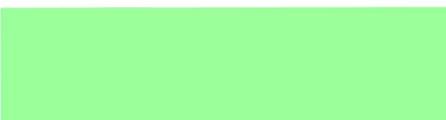
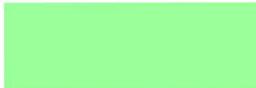


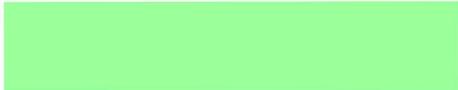


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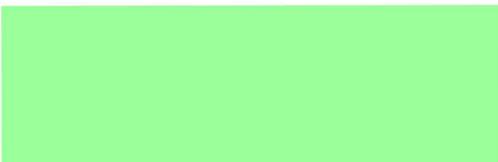


DATE: **JUN 28 2013** Office: NEBRASKA SERVICE CENTER FILE: 

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, Nebraska Service Center. The petitioner filed a subsequent appeal. The Administrative Appeals Office (AAO) determined that the appeal was not filed in a timely manner. The AAO rejected the appeal without rendering a decision on the merits of the case. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO rejecting the appeal as untimely filed will be withdrawn, the decision of the director will be affirmed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts as a Christian musician and songwriter. The director determined that the petitioner had not met the requisite criteria for classification as an alien of extraordinary ability.

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

Counsel asserts that the petitioner has received major, internationally recognized awards and that the petitioner meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i), (v), and (x). For the reasons discussed below, the AAO will uphold the director's decision.

I. LAW

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

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

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

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

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

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

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 580 F.3d 1030 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

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

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

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

II. ANALYSIS

A. One-time Achievement (that is, a major, internationally recognized award)

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.

The petitioner submitted a certificate from the [REDACTED] [REDACTED] stating that he was a *nominee* in the category “ [REDACTED] ” as voted by the membership of the [REDACTED]. The petitioner also submitted a certificate from the [REDACTED] stating that the album “ [REDACTED] ” by [REDACTED] was *nominated* for a [REDACTED] in the category “ [REDACTED] ” in 2011. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3), however, specifically requires a major, internationally recognized award, not a nomination. Earning a nomination is not equivalent to receiving a major, internationally recognized award.

On appeal, counsel points to the O-1 nonimmigrant regulation at 8 C.F.R. § 214.2(o)(3)(v)(A) relating to “an alien of extraordinary achievement in the motion picture or television industry.” Counsel asserts that USCIS “is erroneously applying an undisclosed legal requirement that nominations for internationally recognized awards can be considered for the purposes of a non-immigrant visa, but cannot be given the same weight in an immigrant visa application.” First, the petitioner does not work in the motion picture or television industry. Second, in contrast to the nonimmigrant requirements, the immigrant regulations do not provide for nominations. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3) specifically requires the alien’s receipt of a major, internationally recognized “award.”

Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, “The term ‘extraordinary ability’ means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(o)(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines extraordinary ability as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 nonimmigrant eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A) and 8 C.F.R. § 214.2(o)(3)(v)(A), but the immigrant classification sought by the petitioner specifically requires actual receipt of a major, internationally recognized award, 8 C.F.R. § 204.5(h)(3), or nationally or internationally recognized prizes or awards. 8 C.F.R. § 204.5(h)(3)(i).

The petitioner submitted a list of numerous [REDACTED] from the [REDACTED] website indicating that “ [REDACTED] ” won the “ [REDACTED] ” category. The petitioner’s name does not appear on the list of “ [REDACTED] ”

_____ and there is no documentary evidence demonstrating his receipt of the _____. Instead, the award was received by the performing artist _____ (whose real name is _____). The petitioner submitted a May 22, 2012 letter from _____ stating:

My name is _____ aka _____. Over the past 11 years I have used the moniker _____ to organically build my fan base playing hundreds of shows on three continents. In 2006, we released _____ from which the rock anthem “_____” featuring _____ became a global hit. In 2008, we followed up with _____ which catapulted success garnering multiple TV placements In 2010, we released our most critically acclaimed project, _____ . . .

* * *

[The petitioner] and I have collaborated on numerous projects in the past and it is my plan to continue to work with [the petitioner] in the future on our upcoming projects.

I have had great success working with [the petitioner] in the past. [The petitioner] has worked as a songwriter, producer and performer on the following songs:

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____

In addition, the petitioner submitted the album credits for _____ confirming that he contributed to only two songs on the ten-song album. _____ is credited for all ten songs on _____ album, _____ is credited for nine songs, and _____ is credited for three songs. As the “(_____ submitted by the petitioner list “_____” not the petitioner, as the _____ winner, and the petitioner contributed to only two songs on that album, the petitioner has failed to establish that the _____ primarily recognized the petitioner’s specific work rather than that of _____.

In response to the director’s request for evidence, the petitioner submitted documentation from the _____ indicating that _____ by “_____” won “_____” and that the song “_____” by the music group _____ won “_____” in October 2011.² The petitioner also submitted information about the _____ from the _____ website that states: “_____ were handed out _____ 2011 in _____ Canada.” In addition, the petitioner submitted a certificate from _____

² The petitioner submitted the album credits for _____ album indicating that he co-wrote the song lyrics for “_____” and performed on the album.

the [REDACTED] stating that the album "[REDACTED]" by [REDACTED] was nominated for a [REDACTED] in the category "[REDACTED]" in 2012. The [REDACTED] received by [REDACTED] and [REDACTED] on [REDACTED], 2011 and [REDACTED] nomination post-date the petition's September 6, 2011 filing date. Eligibility, however, 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 [REDACTED] received by [REDACTED] and [REDACTED] on [REDACTED], 2011 and [REDACTED] nomination as evidence in support of the petitioner's eligibility.

The petitioner's evidence included information from the online encyclopedia *Wikipedia* about the [REDACTED] the [REDACTED] and the [REDACTED]. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.³ See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008). Accordingly, USCIS will not assign weight to information for which *Wikipedia* is the source. The petitioner also submitted [REDACTED] guidelines announced by the [REDACTED] information about the [REDACTED] from the website of the [REDACTED] and information about the [REDACTED] from the website of the [REDACTED]. Regarding the preceding information originating from the awards' presenters, 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). There is no reliable, objective documentary evidence showing that the [REDACTED], the [REDACTED] and the [REDACTED] are commensurate with major, internationally recognized awards.

³ Online content from *Wikipedia* is subject to the following general disclaimer:

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

See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on May 30, 2013, copy incorporated into the record of proceeding.

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 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 internationally recognized in the alien's field as one of the top awards in that field.

In this instance, the petitioner has failed to submit evidence showing that was the recipient of a major, internationally recognized award. Accordingly, the petitioner has failed to demonstrate evidence of a qualifying one-time achievement pursuant to the regulation at 8 C.F.R. § 204.5(h)(3).

B. Evidentiary Criteria⁴

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 a certificate from the [REDACTED] stating that he was a *nominee* in the category [REDACTED] as voted by the membership of the [REDACTED]. The petitioner also submitted a certificate from the [REDACTED] stating that the album "[REDACTED]" by [REDACTED] was *nominated* for a [REDACTED] in the category "[REDACTED]" in 2011. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i), however, specifically requires evidence of "the alien's receipt" of "nationally or internationally recognized prizes or awards" for excellence in the field of endeavor, not receipt of nominations. Earning nominations is not equivalent to receiving nationally or internationally recognized prizes or awards for excellence in the field.

The petitioner submitted a list of numerous [REDACTED] from the [REDACTED] website indicating that "[REDACTED]" won the "[REDACTED]" category. As previously discussed, the petitioner's name does not appear on the list of [REDACTED] and there is no documentary evidence demonstrating his receipt

⁴ On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision. Therefore, the AAO has not considered whether the petitioner meets the remaining categories of evidence.

of the [REDACTED]. Instead, the award was received by the performing artist [REDACTED]. The petitioner also submitted the album credits for [REDACTED] confirming that he contributed to only two songs on the ten-song album. As the [REDACTED] submitted by the petitioner list "[REDACTED]" not the petitioner, as the [REDACTED] winner, and the petitioner contributed to only two songs on the ten-song album, it has not been established that the [REDACTED] primarily recognized the petitioner's specific work rather than that of [REDACTED].

In response to the director's request for evidence, the petitioner submitted documentation from the [REDACTED] indicating that [REDACTED] by [REDACTED] won [REDACTED]" and that the song "[REDACTED]" by the music group [REDACTED] won [REDACTED]" in October 2011. The petitioner also submitted information about the [REDACTED] from the [REDACTED] website that states: "[REDACTED] were handed out [REDACTED] 2011 in [REDACTED] Canada." In addition, the petitioner submitted a certificate from the [REDACTED] stating that the album "[REDACTED]" by [REDACTED] was *nominated* for a [REDACTED] in the category "[REDACTED]" in 2012. The [REDACTED] received by [REDACTED] and [REDACTED] on [REDACTED] 2011 and [REDACTED] nomination post-date the petition's September 6, 2011 filing date. 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] received by [REDACTED] and [REDACTED] on [REDACTED] 2011 and [REDACTED] nomination as evidence in support of the petitioner's eligibility.

The petitioner submitted information from the online encyclopedia *Wikipedia* about the [REDACTED], the [REDACTED], and the [REDACTED]. As previously discussed, there are no assurances about the reliability of *Wikipedia's* online content. See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d at 909. Accordingly, USCIS will not assign weight to information for which *Wikipedia* is the source. The petitioner also submitted [REDACTED] guidelines announced by the [REDACTED] information about the [REDACTED] from the website of the [REDACTED] and information about the [REDACTED] from the website of the [REDACTED].

The preceding information originating from the presenting organizations is not sufficient to demonstrate the national or international *recognition* of the awards claimed by the petitioner. Once again, USCIS need not rely on self-promotional material. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. Even if the petitioner were to establish that he was the actual recipient of nationally or internationally recognized "prizes or awards" for excellence in the field at the time of filing, which he has not, there is no documentary evidence demonstrating that the petitioner's specific honors were recognized beyond the presenting organizations at a level commensurate with nationally or internationally recognized prizes or awards for excellence in the field.

In light of the above, the petitioner has not established that he 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 director discussed the evidence submitted for this regulatory criterion and found that the petitioner failed to establish his eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The issue, therefore, is considered to be abandoned. *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) (plaintiff's claims found to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not established that he meets this regulatory criterion.

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

The director discussed the evidence submitted for this regulatory criterion and found that the petitioner failed to establish his eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The issue, therefore, is considered to be abandoned. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885, at *9. Accordingly, the petitioner has not established that he meets this regulatory criterion.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.” Based upon a review of the record of proceeding, the petitioner submitted sufficient documentation establishing that he meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). Accordingly, the petitioner has established that he meets this regulatory 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 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 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 (3rd Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

The petitioner submitted a certificate from the [REDACTED] stating that he was a “nominee” in the category ‘ [REDACTED] ’ for [REDACTED] album [REDACTED], but the evidence submitted by the petitioner indicates that he contributed to only one song on the album. The petitioner also submitted a certificate indicating that the album [REDACTED] by [REDACTED] was “nominated” for a [REDACTED] in the category [REDACTED] in 2011. The documentation submitted by the petitioner indicates that he contributed to only two songs on [REDACTED] album. In addition, the petitioner submitted a list of numerous ‘ [REDACTED] ’ from the [REDACTED] website indicating that “ [REDACTED] ” won the ‘ [REDACTED] ’ category. The preceding award was received by the performing artist [REDACTED] not the petitioner. As such, the petitioner has failed to establish that the [REDACTED] primarily recognized the petitioner’s specific work rather than that of [REDACTED]. There is no documentary evidence showing that the petitioner’s specific work on [REDACTED] (two songs) and [REDACTED] (one song) significantly impacted the recording industry, has substantially influenced the work of other contemporary [REDACTED] musicians, or otherwise equates to original contributions of major significance in the field.

In response to the director’s request for evidence, the petitioner submitted documentation indicating that [REDACTED] by [REDACTED] won ‘ [REDACTED] ’ and that the song “ [REDACTED] ” by the music group [REDACTED] won “ [REDACTED] ” at the [REDACTED] in October 2011. In addition, the petitioner submitted a certificate from the [REDACTED] stating that the album ‘ [REDACTED] ’ by [REDACTED] was *nominated* for a [REDACTED] in the category “ [REDACTED] ” in 2012. As previously discussed, the preceding awards and nomination post-date the petition’s September 6, 2011 filing date. Eligibility, however, 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, USCIS will not consider the awards and nomination as evidence to establish the petitioner’s eligibility.

The petitioner submitted an August 17, 2011 letter from [REDACTED], Producer, [REDACTED], stating:

Based on my review of [the petitioner’s] extensive performance, production, and songwriting career, I would evaluate [the petitioner] as a person of extraordinary ability in the field of [REDACTED] Music. Moreover, he possesses a unique combination of skills and experience that will certainly benefit the United States.

In my experience, very few people possess the background [the petitioner] possesses for performing nationally and internationally both as a recording artist and live performer. He clearly ranks among that small percentage who have risen to the top of his field and

has a rare combination of exceptional skills, achievements, and background in a very difficult field of considerable economic and cultural importance to the United States. As there is a current need for [the petitioner's] specialized experience, I recommend prompt approval of this petition filed in his behalf as a person of extraordinary ability in the field that very directly and substantially benefits the United States.

asserts that the petitioner is “a person of extraordinary ability in the field of Music” and that the petitioner “ranks among that small percentage who have risen to the top of his field,” 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.). In addition, comments on the petitioner’s “unique combination of skills and experience” and “rare combination of exceptional skills, achievements, and background.” Assuming the petitioner’s music 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). also asserts that the petitioner’s work will benefit the United States, but fails to provide specific examples of how the petitioner’s original work was of major significance in the field at the time of filing.

The petitioner submitted a May 22, 2012 letter from stating:

[The petitioner] has had tremendous success throughout his career as a musician in the Music genre. It is not a coincidence that some of my most critically acclaimed work was on the tracks I worked with [the petitioner].

* * *

Our work that we have worked on together has been critically acclaimed and has created tremendous press.

In support of comments, the petitioner submitted a September 1, 2011 article entitled “ ” posted at . The article states:

’ and two-time nominee, is celebrating his first career No. 1 radio single this week with the song “ ” at Rock radio formats. This is the fourth charting single from the 2010 release, , which marks highest-selling album to date.

* * *

My first #1 single!!! I’m freaking out!!!” said .

The focus of the article is [REDACTED] and his work, not the petitioner and his contributions in the field. The petitioner is not even mentioned in the article. In addition, the readership of the preceding article was limited in that it was "viewed" only 721 times.

The petitioner also submitted a [REDACTED], 2010 music review of [REDACTED] album [REDACTED] posted at [REDACTED] but the website's readership is undocumented. The album review states:

So, if you haven't heard of [REDACTED] of Ontario yet, then you have simply missed out on one of the hottest [REDACTED] around throughout the past few years. Better known as [REDACTED] the multiple award winning artist has three previously released albums under his belt, all of which are very good. [REDACTED] is his fourth installment, and fans will wonder how it stacks up to the rest.

The album opens with "[REDACTED]," setting the tone for the entire record. [REDACTED] delivers a great mix of unique production coupled with a great [REDACTED] sound laid over hopeful soul-searching lyrics. It's easy to catch the influence of [REDACTED] throughout the album, especially since he's vocally featured on a handful of tracks. There are many good songs, such as "[REDACTED]," "[REDACTED]" "[REDACTED]," and "[REDACTED]" tracks that all feature [REDACTED] lyrics about staying strong for [REDACTED] laced with some tight beats.

[REDACTED] has also decided to take a few musical chances on [REDACTED] One of the best tracks would have to be "[REDACTED]" for its slower sound, display of the piano keys, and great message for everyone. "[REDACTED]" is a really cool song where [REDACTED] shares his powerful testimony while the chorus, featuring [REDACTED], makes the track [REDACTED] Overall, this latest release isn't perfect, but it's also not too far from that goal either. The album has a little less [REDACTED] a little more [REDACTED], and a few more singing choruses than previous albums, and while that works rather well, it's not what I was expecting. All in all, the final product is very good and any fan of the [REDACTED] genre will definitely appreciate the sounds and message of [REDACTED]

Once again, the focus of the article is [REDACTED] and his work, not the petitioner and his contributions in the field. While the article discusses the contributions of both [REDACTED] and [REDACTED], the petitioner is not mentioned in the article. In addition, the review mentions only one song on the album, "[REDACTED]" to which the petitioner contributed. The preceding articles posted at [REDACTED] and [REDACTED] are not sufficient to demonstrate that the petitioner's work rises to the level of original contributions of major significance in the field.

The letter of support from [REDACTED] further states:

[REDACTED]' has proven to be a huge hit for us as it has been implemented in major projects such as [REDACTED] [REDACTED] and the [REDACTED] We are currently in the process of negotiating its use with the [REDACTED] as well. This is one of the songs [the petitioner] is directly responsible for as songwriter, producer, and performer.

In support of [REDACTED] comments, the petitioner submitted documentation indicating that [REDACTED] song (which the petitioner collaborated on) was utilized as a “background vocal” for [REDACTED] and for [REDACTED] programming. The petitioner has not established that providing background music for television programming equates to original contributions of major significance in the field. The fact that [REDACTED] received a \$7,500 royalty fee for “background vocal” music usage in [REDACTED] for example, does not demonstrate that the petitioner’s work has had major significance in the field of [REDACTED] music.

[REDACTED] letter of support continues:

Each member in a band has a different role. There are vocalists, instrumentalists, writers, producers, and editors. I understand that certain roles have different levels of importance to the overall success of any album or song. [REDACTED] is my brand name, and my band has various members that can be interchanged as necessary. [The petitioner’s] role as songwriter is not one that can be replaced. His music is registered and has copyrights with the [REDACTED]. He is a music creator, and more significantly, he is the music creator behind some of my most popular and successful tracks.

There is no great secret to the reason why [the petitioner’s] work is significant and sought after. It sells very well and the public loves his sound. He has worked with many other musical artists in the [REDACTED] music genre including [REDACTED] and many others. [The petitioner’s] work is on the creative side of the musical process, and is of the highest importance.

The petitioner submitted evidence of his musical collaborations and recordings with [REDACTED] and others. While the musical registrations and copyrights with the [REDACTED] demonstrate the originality of the petitioner’s work, the record lacks documentary evidence showing that the petitioner’s work was of major significance in the field. [REDACTED] asserts that the petitioner’s “role as songwriter is not one that can be replaced,” but there is no documentary evidence demonstrating that the petitioner’s work has had a substantial impact in the recording industry, has significantly influenced the work of other musicians in the field, or otherwise constitutes original contributions of major significance in the field.

[REDACTED] letter of support further states: “I have been fortunate to have a number of chart topping hits. The songs I worked on with [the petitioner] have had significant global sales such that we’ve landed on the *Billboard* charts as top sellers.” The petitioner submitted the following *Billboard* charts:

1. *Billboard* [REDACTED] Hit Radio National Airplay chart reflecting that [REDACTED] song “[REDACTED]” ranked [REDACTED] in [REDACTED] 2010;

2. *Billboard* "[redacted]" chart reflecting that [redacted] song "[redacted]" ranked [redacted] in [redacted] 2010;
3. *Billboard* "[redacted] Hit Radio" airplay chart reflecting that [redacted] song "[redacted]" ranked [redacted] in [redacted] 2010; and
4. *Billboard* "[redacted]" chart reflecting that [redacted] song "[redacted]" ranked [redacted] in [redacted] 2011.

With regard to items 1 – 4 above, according to the letter from [redacted] and the album credits for [redacted] the petitioner was not a songwriter or musical contributor for the songs [redacted] and "[redacted]". As the petitioner failed to submit any *Billboard* charts listing songs that he co-wrote or that were credited to him on a [redacted] album, the record lacks evidence to support [redacted] assertion. 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)). Regardless, the petitioner has failed to establish that the commercial successes achieved by [redacted] are primarily attributable to the petitioner's work, and there is no evidence demonstrating that the petitioner's specific contributions have had major significance in the field. Moreover, the regulations contain a separate criterion regarding commercial successes in the performing arts. 8 C.F.R. § 204.5(h)(3)(x). It will not be presumed that evidence relating to or even meeting the commercial successes criterion is presumptive evidence that the petitioner also meets the criterion at 8 C.F.R. § 204.5(h)(3)(v). 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 the two as being interchangeable. To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that an alien meet at least three separate criteria. Music sales are far more relevant to the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x) and will be further addressed there.

The petitioner submitted a May 22, 2012 letter from [redacted], lead singer of [redacted], stating:

I am submitting this letter in support of the major contributions [the petitioner] has made in the field of [redacted] music. . . . He has personally worked with [redacted] on our most recent album [redacted] as both a songwriter and musician.

* * *

[The petitioner] performed on Guitars, Drums, and Bass, and co-wrote the following songs on [redacted]

1. [redacted]
2. [redacted]
3. [redacted]

4. [REDACTED]
5. [REDACTED]

These songs would not have been possible without [the petitioner's] efforts. We wrote these songs together equally. He was the co-songwriter for nearly half of the album. All of his contributions were original in nature in that he is the credited author of the music. The music was not sampled or simply performed by [the petitioner] for the album. His role was significant and vital as an author of the music.

* * *

[REDACTED] is a significant album in that it was awarded with a 2012 [REDACTED] nomination. These nominations are based on submission and actual record sales. The final nominees are identified and awarded as such with one winner from each category selected annually. The single '[REDACTED]' authored by [the petitioner], was the 2011 winner of the [REDACTED] . . . best [REDACTED]. This is a tremendous honor of major significance within the [REDACTED] Music scene. The accolades this album and song have achieved are among the pinnacle achievements of [REDACTED] Music, and these are directly attributable to [the petitioner's] contributions.

[REDACTED] comments on the music that the petitioner co-wrote and performed on [REDACTED] album, but [REDACTED] does not provide specific examples of how the petitioner's work has substantially influenced the music industry or otherwise equates to artistic contributions of major significance in the field of [REDACTED] music. In addition, [REDACTED] states that [REDACTED] album [REDACTED] received a 2012 [REDACTED] nomination and that the song '[REDACTED]' won "best [REDACTED]" in 2011. As previously discussed, the [REDACTED] were presented on [REDACTED] 2011. Eligibility, however, 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] received by [REDACTED] on [REDACTED] 2011 and [REDACTED] 2012 [REDACTED] nomination as evidence to establish the petitioner's eligibility.

The opinions of the petitioner's references are not without weight and have been considered by USCIS. The letters of support submitted by the petitioner are all from those who have collaborated on various projects with the petitioner. While such letters are important in providing details about the petitioner's role in the collaborations, they cannot by themselves establish the impact of the petitioner's work beyond his immediate circle of musical acquaintances. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. See *id.* at 795-796; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to

be evidence as to “fact”). Thus, the content of the references’ statements and how they became aware of the petitioner’s reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a musician or songwriter 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, substantially impacted his field, or has otherwise risen to the level of contributions of major significance, the petitioner has failed to establish that he meets this regulatory criterion.

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

The director’s finding that the petitioner meets this regulatory criterion will be withdrawn. The petitioner submitted documentary evidence of his various music performances at concerts and festivals as evidence for this criterion. The petitioner also submitted documentation indicating that [REDACTED]” song (which the petitioner collaborated on) was utilized as a “background vocal” for [REDACTED]’ and for [REDACTED] programming. Neither the petitioner nor counsel has explained how the preceding music performances equate to visual art exhibitions or showcases. The petitioner’s work as a musician is audible in nature and is enjoyed for its sound, not its visual aspects. Therefore, his music 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*.” [Emphasis added.] The petitioner is a musician. When he records a song or performs in concert, he is not displaying his music in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing his music, he is not displaying his work. In addition, to the extent that the petitioner is a musician, it is inherent to his occupation to perform and play music. 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, he has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). As the petitioner’s music performances are far more relevant to the “commercial successes in the performing arts” criterion at 8 C.F.R. § 204.5(h)(3)(x), they will be discussed separately within the context of that regulatory criterion.

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

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

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

The petitioner submitted the following:

1. *Billboard* [redacted] Hit Radio National Airplay chart reflecting that [redacted] song "[redacted]" ranked [redacted] in [redacted] 2010;
2. *Billboard* "[redacted]" chart reflecting that [redacted] song "[redacted]" ranked [redacted] in [redacted] 2010;
3. *Billboard* "[redacted] Hit Radio" airplay chart reflecting that [redacted] song "[redacted]" ranked [redacted] in [redacted] 2010;
4. *Billboard* "[redacted]" chart reflecting that [redacted] song "[redacted]" ranked [redacted] in [redacted] 2011; and
5. Radio and Records "[redacted] National Airplay" chart reflecting that [redacted] song "[redacted]" ranked [redacted] in [redacted] 2009.

With regard to items 1 – 5 above, according to the letter from [redacted] and the album credits for [redacted] and [redacted] the petitioner was not a songwriter or musical contributor for the songs "[redacted]," "[redacted]," and "[redacted]." As the petitioner did not contribute to any of the preceding three [redacted] songs listed in the above charts, such evidence does not establish the petitioner's commercial success.

The petitioner submitted a [redacted] "compiled from retail, physical and digital sales" reflecting that [redacted] album ranked [redacted] in [redacted] 2011. As the album credits for [redacted] and the letter from [redacted] indicate that the petitioner contributed to only two songs on the ten-song album, the petitioner has not demonstrated that the sales of [redacted] are primarily attributable to the petitioner instead of [redacted] and therefore, are evidence of the petitioner's commercial success.

The petitioner submitted a September 1, 2011 article entitled "[redacted]" posted at [redacted] but the petitioner failed to submit the actual singles chart showing that "[redacted]" achieved the number one ranking as measured by retail, digital, or physical sales. In addition, the article does not specify the volume of sales for the "[redacted]" recording as required by the plain language of this regulatory criterion.

The petitioner submitted a March 25, 2009 Letter to [redacted] from [redacted] stating that [redacted] album [redacted] CD had "NET SOUND SCANS" of 18,935 units. The letter does not indicate that a "sound scan" equates to an actual music sale and does not specify the monetary amount of sales. In addition, the album credits for [redacted] and the letter from [redacted] indicate that the petitioner contributed to only one song on the album. As such, the

petitioner has not demonstrated that the sales of the [REDACTED] are primarily attributable to the petitioner instead of [REDACTED] and therefore, are evidence of the petitioner's commercial success.

The petitioner failed to submit documentary evidence of "sales" or "receipts" demonstrating that his specific songs and music performances were indicative of his commercial successes in the performing arts. Accordingly, the petitioner has not established that he meets this regulatory criterion.

C. Summary

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

III. CONCLUSION

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

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.⁵ 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,

⁵ 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).

1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th 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.

ORDER: The decision of the director is affirmed and the petition is denied.