

(b)(6)

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



U.S. Citizenship
and Immigration
Services

[Redacted]

Date: **NOV 12 2013** Office: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

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

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

On appeal, counsel asserts that the director erred in finding that the petitioner met only one of the evidentiary criteria outlined in the regulations. Counsel maintains that the evidence demonstrates that the petitioner met five additional criteria and that the director erroneously considered a single category of evidence instead of considering the entirety of the record.

I. LAW

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

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

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

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

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

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

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

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

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

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

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

II. ANALYSIS

A. Prior O-1 Nonimmigrant Visa

While U.S. Citizenship and Immigration Services (USCIS) has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude

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).

USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. Moreover, 8 C.F.R. §§ 214.2 (o)(3)(ii), (iv), relating to nonimmigrant aliens of extraordinary ability in the arts, provides for a different standard (distinction) and different criteria than those for the immigrant classification the petitioner now seeks. Thus, the petitioner could meet the nonimmigrant criteria and not the ones necessary for immigrant classification.

Furthermore, USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, USCIS approves some nonimmigrant petitions in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r. 1988). USCIS need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

B. Evidentiary Criteria²

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

The director, in the denial decision, determined that none of the awards the petitioner submitted as evidence under this criterion met the requirements of the regulation. On appeal, counsel asserts that the director erred in characterizing the awards as regional and observes that a prize or award need not be open to the entire field of endeavor to qualify as a lesser nationally or internationally recognized prize or award. In addition, counsel asserts the petitioner's position as an associate concertmaster at the

where the petitioner was invited to play with the all meet the requirements of this criterion.

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

While numerous letters characterize the petitioner as having won his current job as an associate concertmaster at the [REDACTED] through a series of auditions, the petitioner's job is not a prize or award. While the evidence indicates that the petitioner's employer conducted a broad search for the petitioner's current position, a competitive job search process does not transform a job offer into a prize or award for excellence. Similarly, while the record includes a contract indicating that the petitioner was the recipient of a fellowship that provided a stipend for his participation in the [REDACTED] the record does not include evidence that the sponsors conferred or awarded the fellowship to recognize excellence. Thus, the fellowship is not an award or prize for excellence, as contemplated by the regulation.

Regarding the [REDACTED] and the [REDACTED] while counsel correctly states that a prize or award need not be open to the entire field to qualify under this criterion, there must be sufficient evidence to substantiate that an award or prize has either national or international recognition. The documentary evidence submitted with respect to the [REDACTED] and the [REDACTED] does not establish the national or international recognition of the claimed prizes. The press release in the record that provides information about the [REDACTED] generally observes that the various winners from a pool of 45 competitors from seven states in the Northwest had been invited to perform with the [REDACTED]. This promotional information does not suggest that the competition is nationally or internationally recognized. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (stating that the truth is to be determined not by the quantity of evidence but by its quality) citing *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989). Moreover, independent journalistic coverage of a competition is more probative evidence of its recognition than a press release from the organizing entity. See *Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media).

For all of the foregoing reasons, the petitioner has not established that he meets this criterion.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields. 8 C.F.R. § 204.5(h)(3)(ii).

The petitioner previously submitted evidence under this criterion. The director's denial concluded that the petitioner did not meet this criterion and the petitioner does not identify any factual or legal error relating to this criterion on appeal. Consequently, USCIS concludes that the petitioner abandoned this claim. See *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall

include the title, date, and author of the material, and any necessary translation. 8 C.F.R. § 204.5(h)(3)(iii).

The director concluded that the petitioner did not submit evidence that established this criterion. On appeal, counsel asserts that the petitioner submitted articles in the [REDACTED] and is submitting a blog posted by a music critic on [REDACTED] website that highlight and discuss the petitioner's work, as well as that of the [REDACTED]. While the submitted articles in the [REDACTED] do reference the petitioner and the [REDACTED] they are not about the petitioner. The regulation specifically requires that the published material be "about the alien." On appeal, counsel cites to *Muni v. INS*, 891 F.Supp. 440, 445 (N.D. Ill. 1995) and *Racine v. INS*, 1995 WL 153319 at 6 (N.D. Ill. 1995), and asserts that there is no requirement that an alien be established as one of the stars in the article. The courts in the cited cases noted that the alien need not show that the published material expressly characterizes the alien as one of the stars of the NHL. Neither decision, however, suggests that the article need not be about the alien. The courts in those two decisions did not reinterpret or otherwise depart from the plain language of the regulation that requires published material to be about the petitioner. Brief references in general interest stories about a petitioner's employer do not constitute published material about the petitioner, as required by the regulation. *See generally Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor).

On appeal, counsel asserts that the blog of a music critic and [REDACTED] are professional publications and that the [REDACTED] is major media because it is a major newspaper that serves the second largest city in the [REDACTED]. 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). The director's request for evidence specifically requested evidence of the circulation (online and/or in print) of the publications. The petitioner did not submit this requested evidence.

Accordingly, the record supports the director's conclusion that the petitioner has not established that he meets this criterion.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv).

The director determined in his decision that the petitioner met this regulatory criterion and the record supports the director's conclusions in this regard.

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

The director determined that the petitioner's evidence of performances as a concertmaster with the [REDACTED] other specified performances, and support letters did not satisfy the requirements of 8 C.F.R. § 204.5(h)(3)(v). On appeal, counsel asserts that the director erred in

dismissing the letters of support and in dismissing the petitioner's performances in nationally known competitions and venues and with top level orchestras.

At the outset, while counsel asserts that the performances that should be considered as original contributions because they were in nationally known competitions and venues, the record lacks documentation that substantiates those claims. As stated above, 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, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972), broadened in *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Regarding the petitioner's performances with top level orchestras, counsel does not specify which orchestra(s) qualify as a top level orchestra. Moreover, even if the record substantiates that a particular orchestra is recognized as being top level, an individual performance does not necessarily constitute an original contribution of major significance in the field. The record does not include evidence of the broad impact of any individual performance such that it would constitute a contribution of major significance in the field. In addition, the regulation requires that a contribution be an original contribution by the alien. A performance, where the petitioner is but one member of a large orchestra, cannot be fully attributable to the petitioner as an original contribution.

In challenging the director's findings regarding the letters of support submitted on behalf of the petitioner, counsel asserts on appeal that the director erred in failing to actually consider the information in the letters and the reputation of the persons writing the letters. Counsel specifically stresses that [REDACTED] Music Director of the [REDACTED] has won a Grammy and is a regular guest conductor with leading symphonies in the United States. Counsel also highlights letters from three individuals associated with the [REDACTED] Concertmaster of the [REDACTED] Principal Second Violin of the [REDACTED] and [REDACTED] Associate Conductor of the [REDACTED]. However, while the reputation of the authors and the organizations with which the authors are associated may reflect the authors' expertise, at issue is whether or not the contents of the letter establish the petitioner's original contributions of major significance in the field.

The contents of [REDACTED] letter and [REDACTED] letter share the main characteristics with the bulk of the letters that petitioner submitted along with other documentary evidence supplementing the petition. The other letters in this group include letters from the following individuals: [REDACTED] Executive Director of the [REDACTED] Director of Orchestral Studies at the [REDACTED] Artistic Director at [REDACTED] [REDACTED] Executive Director of the [REDACTED]. This group of letters discusses the importance and difficulty of obtaining a concertmaster position and/or the petitioner's talent as a violinist. Orchestras at all levels of expertise have a concertmaster and while many of the letters attest to the critical role that a concertmaster performs in a particular orchestra, that critical function does not equate to an original contribution of major significance that goes beyond the specific organization and impacts the field as a whole. With respect to the petitioner's acknowledged talent as a violinist, the letters generally discuss the petitioner's proficiency and skill as a violinist, but

do not specifically identify contributions that influenced the field. *See Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010) (finding letters that did not specifically identify contributions nor provide specific examples of how those contributions influenced the field to be insufficient as major contributions). Consequently, the above letters are insufficient to demonstrate the petitioner's eligibility under 8 C.F.R. § 204.5(h)(3)(v).

The letters from [REDACTED] are similar to the letters submitted by other experts who took part in the petitioner's musical training. The other letters in this group includes letters from [REDACTED] School of Music, and [REDACTED] the President of the [REDACTED]. The plain language of the regulation requires that the evidence demonstrate contributions of major significance. In general, contributions of major significance are those that are impacting or have already impacted the field. But the letters in this group generally attest to the future impact that the petitioner will have in the field. For instance, [REDACTED] observes that the petitioner is, "destined for a remarkable career" while [REDACTED] predicts that he, "will make significant contributions" and [REDACTED] believes that, the petitioner "will make an incredible and invaluable contribution to the musical culture of the United States of America." Therefore, this group of letters does not satisfy the requirements for this criterion.

On appeal, counsel submits a final group of letters in an effort to address concerns raised in the director's denial. The letters submitted on appeal include letters from: [REDACTED] Concertmaster of the [REDACTED] Concertmaster of the [REDACTED] Principal Viola of the [REDACTED] (second letter), Head of the Violin Department of the [REDACTED] Violinist at the [REDACTED] Principal Violinist at the [REDACTED] and [REDACTED] Professional Violinist.³ These letters provide additional details of the critical role that a concertmaster performs in the context of an orchestra, attest to the difficulty of obtaining a concertmaster position, or generally make positive observations about the petitioner's talent as a violinist. The regulations include a separate criterion for leading or critical role for organizations or establishments with a distinguished reputation. At issue for the criterion set forth at 8 C.F.R. § 204.5(h)(3)(v) is whether the petitioner has made original contributions of major significance in the field.

While all of the letters submitted on behalf of the petitioner are complimentary, they do not demonstrate the petitioner's eligibility under this criterion. USCIS determines the truth not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) citing *Matter of E-M*, 20 I&N Dec. 77, 80 (Comm'r 1989). While the record contains several letters supporting the petition, the contents of these letters do not specifically identify original contributions by the petitioner and explain how they have impacted the field at a level consistent with a contribution of major significance in the field.

Accordingly, for all of the above reasons, the petitioner has not established that he meets this criterion.

³ The letter purportedly from Ms. [REDACTED] is unsigned and, thus, has no probative value.

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

The director determined that the evidence the petitioner submitted in support of this criterion did not meet the requirements of the regulation. Petitioner's submissions relating to this regulatory criterion consisted of documentary evidence of various musical performances. On appeal, counsel asserts that USCIS regularly considers orchestral performances and other musical performances as display of the alien's work at an artistic exhibition. However, 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. *See Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at *7 (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, and is instead a musician, 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).

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

The director concluded that the petitioner did not meet the requirements of 8 C.F.R. § 204.5(h)(3)(viii). On appeal, counsel asserts that the evidence of the petitioner's role as an associate concertmaster is sufficient to demonstrate that he has performed in a leading or critical role and states that the director agrees that the role of concertmaster is a critical one for an orchestra. Counsel further asserts that the petitioner served in the role of a concertmaster for the [REDACTED] the [REDACTED] and the [REDACTED] Symphony Orchestra and concludes that all of these organizations have distinguished reputations in their field. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Along with the appeal and other supplemental evidence, the petitioner submitted an article titled, [REDACTED]. None of the above-mentioned orchestras are included among the mentioned orchestras in the article. The remainder of the record includes evidence referencing the reputation of only one of the above mentioned orchestras – the [REDACTED] concertmaster of the [REDACTED] writes in a support letter: “[] I feel strongly that the [REDACTED] must be included as one of the best mid-level orchestras in the United States.” However, as neither Mr. [REDACTED] nor other evidence in the record provides a context for what it means to be one of the “best mid-level orchestras,” the letter is insufficient to establish that the [REDACTED] has a distinguished reputation. [REDACTED] the President of the [REDACTED] in a support letter discussing the petitioner's accomplishments observes that the petitioner: “[procured] the 2nd highest position with one of this nation's finest orchestras, the [REDACTED] . . .” The opinion of one expert in the field is insufficient to establish that the [REDACTED] is an organization that has a distinguished reputation, as required by 8 C.F.R. § 204.5(h)(3)(viii).

Even assuming that the [REDACTED] enjoys a distinguished reputation, the record supports the director's ultimate determination that the petitioner cannot establish eligibility under this criterion because he has not submitted evidence demonstrating his performance in a leading or critical

role for organizations or establishments (in the plural) that have a distinguished reputation, which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(K)(3)(ii)(B) that evidence of experience must be in the form of “letter(s).” Thus, the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS’ ability to interpret significance from whether the singular or plural is used in a regulation.⁴

Accordingly, because record does not include evidence demonstrating the distinguished reputation of multiple orchestras in which the petitioner performed a critical role, the petitioner did not establish his eligibility pursuant to 8 C.F.R. § 204.5(h)(3)(viii).

C. Merits Determination

The director in his denial concluded that the petitioner only established one of the evidentiary criteria outlined in 8 C.F.R. § 204.5(h)(3). The director then subsequently considered the single criterion in a merits determination. On appeal, counsel asserts that the director erred in conducting a merits determination based on a single evidentiary criterion, rather than conducting a merits determination on the entirety of the record. The director considered all of the evidence in determining that the petitioner in this instance did not submit the requisite evidence under at least three evidentiary categories in accordance with *Kazarian*. Consequently, while a final merits determination in a case where the petitioner has met the antecedent procedural step should consider all of the evidence in the aggregate, a final merits determination analysis in this matter was unnecessary because the petitioner did not first satisfy initial evidence requirements.

III. CONCLUSION

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

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R.

⁴ See *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for “a” bachelor’s degree or “a” foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

§§ 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 regulatory requirement of three types of evidence. *Id.* at 1122. The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

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).