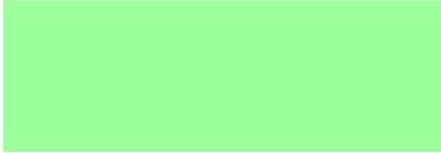


(b)(6)

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

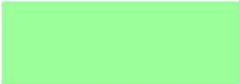


U.S. Citizenship
and Immigration
Services



DATE: **JAN 09 2014**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE:

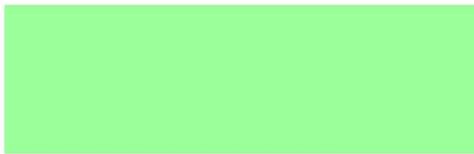
Petitioner:

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 (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,

Ron Rosenberg
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 dismissed.

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

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

On appeal, counsel claimed that the beneficiary meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and asserts that the director did not consider the comparable evidence that the petitioner submitted. On June 18, 2013, the AAO issued a notice of derogatory evidence. The petitioner responded on July 12, 2013 and the response is now part of the record of proceeding.

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.*

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. Comparable Evidence

Counsel claims in his brief that the director did not consider the petitioner's comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4) regarding the beneficiary's conferment of the title "Pandit" by his guru. Moreover, counsel claims that the beneficiary's reference letters can be used as comparable evidence pursuant to the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii) and the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

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. *See* 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). 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. Further, the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary'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 the beneficiary's occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In counsel's brief, he does not explain why the regulatory criteria at 8 C.F.R. § 204.5(h)(3) are not applicable to the beneficiary's occupation. Instead, counsel makes unsupported assertions such as "we did not submit evidence of membership in associations in the field which require outstanding achievements as judged by recognized experts because this does not readily apply," and "we have explained that as a Tabla musician, you are rarely written about and published in major media." The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). In fact, counsel's claim that an individual is "rarely" written about demonstrates that there could be published material about a tabla player. Moreover, counsel did submit published material about other tabla players, and the petitioner did submit two articles that were published material about the beneficiary, which will be discussed further below, evidencing that the criterion does apply to the beneficiary's occupation.

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the beneficiary's occupation as a table player. In fact, as indicated in this decision, counsel discusses evidence in his brief that specifically addresses six of the ten criteria at 8 C.F.R. § 204.5(h)(3) that relates to the beneficiary's occupation. An inability to meet a criterion, however,

is not necessarily evidence that the criterion does not apply to the beneficiary's occupation. Moreover, the regulation at 8 C.F.R. § 204.5(h)(3) includes other broad criteria, including evidence that the beneficiary commanded a high salary pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix) and have commercial successes pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x). Counsel provides no documentation as to why these provisions of the regulation would not be appropriate to the profession of a tabla player/musician.

The petitioner also did not indicate how the letters supporting the petition are comparable to the objective evidence independent of the filing of the petition required under the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(ii) and (iii). Where a beneficiary is simply unable to meet or the petitioner is unable to submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

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.

On June 18, 2013, in accordance with the regulation at 8 C.F.R. § 103.2(b)(16)(i), the AAO issued a notice advising the petitioner that the beneficiary previously submitted an altered document. Specifically, on April 16, 2010, the beneficiary filed Form I-140 [REDACTED], seeking to classify himself as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. At that time, the beneficiary submitted his résumé and claimed that he was an [REDACTED] (Emphasis added.) Moreover, the beneficiary submitted a copy of a letter, dated November 24, 1988, from [REDACTED] Station Director for [REDACTED] who stated that the beneficiary "placed in A (H) grade." (Emphasis added.) Furthermore, prior counsel claimed that [REDACTED] "selects musicians for their music programs based on their stature and ability and grades them according to their talent and ability, the highest grade being A."³ On February 21, 2012, the AAO dismissed the appeal and indicated that [REDACTED] letter was altered where the 'A' grade was listed. At the time of filing the current petition [REDACTED] the petitioner submitted a copy of the unaltered version of [REDACTED] letter reflecting that the beneficiary received a "B" grade for his audition. Neither the petitioner nor counsel addressed the previous findings of the AAO or provided an explanation for the prior submission of an altered document.

On July 12, 2013, counsel responded to the AAO's June 18, 2013 notice and submitted a letter, dated June 26, 2013, from [REDACTED] Program Head for [REDACTED] who stated that the beneficiary is a "'B High' grade [REDACTED] In addition, counsel submitted an affidavit from the beneficiary who claimed that he did not alter [REDACTED] letter, had no knowledge of how the letter was altered, and was unsatisfied by the representation of his former

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

³ Prior counsel was [REDACTED]

counsel. Moreover, counsel submitted some email correspondence between the beneficiary and former counsel.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submitted competent, objective evidence pointing to where the truth lies. *Id.* Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. Although the petitioner established that the beneficiary was a "B" graded artist of [REDACTED] the petitioner has not demonstrated that the beneficiary did not submit an altered document in order to procure an immigration benefit. Neither counsel's response nor the beneficiary's affidavit addresses why, in support of the previous petition, the beneficiary submitted his résumé indicating that he was an "A" Grade Artist of [REDACTED]" Regardless, the beneficiary's receipt of a "B" grade from [REDACTED] will be evaluated below, along with the other claims on appeal, to determine if the documents meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

The director determined that the petitioner did not establish the beneficiary's eligibility for this criterion. On appeal, counsel claimed that the beneficiary meets this criterion based on the following:

1. Selection as "winner" of the [REDACTED] conducted by [REDACTED]
2. Receipt of a Gold Medal from the [REDACTED]
3. Receipt of the title [REDACTED] and [REDACTED]
4. Receipt of a National Scholarship from the [REDACTED]

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor." It is the petitioner's burden to establish that the evidence meets every element of this criterion. Not only must the petitioner demonstrate the beneficiary's receipt of prizes and awards, it must also demonstrate that those prizes and awards are nationally or internationally recognized for excellence in the field of endeavor, which, by definition, goes beyond the awarding entity.

Regarding item 1, the petitioner submitted a certificate indicating that the beneficiary "participated in the [REDACTED] and has placed 2nd in [REDACTED] on January 24, 1974. Thus, according to this certificate, the beneficiary placed second and was not the winner of the competition as counsel claimed on appeal. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See Phinpathya*, 464

U.S. at 188-89 n.6. The AAO must look to the plain language of the documents and not to subsequent statements of counsel. *See Matter of Izummi*, 22 I&N Dec. 169, 185 (Comm'r 1998). Nonetheless, on appeal, the petitioner submitted screenshots from [REDACTED] and www.wikipedia.org reflecting background information about [REDACTED]

However, none of the screenshots provide any information regarding the [REDACTED] or associated prizes or awards, so as to demonstrate that the beneficiary's second place finish constitutes a nationally or internationally recognized prize or award for excellence. Without additional evidence regarding the national or international recognition of the prize or award, the reputation alone of the awarding entity is insufficient to establish eligibility for this criterion.

Similarly, regarding the beneficiary's receipt of a "B" grade from [REDACTED] as discussed above, the petitioner did not submit any documentary evidence regarding the significance of being a graded artist, as well as receiving a "B" grade, so as to demonstrate that it equates to a nationally or internationally recognized prize or award for excellence in the field pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i).

Regarding item 2, the petitioner submitted two certificates dated March 31, 1977 and March 22, 1977. The March 31, 1977 certificate indicates that the beneficiary "participated in the [REDACTED] conducted by the [REDACTED] in 1976/77, and was given a Gold Medal for placing first in the [REDACTED]" The March 22, 1977 certificate indicates that the beneficiary "participated in the regional Music Competition in [REDACTED] conducted by the [REDACTED] in 1976/77, and has won first prize in [REDACTED]" [REDACTED] signed both certificates. The certificates bear no indicia that the national organization issued either certificate.

On appeal, the petitioner submitted a screenshot from [REDACTED] a press release regarding 2011 [REDACTED] photos of [REDACTED] a screenshot from www.wikipedia.org, screenshots from www.nytimes.com, a screenshot from [REDACTED] a screenshot from www.firstpost.com, and [REDACTED] annual report. The documentary evidence contains background information regarding [REDACTED]

According to the documentation, the [REDACTED] are recognized as the highest national honour conferred on practicing artistes, gurus and scholars, and have come to stay as the most coveted honours to which the artistes aspire." The press release reflects that [REDACTED] is based in New Delhi. The petitioner, however, has not demonstrated that the beneficiary received a [REDACTED] In fact, the petitioner submitted screenshots from [REDACTED] that listed the recipients of the [REDACTED] and the beneficiary is not listed as a recipient. Rather, the beneficiary received a gold medal in a competition that the [REDACTED] conducted. The March 22, 1977 certificate expressly states that the competition was regional. The petitioner did not submit any documentary evidence regarding the gold medal or first prize in the senior percussion category at the music presentations in [REDACTED] so as to establish that either certificate is a nationally or internationally recognized prize or award for

excellence in the field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

Regarding item 3, on appeal counsel claimed:

It is apparent from the contents of the Denial that reliance was placed on a prior AAO Decision [REDACTED] associated with the Beneficiary.

For instance, the Denial repeats the AAO's contention from that Decision that although the letter from [REDACTED] provided history and selection process for the award. "Nothing in Mr. [REDACTED] support letter or the record; however, reflect that the award is nationally/internationally recognized."

It is clear the reviewing Officer has not read the letter that was submitted this time around.

Counsel then quoted portions of the letter. However, a review of the record of proceeding reflects that the petitioner submitted the same letter from [REDACTED] dated May 31, 2010, which the beneficiary previously submitted in support of his prior petition. The petitioner did not submit an updated or new letter as suggested by counsel. Regardless, while Mr. [REDACTED] described the annual music festival and the selection process for the various awards, as well as background information, his letter provides no information demonstrating that receiving a [REDACTED] equates to a nationally or internationally recognized prize or award for excellence in the field pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i). The petitioner also submitted a screenshot from [REDACTED] dated July 12, 2010, regarding [REDACTED] who received the [REDACTED] at the [REDACTED]. The article, from the [REDACTED] who claimed that "[t]his title is considered to be very prestigious as only select few talents [sic] get invited to perform at the annual fest" and "[t]he title is given in recognition of meritorious performance at the fest." The personal opinion of a winner in a local section of a newspaper is not persuasive evidence that receiving the [REDACTED] title meets all of the elements of this criterion. The article does not establish that the [REDACTED] title is a nationally or internationally recognized prize or award for excellence in the field; there is no evidence demonstrating that the title is nationally or internationally recognized beyond [REDACTED].

Regarding item 4, on appeal, the petitioner submitted a screenshot from [REDACTED] reflecting that "[t]his scheme seeks to give assistance to young artists of outstanding promise for advanced training within India in the field of Indian Classical Music, Indian Classical Dance, Theatre, Visual art, Mime Folk, Traditional and Indigenous Arts and Light Classical Music." However, academic study is not a field of endeavor, but training for a future field of endeavor. As such, academic scholarships, student awards, postdoctoral fellowships, and financial aid awards cannot be considered nationally or internationally recognized prizes or awards in the petitioner's field of endeavor. Moreover, financial aid awards in the form of scholarships are reserved for

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

Finally, the director also determined that the beneficiary did not receive a gold medal for the film, [REDACTED]. On appeal, counsel claims:

While it is true that the Gold Medal for Original Score was awarded to [REDACTED] and therefore evidence of Beneficiary's role, however leading, or critical may not go to satisfy the extraordinary ability prong at 8 CFR § 204.5(h)(3)(i) as *Evidence of receipt of lesser nationally or internationally recognized prizes or awards*, we respectfully request that it can be considered as evidence to satisfy 8 CFR § 204.5(h)(3)(viii) – *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation*.

(Emphasis in original.)

As counsel is no longer contesting this issue under the awards criterion, this issue is considered to be abandoned and the evidence will be considered under the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). See *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011).

As discussed above, the plain language of this regulatory criterion specifically requires that the beneficiary's prizes or awards be nationally or internationally recognized for excellence in his field. In this case, the petitioner did not establish that the beneficiary's prizes or awards are nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Accordingly, the petitioner did not establish that the beneficiary 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.

As indicated earlier in this decision, counsel requested that the beneficiary's reference letters be considered as comparable evidence to meet this criterion. Again, counsel did not establish that the beneficiary's occupation as a tabla musician is eligible for the provisions of the regulation at 8 C.F.R. § 204.5(h)(4) and explain how reference letters are comparable to the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires "[d]ocumentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields." In order to demonstrate that membership in an association meets this criterion a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; at issue are the membership requirements rather than the association's overall reputation.

The reference letters do not make any claims that the beneficiary has any memberships in associations, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

Accordingly, the petitioner did not establish that the beneficiary meets this criterion.

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

The director determined that the petitioner did not establish the beneficiary's eligibility for this criterion. On appeal, counsel claims that the director "added a substantive requirement required beyond those set forth in the regulations" by indicating that the articles were not primarily about the beneficiary. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought." USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. See *Kazarian*, 596 F.3d at 1221, citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir.2008). As the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about" the beneficiary relating to his work in the field for which classification is sought, material

that mentions the beneficiary but is about another subject does not meet the plain language requirements of the regulation. Nevertheless, an article that is about the beneficiary in addition to other subjects, would generally meet the elements of this criterion.

A review of the record of proceeding reflects that the petitioner submitted numerous articles that briefly mention the beneficiary as one of the performers or as the instructor of students but are not published material about him relating to his field. As an example, the petitioner submitted an article entitled, “[REDACTED] (unidentified date and publication) that mentioned the beneficiary one time as accompanying [REDACTED] at a concert in Tampa, Florida. The article is about [REDACTED] and his spiritual chants rather than published material about the beneficiary relating to his work in the field. It is insufficient to establish eligibility for this criterion based on material that simply lists, mentions, or indicates the beneficiary’s name without providing material that is about him and relates to his work. According to the plain language of the regulation, any published material that mentions a beneficiary’s name does not automatically qualify for the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

Likewise, the petitioner submitted articles reflecting published material about shows or events in which the beneficiary is mentioned as being a participant, but the articles are not about the beneficiary relating to his work. For example, the petitioner submitted an article entitled, “[REDACTED] While the article mentioned the beneficiary and credited him as the guru and instructor, the article is about a concert organized by the [REDACTED] performed at the [REDACTED]. An article that is not about the beneficiary does not meet this regulatory criterion. *See, e.g., Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor).

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought.” Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that “[s]uch evidence shall include the title, date, and author of the material, and any necessary translation.” In general, in order for published material to meet this criterion, it must be about the beneficiary and, as stated in the regulations, be published in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.⁴

A review of the record of proceeding reflects that the petitioner submitted various screenshots from the publications’ websites. For example, the petitioner submitted screenshots from [REDACTED]. However, USCIS need not rely on the self-promotional material of the publisher. *See Braga v. Poulos*, No. CV 06

⁴ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual’s reputation outside of that county.

5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that self-serving assertions on the cover of a magazine as to the magazine's status is not reliant evidence of major media). Moreover, the petitioner submitted screenshots from *Wikipedia*; however, as there are no assurances about the reliability of the content from this open, user-edited Internet site, information from *Wikipedia* has little evidentiary weight. *See Badasa v. Mukasey*, 540 F.3d 909 (8th Cir. 2008).⁵ Further, the petitioner submitted material that was posted on Internet websites, such as

However, the petitioner did not demonstrate that the material is considered to be major media. The petitioner did not submit independent, objective evidence establishing that the websites are considered major media. In today's world, many newspapers and organizations, regardless of size and distribution, post at least some of their stories on the Internet. To ignore this reality would be to render the "major media" requirement meaningless. However, the petitioner did not establish that international accessibility by itself is a realistic indicator of whether a given website is "major media." Finally, the petitioner submitted articles from various publications, such as *Indo-American News*, without any documentation demonstrating that they are professional or major trade publications or other major media.

The director found that the petitioner submitted one article, which qualified as published material about the beneficiary in a major medium; however the director indicated that the regulatory criterion "requires published material in the plural." Section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires published material in more than one professional or trade publication or other major medium. 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. *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

⁵ See also the online content from http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on December 18, 2013, and copy incorporated into the record of proceeding is subject to the following general disclaimer:

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

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(I)(2) requires a single degree rather than a combination of academic credentials).

Notwithstanding the above, the director stated that “USCIS is satisfied that his publication is major.” However, the record of proceeding does not support the director’s finding. Regarding [REDACTED] counsel previously claimed that [REDACTED] is one of the most widely read newspapers in India, with a circulation of 309,000, according to the [REDACTED] and referenced in *Wikipedia*. Counsel did not submit any documentary evidence from the [REDACTED] or from *Wikipedia* to support his assertions. Without documentary evidence to support the claim, 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). See also *Badasa*, 540 F.3d at 909 (weight will not be assigned to information from *Wikipedia* as there are no assurances about the reliability of the content from this open, user-edited Internet site). Moreover, the petitioner submitted screenshots from [REDACTED] that provide general information about the [REDACTED] brands in the aggregate but no specific circulation or distribution statistics for the [REDACTED] specifically. USCIS need not rely on the general self-promotional material of the publisher. See *Braga*, 2009 WL at 604888 (concluding that self-serving assertions on the cover of a magazine as to the magazine’s status is not reliable evidence of major media). The petitioner did not submit any independent, objective evidence or other specific circulation or distribution data establishing that [REDACTED] is a major medium. As such, the director’s finding is withdrawn.

On appeal, counsel specifically refers to the following three articles:

1. An article entitled, [REDACTED]
2. An article entitled, [REDACTED]
3. An article entitled, [REDACTED]

Regarding item 1, the article reflects published material about the beneficiary relating to his work. According to the translation, which the beneficiary’s spouse executed, the article is “[f]rom [REDACTED] [REDACTED]’ However, as evidence of the significance of this publication, the petitioner submitted screenshots from *Wikipedia*, which is not a source of probative evidence. See *Badasa*, 540 F.3d at 909 (weight will not be assigned to information from *Wikipedia* as there are no assurances about the reliability of the content from this open, user-edited Internet site). Moreover, the petitioner submitted a screenshot from [REDACTED] reflecting that “Sakal operations consist of regional newspapers, magazines, and Internet publishing.” The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the material be published in professional or major trade publications or other major media. Hence, the determining factor is the publication

(*Sakal*) rather than the publishing company [REDACTED]. The petitioner has not established that the publication is a professional or major trade publication or other major medium consistent with this regulatory criterion.

Regarding item 2, the article is about a concert at the [REDACTED]. Although the beneficiary is mentioned as performing at the concert, the article is about the concert. An article that is not about the beneficiary does not meet this regulatory criterion. *See, e.g., Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at *7 (upholding a finding that articles about a show are not about the actor). Moreover, counsel claimed that “Oxford Town is the Oxford Eagle’s weekly arts and entertainment guide established in 1993,” and “[t]he Oxford Eagle is a daily newspaper serving Oxford Town, Mississippi and surrounding counties.” However, counsel did not provide any documentary evidence to support his assertions. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See Phinpathya*, 464 U.S. at 188-89 n.6. Regardless, if true, the newspaper appears to enjoy only a local distribution and circulation. Finally, as the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires the date of the material, the submission of a copy of an article with an illegible date does not satisfy this regulatory criterion.

Similarly, regarding item 3, the article is about a concert by the beneficiary’s students at the [REDACTED]. Although the article provides some background information about the beneficiary, the article is about the concert. An article that is not about the beneficiary does not meet this regulatory criterion. *See, e.g., Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at *7 (upholding a finding that articles about a show are not about the actor). Moreover, as previously discussed, the petitioner did not submit any documentary evidence establishing that [REDACTED] is a professional or major trade publication or other major media.

Furthermore, although not discussed in counsel’s brief, counsel submitted two additional articles on appeal. First, counsel submitted a screenshot entitled, “[REDACTED] August 30, 2012, by [REDACTED].” The petitioner filed the petition on December 21, 2011. The petitioner must establish the beneficiary’s eligibility 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. at 175. 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. Regardless, the article is about a concert the [REDACTED] organized. Although the article mentions the beneficiary one time as being a performer at the concert, the article is not about him relating to his work. An article that is not about the beneficiary does not meet this regulatory criterion. *See, e.g., Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at *7 (upholding a finding that articles about a show are not about the actor). In addition, counsel did not submit any documentary evidence demonstrating that [REDACTED] is a professional or major trade publication or other major medium.

Second, counsel submitted a screenshot entitled, '[REDACTED]' unidentified date, by [REDACTED]. Again, the article is about a concert at the [REDACTED] and mentions the beneficiary as a performer. An article that is not about the beneficiary does not meet this regulatory criterion. *See, e.g., Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at *7 (upholding a finding that articles about a show are not about the actor). Further, as indicated above, counsel did not submit any documentary evidence establishing that [REDACTED] is a professional or major trade publication or other major medium. Finally, counsel did not include the date of the material as required pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii).

While the petitioner submitted a few articles reflecting published material about the beneficiary and his work, the petitioner did not establish that the material was published in professional or major trade publications or other major media. Submitting published material about the beneficiary and his work is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) without establishing that the material was published in professional or major trade publications or other major media. The burden is on the petitioner to establish every element of this criterion.

Accordingly, the petitioner did not establish that the beneficiary meets this criterion.

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

The director did not make a determination of the beneficiary's eligibility for this criterion. On appeal, counsel states that he requested consideration of this criterion in response to the director's request for evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8). Based on a review of the record of proceeding, counsel claimed the beneficiary's eligibility for this criterion based on a letter from [REDACTED] who stated that the beneficiary was affiliated with the university from 1996 to 1998 and "served on the panel of examination for both theory and practicals for [REDACTED]"⁶ The letter does not include "a specific description of the duties" the beneficiary performed and, thus, does not comply with the regulation at 8 C.F.R. § 204.5(g)(1) regarding evidence of experience.

The regulation at 8 C.F.R. § 103.2(b)(2) provides in pertinent part:

(i) The non-existence or other unavailability or required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the fact at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more

⁶ The letterhead, body and seal on this letter state "[REDACTED]" while the author's title says "[REDACTED]"

affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits.

In this case, while the petitioner submitted a letter, the petitioner did not submit any documentary evidence demonstrating that primary evidence and secondary evidence do not exist or cannot be obtained. Regardless, the letter that has been provided is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (9th Ed., West 2009). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signer, in signing the statement, certifies the truth of the statement, under penalty of perjury. 28 U.S.C. § 1746. Furthermore, the plain language of the regulation at 8 C.F.R. § 103.2(b)(2)(i) requires the submission of "two or more affidavits" in which the petitioner only submitted one letter.

Regardless, 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." In the case here, [REDACTED] letter does not contain specific information such as the beneficiary's responsibilities on the panel and who he purportedly judged, so as to establish that the beneficiary participated as a judge of the work of others consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). *See also* 8 C.F.R. § 204.5(g)(1) (providing that letters documenting experience must provide "a specific description of the duties" the individual performed). Without additional, specific information supporting the letter, the petitioner has not demonstrated that the beneficiary meets this regulatory criterion.

Accordingly, the petitioner did not establish that the beneficiary meets this criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

The director determined that the petitioner did not establish the beneficiary's eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." Here, the evidence must be reviewed to see whether it rises to the level of original 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 director found that the beneficiary's reference letters did not reflect any original contributions of major significance in his field. Specifically, the director discussed a letter from [REDACTED] and found that the reference did not identify the beneficiary's "new techniques" or any original contributions of major significance. The director's ultimate conclusion is consistent with the record, including the beneficiary's reference letters. For example, [REDACTED] stated that the beneficiary's "unique style of playing wherein he has ably merged two schools of thoughts [REDACTED] makes him one of the contemporary musicians in India." Although [REDACTED] identified the beneficiary's unique style of playing, she did not indicate how the beneficiary's playing style has influenced or impacted the field, so as to demonstrate an original contribution of major significance in the field. Similarly, [REDACTED] stated that the beneficiary "represents the [REDACTED] (school of thoughts) and is among the selected tabla players who can play different [REDACTED] with equal mastery." Again, [REDACTED] did not discuss how the beneficiary's school of thought and playing ability have been of major significance in the field consistent with the regulation at 8 C.F.R. § 204.5(h)(3)(5).

Moreover, the director indicated that the beneficiary's other reference letters praised the beneficiary's talents and skills but did not demonstrate how those talents and skills equated to original contributions of major significance in the field. A review of the record of proceeding reflects that the beneficiary's references highly praised the beneficiary. For example, the letters include the following statements: "[the beneficiary] is one of only a handful of Tabla percussionists who is both a performer and an educator" [REDACTED] "[the beneficiary has] the ideal combination [of] talent, knowledge, determination and worldly vision – a quality that has made him successful not only as a performer in India, but also as a performer-cum-teacher of this art in the Western countries" [REDACTED] and "[the beneficiary is] a unique breed of Hand Drumming Percussive maestros who are in paucity today" [REDACTED]. None of the letters indicated how the beneficiary's skills, talents, or knowledge are original contributions of major significance to the field. While [REDACTED] states that in addition to spreading Tabla/Indian music to the next generation in the United States, the beneficiary "has left his mark also in the field of Fusion music – a music that creates the bond between the world and the people of the USA," [REDACTED] provides no examples or other support of this conclusory statement. USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

Having a diverse skill set is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the beneficiary has already used those unique skills to impact the field at a significant level. Furthermore, assuming the beneficiary's skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment labor certification process. *See Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215, 221 (Comm'r 1998).

Similarly, while counsel claimed that the title of [REDACTED] constitutes comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4), the petitioner has not demonstrated that the standards at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the beneficiary's occupation. Insofar as counsel's assertions relate to this criterion, the beneficiary's [REDACTED] title will be considered under this criterion. Although [REDACTED] described the beneficiary as "one of my best students" who "imparts not only the knowledge of the [REDACTED] but is also a Guru (teacher) in the fullest sense," he did not identify the beneficiary's original contributions of major significance in the field beyond playing with other Indian musicians and performing at various venues. In order to demonstrate eligibility for this criterion, the petitioner must establish that the beneficiary has made original contributions and demonstrate how those contributions have been of major significance in the field. However, [REDACTED] recommendation letter does not explain how the beneficiary's achievement of receiving the title of "[REDACTED]" is indicative of an original contribution to the field that has impacted or influenced the field at a level consistent with a contribution of major significance in the field. Likewise, on appeal, the petitioner submitted an article entitled, "The guru recontextualised? – Teaching and learning North Indian classical music in a western professional training environment" by [REDACTED]. Although the article reflects background information regarding gurus as well as the role of gurus in learning music, it does not reflect that the beneficiary has made any original contributions of major significance in the field. It is not persuasive that every "[REDACTED]" also demonstrates an original contribution of major significance in the field.

On appeal, counsel submits a letter from [REDACTED] who stated that the beneficiary's "'feathertouch' approach to playing is non-traditional and unique." Although [REDACTED] identified an original contribution through the beneficiary's development of a new tabla playing technique, he did not demonstrate how this technique has significantly impacted the field as a whole rather than limited to his own performances. [REDACTED] did not indicate, for example, if other tabla players have widely adopted the beneficiary's playing technique, so as to demonstrate an original contribution of major significance in the field pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

Moreover, on appeal counsel submitted another letter from [REDACTED] who stated:

[The beneficiary] is an innovative Tabla player who can very easily be called extraordinary for his remarkable 'feathertouch' method of rendering [REDACTED]. The fact that I willingly acknowledge his extraordinary ability should in itself be adequate to qualify him for whatever benefit he is seeking. The reason being that not only have I performed with [the beneficiary] but I have observed the innovative, new techniques he uses while playing. The new techniques are in the way he makes certain sounds with his [REDACTED]. I have a term for the way he plays – "whispering drums". This is a rare form of rendering [REDACTED] music and clearly [the beneficiary] has come up with this unique and remarkable way by experimenting with modulations that are not readily apparent.

Although [REDACTED] claims that the beneficiary is extraordinary, his letter does not establish that the beneficiary has made original contributions of major significance in the field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v). Similar to [REDACTED] letter, he identified the beneficiary's original contribution of the "feathertouch" technique but did not offer any examples demonstrating that it is considered an original contribution of major significance in the field. [REDACTED] provided no evidence reflecting the impact or influence that the "feathertouch" has had on the field, so as to establish that it has been of major significance. The act of teaching students, by itself, does not establish that the teacher's techniques have influenced the field at a level consistent with a contribution of major significance in the field.

The opinions of the beneficiary's references are not without weight and have been considered above. 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 beneficiary'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 tabla player who has made original contributions of major significance in the field.

While those familiar with the beneficiary's work generally describe it as "extraordinary," "unique," and "rare," there is insufficient documentary evidence demonstrating that the beneficiary's work is of major significance. This regulatory criterion not only requires the beneficiary to make original contributions, the regulatory criterion also requires those contributions to be significant. Vague, solicited letters that repeat the regulatory language but do not explain how the beneficiary's contributions have already influenced the field is insufficient to establish original contributions of major significance in the field. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the USCIS' conclusion that the "letters from physics professors attesting to [the petitioner's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. 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*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, on appeal counsel claims that the beneficiary's promotion of the next generation of tabla players is relevant to this criterion. Specifically, counsel submitted documentary evidence reflecting that [REDACTED], the beneficiary's son, was a finalist for the [REDACTED] was a finalist for the [REDACTED] and was selected to perform with the [REDACTED]. However, the documentary evidence does not demonstrate the beneficiary's influence in the field beyond his

son and students that he has taught, so as to establish that his teachings can be considered original contributions of major significance in the field. There is no evidence reflecting that his musical instruction has risen to the level of major significance in the field. Although the beneficiary's son has received some recognition for his own musical abilities, the personal achievements of the beneficiary's son do not constitute the beneficiary's original contributions of major significance in the field consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

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

Accordingly, the petitioner did not establish that the beneficiary meets this criterion.

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

The director determined that the petitioner established the beneficiary's eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence of the display of the alien's work in the field at artistic exhibitions or showcases." However, a review of the record of proceeding does not reflect that the petitioner submitted sufficient documentary evidence establishing that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) for the reasons outlined below.

The beneficiary is a tabla musician. Not every music performance is an artistic exhibition designed to showcase the performer's art. 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*, 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 beneficiary 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). Therefore, the decision of the director for this criterion is withdrawn.

Accordingly, the petitioner did not establish that the beneficiary meets this criterion.

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

The director determined that the petitioner did not establish the beneficiary's eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." 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.

On appeal, counsel claims that the beneficiary meets this criterion based on the following:

1. The beneficiary's gold medal at the [REDACTED]
2. The beneficiary's performance at an event to commemorate the [REDACTED] and [REDACTED]
3. The beneficiary's position for the petitioner, the [REDACTED]

Regarding item 1, the petitioner submitted a letter from Scott Szabo clarifying a letter that he previously submitted with an earlier petition. [REDACTED] stated that the musical score for a feature film, [REDACTED] won a gold medal at the [REDACTED] and that the beneficiary's opening and ending renditions of Mr. [REDACTED] score "may have actually been the reason my score was selected for a Gold Medal." Although the beneficiary may have played a critical role in the musical score, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." The petitioner did not demonstrate how a musical score or a feature film equates to an organization or establishment. As such, this item does not meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

Regarding item 2, the petitioner submitted a certificate recognizing the beneficiary's performance at the [REDACTED] concert on July 19, 2005. Similar to item 1, the petitioner did not establish how a performance equates to an organization or establishment consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). Moreover, although the United Nations is an organization, the petitioner did not demonstrate how performing at a single event constitutes performing in a leading or critical role for an organization as a whole. In fact, the petitioner submitted an article entitled, [REDACTED] that reported on the concert. While the article named other individuals who performed at the concert, such as [REDACTED] the article does not mention the beneficiary. Rather, he is included in a photograph with other performers. The petitioner did not establish that the beneficiary's performance at the United Nations meets the plain language of this regulatory criterion.

Regarding item 3, the petitioner submitted a letter from [REDACTED] Director of the [REDACTED] and stated that the beneficiary "is an invaluable and critical asset to our organization," "has contributed immensely to the growth and success of our programs," and "has established a name for himself as a leading Tabla exponent in the U.S. and a critical role within our organization." However, repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *See Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d at 41; *Avyr Associates, Inc.*, 1997 WL 188942 at *5. Moreover, the petitioner's letter claims that the beneficiary's "affiliation led to doubling our enrollment in a very short period of time," and the beneficiary "has

contributed to the spread of [the petitioner's] reputation as a premier institute for the [redacted] [redacted]. However, the petitioner did not submit any documentation to support its assertions. 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)). It appears from [redacted] job title alone that the beneficiary performs in a subordinate role. The petitioner did not submit any organizational charts, for example, to demonstrate that the beneficiary's role was leading when compared to other employees. Without additional, supporting documentation, the petitioner's letter is insufficient to demonstrate that the beneficiary performed in a leading or critical role.

Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires the organizations or establishments to "have a distinguished reputation." The petitioner submitted several letters recognizing the work of the petitioner including letters from government officials, educators, and parents. Although the documentation generally acknowledges the petitioner's service, it does not demonstrate that it has a distinguished reputation. Not every educational or cultural institution has a distinguished reputation. The petitioner did not submit any documentary evidence, for example, reflecting that it received any recognized awards or notable media coverage, so as to distinguish it from other art forums.

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

Accordingly, the petitioner did not establish that the beneficiary meets this criterion.

C. Summary

The petitioner has not satisfied the antecedent regulatory requirement of three types of evidence.

III. O-1 Nonimmigrant

USCIS recently approved the beneficiary for O-1 nonimmigrant status from September 2, 2013 to September 1, 2014. 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 that "[t]he 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). The same regulation further defines "distinction" as follows:

Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

“Distinction” is a different 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 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the petitioner’s receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as a performing artist with extraordinary ability. Further, an approval of a nonimmigrant visa does not mandate the approval of a similar immigrant visa. Each case must be decided on a case-by-case basis upon review of the evidence of record.

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

USCIS is not required to approve petitions where the petitioner has not demonstrated eligibility because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). USCIS or any agency 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 has approved a nonimmigrant petition on behalf of the alien, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 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).

An application or petition that does not comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.⁷ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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

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.

⁷ The AAO maintains de novo review of all questions of fact and law. *See Soltane*, 381 F.3d at 145. 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).