioner meets any of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) based solely on her achievements as a music teacher, or that any of the young students under her direct tutelage have performed at a level demonstrating the petitioner's sustained national or international acclaim as a music educator at the very top of her field.

2. An April 16, 2011 letter from [REDACTED] Principal, [REDACTED] Elementary School, [REDACTED] School District, stating that the petitioner “has been employed at [REDACTED] Elementary School as a Music Teacher with a specialty in Suzuki Violin”;
3. Photos of the petitioner with her elementary school students;
4. A “Texas Educator Certificate” with an effective date of August 19, 2010 stating that the petitioner “has fulfilled all the requirements of the State of Texas and is authorized to practice as a certified educator”; and
5. A [REDACTED] School District employee contract signed and dated by the petitioner on October 22, 2010.

On appeal, the petitioner submits a November 13, 2012 “offer of employment as a CLASSROOM TEACHER-SECONDARY . . . at [REDACTED] Junior High School) from [REDACTED] Schools. The petitioner also submits her November 13, 2012 “Contract of Employment” with the Board of Education of the [REDACTED] Schools. The AAO is not persuaded, however, that a “Professional Violinist” and an elementary or junior high school music teacher are the same area of expertise.<sup>8</sup> In *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

It is reasonable to interpret continuing to work in one’s “area of extraordinary ability” as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee’s extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

*Id.* at 918. The court noted a consistent history in this area. Likewise, it does not follow that a primary or secondary public school music teacher and a professional violinist are the same area of expertise. The AAO acknowledges the petitioner’s submission of the December 4, 2012 letter from Ms. [REDACTED] discussing the petitioner’s occasional work since September 2012 “as a substitute musician” for the [REDACTED] “when the Symphony needs additional violinists,” but this evidence post-dates the September 22, 2011 filing of the petition and cannot be considered in this proceeding. As previously discussed, eligibility must be established at the time of filing.

---

<sup>8</sup> According to the U.S. Department of Labor’s O\*NET program, Instrumental Musicians (including violinists) are not the same occupation as Elementary School Teacher or Secondary School Teacher. These occupations have entirely different Standard Occupational Classification codes and tasks. See Summary Reports for “Musicians, Instrumental,” “Elementary School Teachers,” and “Secondary School Teachers” at <http://www.onetonline.org/link/summary/27-2042.02>, <http://www.onetonline.org/link/summary/25-2021.00>, and <http://www.onetonline.org/link/summary/25-2031.00>, accessed on April 23, 2013, copies incorporated into the record of proceeding. The O\*NET program is the nation’s primary source of occupational information developed under the sponsorship of the U.S. Department of Labor/Employment and Training Administration. See <http://www.onetcenter.org/overview.html>, accessed on April 23, 2013, copy incorporated into the record of proceeding. The 2010 Standard Occupational Classification system is used by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. See <http://www.bls.gov/soc/>, accessed on April 23, 2013, copy incorporated into the record of proceeding.

8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Regardless, as the petitioner has submitted extensive evidence of her pursuit of a teaching career and full-time employment as an elementary or junior high school music teacher, the petitioner has failed to submit “clear evidence” demonstrating that she will continue to work in her area of expertise as claimed on the I-140 petition as required by the regulation at 8 C.F.R. § 204.5(h)(5).

#### 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>9</sup> Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122.

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

The AAO may deny an application or petition that fails to comply with the technical requirements of the law 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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.

---

<sup>9</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).

(b)(6)

Page 28

**ORDER:** The appeal is rejected, or in the alternative dismissed.