



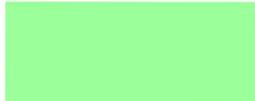
U.S. Citizenship
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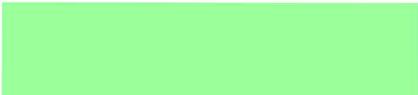


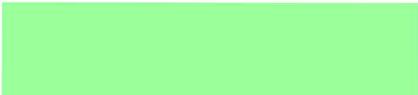
DATE: **JUL 16 2014**

Office: TEXAS SERVICE CENTER

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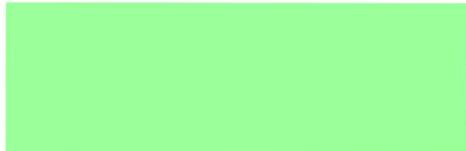
IN RE:

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 Director, Texas Service Center, denied the employment-based immigrant visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. We will dismiss the appeal.

The petitioner seeks classification as an “alien of extraordinary ability” in the arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality 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.

The petitioner’s priority date established by the petition filing date is February 4, 2013. On March 20, 2013, the director served the petitioner with a request for evidence (RFE). After receiving the petitioner’s response to the RFE, the director issued his decision on August 21, 2013. On November 18, 2013, the director dismissed the petitioner’s motion and reaffirmed the denial. On appeal, the petitioner submits a brief with no additional documentary evidence. For the reasons discussed below, we uphold the director’s ultimate determination that the petitioner has not established his eligibility for the classification sought.

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 our decision to deny the petition, the court took issue with our 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 we did)," and if the petitioner did not 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, we 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 not satisfied the regulatory requirement of three types of evidence. *Id.*

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

II. ANALYSIS

A. One-time Achievement

The petitioner initially claimed eligibility for this classification based on several awards that he asserted qualified as a one-time achievement defined at 8 C.F.R. § 204.5(h)(3). The director's RFE notified the petitioner that his awards were not sufficient under the regulation and the petitioner's response did not contest that conclusion. Furthermore, the petitioner does not assert eligibility under this provision on appeal. Therefore, the petitioner has abandoned his claims under this criterion. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, 9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not submitted qualifying evidence under this criterion.

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.

This criterion contains several evidentiary elements the petitioner must satisfy. According to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i), the evidence must establish that the alien is the recipient of the prizes or the awards (in the plural). The clear regulatory language requires that the prizes or the awards are nationally or internationally recognized. The plain language of the regulation also requires the petitioner to submit evidence that each prize or award is one for excellence in the field of endeavor rather than simply for participating in or contributing to an event or to a group. The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion.

The director determined that the petitioner did not meet the requirements of this criterion, specifically concluding that the petitioner had not established that he was the actual recipient of the awards recognizing albums on which he played. The regulation does require evidence "of the alien's receipt" of prizes or awards, but does not require that the alien be the sole recipient of the award.

The evidence the petitioner provided under this criterion with the initial filing does not bear any source information which would allow USCIS to verify the reliability of the claimed information within the documents. Specifically, the documentation lacks any publication title, a relevant website address, or equivalent source information. These documents therefore carry very little evidentiary weight in these proceedings. Much of the evidence the petitioner provided in response to the director's RFE was the same as initially provided and lacked a verifiable source, such as a web address. The petitioner did provide website printouts from the [REDACTED] that indicated the A [REDACTED] won the award in 2006 for [REDACTED], and [REDACTED] as a solo artist, won the award in 2008 for [REDACTED].

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

[REDACTED] verified that the petitioner played percussion on both albums. The credits for [REDACTED], which lack a source, list the petitioner as a group member. The credits for [REDACTED] consistent with a solo album, do not list any group members. With regard to the 2008 award, which [REDACTED] received as a solo artist, the evidence does not demonstrate that the petitioner was one of the recipients. Even assuming that the petitioner was a member of the [REDACTED] in 2006, consistent with the director's concerns, the petitioner must still demonstrate that he was one of the actual recipients of the award.

Where the regulations require specific, objective evidence of achievements, such as awards, the primary evidence of such awards would be copies of the awards themselves. 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. There is no primary evidence demonstrating the petitioner received any of the awards, individually or as part of a musical group. In this case, while the petitioner submitted reference letters, he did not submit any documentary evidence demonstrating that primary evidence and secondary evidence do not exist or cannot be obtained. The petitioner has not demonstrated that the required evidence is unavailable or cannot be obtained, and, therefore, the petitioner is presumed ineligible under this criterion pursuant to 8 C.F.R. § 103.2(b)(2).

Even if the organizers issued a 2006 [REDACTED] to the petitioner as a group member, the petitioner did not submit probative documentary evidence in reference to the national or international recognition of that award as required by the regulation at 8 C.F.R. § 204.5(h)(3)(i). Rather, the petitioner submitted evidence that lacks any publication title, a relevant website address, or an equivalent means to confirm the source of the information. Such documents, therefore, carry very little evidentiary weight in these proceedings. Even if this award met the regulatory requirements, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "prizes or awards" in the plural, which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning.

The petitioner asserts within the appellate brief that the fewer people within an award winning group, the greater each person's impact is on the group's performance, and because the musical groups consisted of three to six members, the petitioner was vital to the end result. The petitioner's assertion is not persuasive as the regulation focuses on the petitioner being a recipient of an award rather than his impact on an award-winning group's performance.

Based on the foregoing, the petitioner has not submitted evidence that meets the plain language requirements of 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.

This criterion contains three evidentiary requirements the petitioner must satisfy. First, the published material must be about the petitioner and the contents must relate to the petitioner's work in the field under which he seeks classification as an immigrant. The published material must also appear in professional or major trade publications or other major media (in the plural). Professional or major trade publications are intended for experts in the field or in the industry. To qualify as major media, the publication should have significant national or international distribution and be published in a predominant national language. The final requirement is that the petitioner provide each published item's title, date, and author, and if the published item is in a foreign language, the petitioner must provide a translation that complies with the requirements found at 8 C.F.R. § 103.2(b)(3). The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner provided published material from [REDACTED] newspaper. Within the initial filing, the petitioner did not identify the type of publication (professional publication, major trade publication, or other major media). In response to the director's RFE, the petitioner focused mostly on whether the published material is about the petitioner. The director determined that the petitioner did not meet the requirements of this criterion placing his primary emphasis on whether the published material was about the petitioner. In the director's decision on the petitioner's motion to reconsider, the director stated: "In addition, counsel's conclusions are misguided regarding 'professional publications' not being required to reach a wide audience. The words 'or other major media' under this criterion establishes that wherever the published material is printed, it must be major; i.e., have significant national or international distribution." As defined at Section 101(a)(32) of the act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulatory definition of profession at 8 C.F.R. § 204.5(k)(2) adds any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. As musician does not fall within the definition of profession, music publications must qualify either as major trade publications or other major media.

The published material from the [REDACTED] newspaper is about the petitioner and his work in the field; however, the record lacks evidence that these are professional or major trade publications or other forms of major media. The petitioner must provide supporting evidence that demonstrates the submitted evidence qualifies as one of the required publication types. The petitioner claims that the [REDACTED] newspaper is [REDACTED] largest newspaper with a readership of over 400,000" and the [REDACTED] is a national professional publication. The petitioner did not submit probative evidence to verify these claims. 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 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

As noted by the director, some of the published material from [REDACTED] is about [REDACTED] the band in which the petitioner performed, and does not discuss the petitioner. While one of the [REDACTED] articles mentions the role of [REDACTED] evidence that simply mentions the petitioner's position within the musical group does not equate to published material about him relating to his work in the field. Further, the remaining articles in this publication do not mention the petitioner.

Within the appeal brief, the petitioner cites to *Racine v. INS*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995) and *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995). In contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before us; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. The petitioner's appellate brief also claims that the articles do not "merely name [the petitioner] in passing without reviewing or evaluating his work. Instead these articles specifically review/critique his work." Regardless, that case did not state that the published material does not have to be about the petitioner, a regulatory requirement; rather, the court concluded the material did not have to expressly single out the petitioner as a star. The record does not contain any probative evidence that constitutes published material about the petitioner in professional or major trade publications or other major media.

Finally, the petitioner did not demonstrate that the director used "primarily" to mean that the material must be solely or exclusively about the alien relating to his work. Nevertheless, an article that is not about the petitioner 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).

Consequently, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

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

The plain language of this regulatory criterion contains multiple evidentiary elements that the petitioner must satisfy. The first is evidence of the petitioner's contributions (in the plural) in his field. These contributions must have already been realized rather than being potential, future contributions. The petitioner must also demonstrate that his contributions are original. In addition, the evidence must establish that the contributions are scientific, scholarly, artistic, athletic, or business-related in nature. The final requirement is that the contributions rise to the level of major significance in the field as a whole, rather than to a project or to an organization. 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). Contributions of major significance connotes that the petitioner's work has significantly impacted the field. *See Visinscaia v. Beers*, --- F. Supp. 2d ---, 2013 WL 6571822, at *6, 8 (D.D.C. Dec. 16, 2013) (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole). The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner did not make a direct eligibility claim under this criterion within the initial filing. In response to the RFE the petitioner claimed two contributions. The first, that "he has taken traditional religious and ceremonial patterns that played on [REDACTED]". The second contribution was his published instructional book with a recorded CD and DVD. The director determined that the petitioner did not meet the requirements of this criterion. The director specifically stated (1) that according to the expert letters, the petitioner has reintroduced a previous practice, and (2) that the record lacks evidence demonstrating the petitioner's contributions were original or significant in the field.

On appeal, the petitioner asserts that the director substituted his own opinion for those of the experts who provided letters relating to the petitioner's contributions within his field. Within the appeal, the petitioner cited to the letters from Dr. [REDACTED] all of whom are experts in the petitioner's field.

Regarding the petitioner's originality through the use of [REDACTED] the letter from Dr. [REDACTED] Professor and Research Fellow at the [REDACTED] states: "I also want to describe an academic and original project that [the petitioner] has created. [The petitioner] has shed new light on an [REDACTED] folkloric practice that was almost forgotten, specifically regarding [REDACTED] music. There is [REDACTED] that are played together as [REDACTED] . . . [the petitioner] has [REDACTED] This [REDACTED] has not been formalized or solidified in any fixed manner or in the Western Hemisphere. This is something original and significant for professors of music, ethnomusicologists, musicians and those who study ancestral rituals and culture." Dr. [REDACTED] provides conflicting information regarding the originality of the petitioner's use of [REDACTED] Initially, Dr. [REDACTED] indicates the practice was almost forgotten, implying it previously existed; however, he also indicates that the petitioner created this practice and that it is original.

The letter from [REDACTED] a collaborator and one of the petitioner's fellow artists, states: "[The petitioner] has recently created a scholarly work of the use of [REDACTED] religious ceremonies in which he has converted [REDACTED] This concept is definitely new and groundbreaking, and it will attract widespread attention in the United States. His work would have already been thrust into the limelight were it not for the communication shortcomings that exist in [REDACTED] . . . Once he is here though, I am certain that his research and writings will attract the attention of anyone with interest in [REDACTED] music and culture."

[REDACTED], a Chicago-based musician, stated within his letter that the petitioner is “transcribing the [REDACTED] rhythms . . . into [REDACTED] which [the petitioner] believes is how [REDACTED] were originally played in [REDACTED] . . . I have not seen this concept performed, studied, or transcribed by anyone else in the world. The communities in the U.S. that study and use [REDACTED] music . . . will very much benefit from [the petitioner’s] original and scholarly work.” The letter from [REDACTED] a Cuban musician and producer also indicates that the petitioner “is working on a project to save the original [REDACTED] (that are now commonly used [REDACTED] but in the origins were played [REDACTED].”

These expert letters are somewhat inconsistent regarding the originality of the petitioner’s use of a [REDACTED]. Accordingly, the record supports the director’s concerns on this issue. Regardless of whether the petitioner’s contribution is original, however, he must also demonstrate that the contribution is of major significance in the field.

The expert letters the petitioner cites from Mr. [REDACTED] and Mr. [REDACTED] do not assert that the petitioner’s incorporation of [REDACTED] has already significantly impacted his field. Both authors reference a future benefit and impact within the petitioner’s field of endeavor. That the petitioner will provide a prospective benefit to the United States as a permanent resident is a requirement under the Act. See section 203(b)(1)(A)(iii) of the Act. However, the above cited expert letters do not identify how the petitioner has already made a significant impact in his field, which is required by this regulatory criterion. A petitioner must establish the elements for the approval of the petition at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). This evidence does not establish that, as of the priority date, the petitioner’s incorporation of [REDACTED] has contributed to his field in a significant manner as required by the regulation.

Regarding the petitioner’s second contribution claimed under this criterion, the petitioner’s appellate brief cites to a letter from Cuban musician [REDACTED] in support of the assertion that the director “misconstrues [the petitioner’s] ‘collaboration on a CD/DVD’ by failing to look to the substance and content of the project.” Mr. [REDACTED] letter quotes the prologue to the book on which the petitioner collaborated as stating that the book includes “a large portion of the percussive rhythms used by musical ensembles . . . offering a new and unique view of our culture. This labor is comparable to a small atlas of [REDACTED] rhythms.” Mr. [REDACTED] letter does not indicate the original nature of the petitioner’s collaborative work. Additionally, although the letter states the prologue describes the work as a small atlas of [REDACTED] rhythms transcribed to written form, Mr. [REDACTED] did not describe how the petitioner’s work has significantly impacted the field.

The appellate brief also refers to the letter from the musician, [REDACTED]. Within this letter, Mr. [REDACTED] implies that transcribing the traditional music to a written format is unique and original. However, this letter lacks sufficient detail indicating the extent to which this contribution has impacted the petitioner’s field. While the possibility exists that the petitioner’s work may have some future impact within his field, he has not provided evidence indicating that his field has already changed as a

result of this work. The petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1), (12). A petition may not be approved if the beneficiary expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. at 49. This evidence does not establish that, as of the priority date, the petitioner had made a contribution of major significance in his field.

The petitioner's appellate brief also reflects that his musical "field cannot be thoroughly grasped and comprehended by a layperson adjudicator. For that reason, the opinions of experts in the industry should be afforded due respect and recognition." While expert letters can provide important information pertaining to the field, to be relevant to this criterion, the expert letters must provide information about the petitioner and how his work has affected the field or must provide information regarding the extent to which the petitioner's work is being replicated or relied upon within his field. The above letters do not provide such a context.

The petitioner also submitted several reference letters praising his talents and abilities as a percussionist. Most collaborated with the petitioner in creating albums and other music works, describing him as a star percussionist who was primarily responsible for the success of the musical productions. Talent and experience in one's field, however, are not necessarily indicative of original artistic contributions of major significance in the petitioner's field. The petitioner must have demonstrably impacted his field in order to meet this regulatory criterion. The reference letters the petitioner submits do not provide specific examples of how the petitioner's work has significantly impacted the field at large or otherwise constitutes original contributions of major significance. The Board of Immigration Appeals (BIA) has stated that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998); *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); see also *Matter of Acosta*, 19 I&N Dec. 211, 218 (BIA 1985)). The Board clarified, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Matter of S-A-*, 22 I&N Dec. at 1332. If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. at 1136.

Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" was insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. The opinions of experts in the field are not without weight and have been considered above. While such letters can provide important details about the petitioner's skills, they cannot form the cornerstone of a successful extraordinary ability claim. 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.* See also *Visinscaia*, 2013 WL 6571822, at *8 (concluding that USCIS' decision to give limited weight to uncorroborated assertions from practitioners in the field was not arbitrary and capricious).

The submission of letters from experts 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; *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" but rather is admissible only if it will assist the trier of fact to understand the evidence or to determine a fact in issue). While letters authored in support of the petition have probative value, they are most persuasive when supported by evidence that already existed independently in the public sphere. Such independent evidence might include, but is not limited to, letters from independent industry experts with firsthand knowledge of the petitioner's impact in the field, media coverage, and published references to the impact of the petitioner's work.

Consequently, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

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

This criterion contains multiple evidentiary elements the petitioner must satisfy. The plain language requirements of this criterion requires that the work in the field is directly attributable to the alien. Generally, 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts. This interpretation is longstanding and has been upheld by a federal district court in *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). The alien's work also must have been displayed at artistic exhibitions or showcases (in the plural). The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion.

The petitioner claimed his musical performances at jazz festivals as qualifying activities under this criterion. The director initially determined that the petitioner met the requirements of this criterion in his initial decision, but reversed his determination in the decision on the motion to reconsider.

Within the appellate brief the petitioner claims: "There is absolutely no language limiting this criterion to visual artists, rather than performing artists." The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(vii) requires evidence of the "display" of the petitioner's work in the field at artistic exhibitions or showcases. A musical performance or program is not a "display."

As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). *See also Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7.

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

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role's matching duties. The petitioner also has the responsibility to demonstrate that he actually performed the duties listed relating to the leading role. A critical role should be apparent from the petitioner's impact on the organization or the establishment's activities. The petitioner's performance in this role should establish whether the role was critical for the organization or establishment as a whole. The petitioner must demonstrate that the organizations or establishments (in the plural) have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-Webster's online dictionary defines distinguished as, "marked by eminence, distinction, or excellence."⁵ Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U.S. 304, 306 (1893). Therefore, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or an equivalent reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner claims eligibility under this criterion based on performing in several musical groups. The director determined that the petitioner did not meet the requirements of this criterion. Specifically, the director stated that the evidence reflects the petitioner performed in a leading or critical role on projects (albums) with the musical groups, but that the record lacked sufficient evidence to establish that the musical groups enjoyed a distinguished reputation.

As the petitioner is claiming that the musical groups are the equivalent of organizations or establishments, he must also demonstrate that these groups enjoy a distinguished reputation. On appeal, the evidence the petitioner claims establishes the distinguished reputation of the below organizations is the same evidence initially discussed under the lesser prizes or awards criterion that does not bear any identifiable source. As such, the evidence associated with the following solo artists and musical groups carries significantly diminished evidentiary weight:

The petitioner also submitted letters from artists and musical group members in reference to each group's distinguished reputation. Regarding the letters from band members, USCIS will not accept assertions made within these letters as the sole evidence of the group's distinguished reputation, or that the group received the claimed awards without evidence on record of the actual award. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

While the receipt of awards by these solo artists and musical groups would be probative evidence regarding their distinguished reputations, the evidence on record bears limited evidentiary value as the documents do not have any indication of the source of this material. The petitioner did document that

⁵ See <http://www.merriam-webster.com/dictionary/distinguished>, accessed on June 17, 2014, a copy of which is incorporated into the record of proceeding.

the [REDACTED] received a [REDACTED] and provided published material about the musical group [REDACTED]. Regarding the [REDACTED] an award for a single album is not sufficient to demonstrate that the group, rather than [REDACTED] as a solo artist who won another award in 2008, enjoys a distinguished reputation. Moreover, as discussed above, the material relating to the significance of the [REDACTED] is from an unidentified source.

While the petitioner has provided published material establishing that [REDACTED] enjoys a distinguished reputation, he did not establish that he performed in a leading or critical role for this band. The petitioner's evidence relating to his role in this band is from a former band member, [REDACTED]. Mr. [REDACTED] asserts that the petitioner was the lead percussionist and was critical to the group's success. Repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, No. 95 CIV. 10729, *1, *5 (S.D.N.Y. Apr. 18, 1997). Notably, the two articles about [REDACTED] that the petitioner submitted do not support the statement that the petitioner was the lead percussionist. First, only one mentions the petitioner by name. Second, the article that does mention the petitioner's last name (as part of a father and son team) first states: "[REDACTED] plays with [REDACTED] two of the highest representatives of their generation of percussionists." The article's discussion of other percussionists before mentioning the petitioner as part of a father and son team rather than singling him out as the lead percussionist, is not consistent with Mr. [REDACTED] letter.

While the petitioner may have performed in a leading role for other musical groups, such as [REDACTED] [REDACTED] he did not provide independent evidence demonstrating that these musical groups enjoy a distinguished reputation. Furthermore, the petitioner did not submit evidence demonstrating that he performed in a critical role for any organization such that the group's success can be attributed to the petitioner.

As the petitioner has not submitted sufficient evidence regarding the distinguished reputation of the claimed musical groups, he has not satisfied the plain language requirements of this criterion.

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

This criterion requires a petitioner to establish eligibility through volume of sales or box office receipts as a measure of the petitioner's commercial success in the performing arts. The director initially determined that the petitioner did not meet the requirements of this criterion in his initial decision, but reversed his determination in the decision on the motion to reconsider. The director based his final determination on the possibility that the petitioner was a member of the band [REDACTED] in 1996 when the band's album reached tenth place in the charts.

The petitioner relies on chart placement to satisfy this criterion's requirements. The petitioner did not provide evidence demonstrating that the chart placement was based on sales, and we will not presume that the evidence on record relates to sales versus airplay. The plain language of the regulation at

8 C.F.R. § 204.5(h)(3)(x) requires evidence of commercial successes in the form of “sales” or “receipts.” Nevertheless, the petitioner did provide an article from [REDACTED] indicating that the album [REDACTED] sold more than 150,000 copies. However, the record lacks probative evidence demonstrating the petitioner’s involvement with this album sufficient to establish that the sales of this album constitute the petitioner’s commercial success in the performing arts. For example, the record lacks evidence that the petitioner was prominently featured in the promotional material for the album.

Accordingly, he has not submitted qualifying evidence that meets the plain language requirements of this criterion.

C. Comparable Evidence

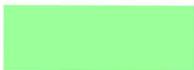
The regulation at 8 C.F.R. § 204.5(h)(4) allows an alien to submit comparable evidence if the petitioner is able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to his occupation. It is the petitioner’s burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x). Where an alien is simply unable to meet or submit sufficient documentary evidence of at least 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. As the petitioner has not attempted to demonstrate that the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to his occupation, the petitioner may not rely on comparable evidence to qualify for this immigrant classification. As such, the petitioner has not demonstrated that he may rely on comparable evidence.

D. Waiver of National Interest in the Alternative

The petitioner checked box “1.a.” under Part 2 of the Form I-140 petition requesting classification as an alien of extraordinary ability. In response to the RFE, the petitioner also requested, in the alternative, to be classified under a second preference immigrant classification in the event the director determined he was not eligible for the extraordinary ability classification. The petitioner renewed this request on motion before the director, but does not make this request on appeal. If the petitioner desires to apply for multiple classifications, he must file a separate petition for each desired classification. *See generally Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 286 Fed. Appx. 963 (9th Cir. July 10, 2008). USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. *See* section 286(m) of the Act, 8 U.S.C. § 1356 (providing that USCIS is required to recover the full cost of adjudication). We will not consider this request within the present proceeding.

E. Summary

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



III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who have 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. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While we conclude 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, we need not explain that conclusion in a final merits determination.⁶ Rather, the proper conclusion is that the petitioner has not satisfied the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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

The 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. at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁶ 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, we maintain 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).