

(b)(6)



U.S. Citizenship
and Immigration
Services



Date: **MAY 19 2014**

Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



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

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

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

On appeal, the petitioner asserts that the submitted evidence is sufficient to establish that he has met at least three of the regulatory criteria establishing his eligibility. The petitioner further asserts that the director erroneously denied his petition as an alien of extraordinary ability.

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,

¹ The petitioner initially submitted evidence with his Form I-140 petition of his eligibility as an actor, along with evidence of his eligibility as a musician. However, on appeal, the petitioner solely challenges the director’s determination of the evidence relating to his claim as an extraordinary musician. Accordingly, the petitioner abandoned the claim as an alien of extraordinary ability as an actor. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885, at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff’s claims were abandoned as he failed to raise them on appeal to the AAO).

(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.² 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.*

² 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. O-1 Visa

While U.S. Citizenship and Immigration Services (USCIS) has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that 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. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, 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 petitioner's qualifications).

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

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

Finally, the regulation at 8 C.F.R. § 214.2 (o)(3)(iv), relating to nonimmigrant aliens of extraordinary ability in the arts, provides for entirely different criteria than those for the immigrant classification discussed below. Thus, the petitioner could meet the nonimmigrant criteria and not the ones necessary for immigrant classification.

B. Evidentiary Criteria³

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

The director determined that the petitioner did not meet this criterion. The petitioner submitted support letters and an online profile referencing his band's [REDACTED] 2008 win of the [REDACTED] [REDACTED] awards from the [REDACTED]. The director, in the Request

³ The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

for Evidence (RFE), specifically requested evidence that the prizes or awards relate to the petitioner's individual excellence in the field. The director also advised that the petitioner must submit either a copy of each prize or award certificate, a clear photograph of each prize or award, or a public announcement regarding the prizes or awards issued by the granting organization. The petitioner did not provide evidence of the prizes or award in the RFE response or on appeal. Instead, the petitioner submitted support letters from (1) [REDACTED] President of [REDACTED] (2) [REDACTED] Professor of Music at [REDACTED] and (3) [REDACTED] CEO of [REDACTED] stating that the petitioner is "the face" and "voice" of [REDACTED]. As the petitioner did not submit the actual awards, he has not established that he is a named recipient of the awards individually or as a member of the group.

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. The director provided notice of the insufficiency of the evidence pursuant to this regulatory criterion and requested primary evidence of the awards. Despite his assertion in the RFE response that the record contains "evidence relating to the public announcement of the awards received through the publicity materials on major media," the record does not contain the award certificates or official announcement of the awards from the organizing organization. Rather, the petitioner submitted his online profile at [www.\[REDACTED\].com](http://www.[REDACTED].com) that discusses the two awards and letters from members of the field affirming the awards. The online profile and support letters that discuss or mention the awards are not primary evidence and the petitioner did not demonstrate that the primary evidence does not exist or cannot be obtained. Therefore, there is a presumption of ineligibility in this instance. *See* 8 C.F.R. § 103.2(b)(2)(i).

For all of the foregoing reasons, the petitioner has not established that he satisfies the requirements of the regulation.

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

The director concluded that the submitted evidence did not establish this criterion. Along with the Form I-140 petition, the petitioner initially submitted letters and sample voting ballots from the [REDACTED] and the [REDACTED] to establish that he is a voting member of The [REDACTED] and [REDACTED].

On appeal, the petitioner submits printed webpages from the official website of The [REDACTED] the organizing body for the [REDACTED] outlining the requirements to become a voting member. There are four methods of applying for voting memberships: (1) recordings released online; (2) recordings released through physical distribution; (3) a [REDACTED] nomination; and (4) endorsement by recording academy voting members. The petitioner asserts on appeal that each of the above qualifying methods should be considered outstanding achievements in the field of music.

Methods 1, 2 and 4 for becoming a voting member do not require outstanding achievements in the field of music. Releasing recordings online or through physical distribution is inherent to the petitioner's occupation and says nothing about how the performer's music is received upon dissemination. Moreover, for the endorsement method, the submitted document, in relevant part, describes the qualifying process:

Applicants who do not fully qualify in any of the above categories may request the necessary endorsement forms from Member Services. . . . Applicants must be endorsed by two current, Voting Members of The Recording Academy. Application will be reviewed by Member Services and may be sent to a local Chapter committee for additional review.

The qualifying process for the endorsement method requires endorsements from two current members, but does not provide any parameters for basis of endorsement. There is no requirement that an endorsement be based upon outstanding achievement in the music field. Thus, because at least three of the methods to become a voting member do not require outstanding achievement, the petitioner has not satisfied the plain language requirements of the regulation. In addition, the petitioner has not submitted evidence showing that recognized national or international experts in the field judge the applications to become a voting member for [REDACTED]

Accordingly, the petitioner does not meet 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. 8 C.F.R. § 204.5(h)(3)(iii).

The director concluded in the decision that the petitioner established his eligibility under 8 C.F.R. § 204.5(h)(3)(iii) and the record supports the director's conclusion in this regard.

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

The director determined that the petitioner established his eligibility under 8 C.F.R. § 204.5(h)(3)(iv) and the record supports the director's determination.

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

The director concluded that the evidence of record did not establish this criterion. The petitioner has submitted multiple sets of evidence during these proceedings as evidence under this criterion.

The petitioner, along with his Form I-140 petition, submitted an initial group of letters in support of this criterion from the following individuals: (1) [REDACTED] Chair, President, and Editor-in-Chief

of [redacted] (2) [redacted] President and CEO of the [redacted] (3) [redacted], musician and songwriter; (4) [redacted] CEO of [redacted] (5) [redacted] Artistic Director of the [redacted] and (6) [redacted] Director of [redacted]

The above group of letter writers consists of leading figures in the media and the music industry. However, while the letters generally speak highly of the petitioner’s talent and the potential for greater future success in the music industry, they do not provide examples of specific contributions that already impacted the field. Cf. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff’d in part* 596 F.3d 1115 (9th Cir. 2010) (noting that 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).

For example, [redacted] writes about the petitioner’s talent and the press he has garnered:

[The petitioner] is a Spanish artist of extraordinary ability. He has performed all over the world, in some of the world’s most important international concerts He is a talented and recognized musician who has travelled the world with his rock band, [redacted] which is considered one of the biggest rock bands in Spain in recent years.

[The petitioner] has been featured in national and international press, including our magazine, [redacted], as well as other prominent magazines, including [redacted] and [redacted]. He has received extensive recognition as a recording artist, acclaimed musician, and live-stage performer. With his band, [redacted] he received awards for [redacted] and [redacted] from the [redacted]. The Band also received a nomination as [redacted] by [redacted] and [redacted] the leading music radio station in Spain.

I believe that [the petitioner] is an accomplished musician of extraordinary artistic ability. He is one of Spain’s best, and I have no doubt that his artistic contribution in the field of music will be of great cultural value and benefit in the United States.

The letter praises the petitioner’s musical ability and talent. However, [redacted] discusses the petitioner’s contributions generally and in terms of future potential.

Many of the letters largely follow the above format by discussing the petitioner’s general talent, then his participation in international music concerts, as well as the press he has received, with a broad conclusion about the petitioner’s future potential for impacting the field. For instance, [redacted] writes:

[The petitioner] is also an exceptional actor and musician – one of Spain’s very best. He has been featured in national and international press, including [redacted] and the [redacted]

[The petitioner] has established himself as a bona-fide rock star in his native Spain. He has toured nationally and internationally, and has received extensive recognition as the co-founder and [redacted] of [redacted] performing in concerts around the world In 2008, [redacted] received the [redacted] for [redacted] and [redacted]. The Band received a nomination as [redacted] by [redacted] the leading music radio station in Spain.

. . . For all the above reasons, it is my personal opinion that [the petitioner] is an artist of extraordinary ability. I am confident his contributions to the United States will be most beneficial and invaluable.

Again, while the letter is complimentary of the petitioner’s talent as a musician and performer, it does not detail the significance or impact that the petitioner’s work has had on the field. *See Visinscaia v. Beers*, --- F. Supp. 2d ---, 2013 WL 6571822, at *6 (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 submitted additional letters in response to the Director’s RFE, in which the director informed the petitioner that the submitted evidence did not establish contributions of major significance in the field of endeavor. In the response to the RFE, the petitioner submitted additional support letters from the following individuals: (1) [redacted] President of [redacted] (2) [redacted] President of [redacted] (3) [redacted] musician and producer; (4) [redacted] singer, songwriter, and musician; (5) [redacted] Chairman of [redacted] (6) [redacted] President of [redacted] LLC; (7) [redacted] President of [redacted] LLC; (8) [redacted] President of [redacted] Inc.; (9) [redacted] Vice President of [redacted] (10) [redacted] CEO of [redacted] (11) [redacted] director, writer, and producer; and (12) [redacted] actor, director, producer, and singer.

Several of the letters in this group, like the letters that the petitioner submitted with his I-140 petition, generally discuss his talent and note the press coverage that he has received. Other letters discuss the petitioner’s contributions in terms of cultural impact.

For instance, [redacted] writes:

. . . [The petitioner] is not a cross-over artist. He is a Spanish rock star, a musician and a songwriter. However, his music is not your typical Latin rock or Spanish rock music. [The petitioner’s] music is written and performed completely in the English language. His music, with his social message, is the flawless integration of multiple cultures, including rock’n roll music, American culture, the English Language, and a Latin identity. It is precisely because of this rare combination, that I believe [the petitioner] to be a very unique artist of extraordinary ability. As a [redacted] and song-writer, [the petitioner] has broken the traditional stereotype of a Latin Rock Star and through his music and his songs, he has created a new and diverse music style, all of his own. A

music style that is universal, which goes beyond any particular language or culture, and this, is precisely what makes [the petitioner] so special.

For all of these reasons, I believe that [the petitioner's] artistic contributions will be of major significance to the arts and culture of the United States, by promoting cultural diversity and cultural integration.

In addition to the above letter and other letters that discuss the unique cultural diversity that the petitioner's music expresses, the petitioner submits on appeal articles relating to the cultural impact that music and other media, such as television, can have. However, the articles discuss the general potential for the role that music can have on cultural diversity and are not about how the petitioner had an impact in the field of music. Potential impact on cultural diversity does not constitute contributions of major impact in the petitioner's field of endeavor.

The final letter of support that the petitioner submits along with other evidence on appeal is from Professor, [REDACTED] at the [REDACTED]. He writes: "I believe that [the petitioner's] musical style and artistic talents contribute significantly to the diversity of popular music in the world, for he represents a unique synthesis of multiple cultures, a kind of diversity transmitted through his music and his lyrics."

The impact that Professor [REDACTED] discusses is an impact on the existing diversity in music based upon the uniqueness of the petitioner's musical style. However, a unique style, while original, does not constitute a contribution of major significance in the field of popular music. The letters discussing the unique cultural diversity that the petitioner brings through his music do not indicate that other artists have attempted to incorporate and copy the petitioner's style or that the petitioner has otherwise had a major impact on the overall field as a result of his unique style. *See Visinscaia*, --- F. Supp. 2d ---, 2013 WL 6571822, at *6. Furthermore, Professor [REDACTED] provides little detail on how he arrived at his conclusions regarding the impact of the petitioner's music to the diversity of popular music in the world. *See 1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990) (noting that USCIS need not accept primarily conclusory assertions).

Accordingly, the petitioner has not satisfied the plain language requirements of 8 C.F.R. § 204.5(h)(3)(v).

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

The petitioner initially submitted evidence under this criterion along with his Form I-140. The director determined in his decision that the petitioner did not meet the requirements of the regulation. The petitioner does not raise this issue on appeal. Therefore, the petitioner abandoned this claim. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885, at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

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

The director concluded that the record does not establish the petitioner's eligibility pursuant to this criterion. On appeal, the petitioner asserts that he performed a leading or critical role for [REDACTED] the [REDACTED] and [REDACTED]. In support of his claim of eligibility, the petitioner submitted evidence relating to his participation in a concert sponsored by [REDACTED] and [REDACTED]. The petitioner states that the earlier mentioned letter from [REDACTED] President of [REDACTED] demonstrates his leading and critical role for the concert:

On [REDACTED] [the petitioner], together with his band [REDACTED], was invited to perform at [REDACTED], United Kingdom. [REDACTED] is the UK's biggest recording studio outside of London. It has serve [sic] as stage to some of the world's greatest artists, including renowned superstars such as [REDACTED] and [REDACTED] among others.

The concert was a special event sponsored by [REDACTED] in association with [REDACTED] one of the United Kingdom's leading institutions for the performing arts, to showcase Spain's most prominent young new talent outside of Spain.

[The petitioner's] role during this event proved critical to the show's success and ultimately to objectives of [REDACTED] and [REDACTED] in the promotion of the arts and awareness of social issues.

Although [REDACTED] states that the petitioner's role was critical to the show's success, the petitioner's band was one of a number of groups that performed at the concert. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942, at *5 (S.D.N.Y.). In addition, participation in a one-time concert, in light of the fact that [REDACTED] and [REDACTED] organize multiple events and concerts, is insufficient to conclude that the petitioner has performed a leading or critical role for the organizations beyond the one-time event of the concert. Thus, the petitioner did not establish that he served in a leading or critical role for [REDACTED] or for [REDACTED].

The petitioner also claims a leading or critical role for the organization [REDACTED] and submits a letter from that organization on appeal. The letter outlines the ways that the petitioner's band has been featured on [REDACTED] various media platforms. However, while the letter states that [REDACTED] has recognized [REDACTED] accomplishments and generally praises the petitioner for his talent, the letter does not discuss how the petitioner performed a leading or critical role on behalf of the organization. [REDACTED], Chief Executive Officer for [REDACTED] writes:

The commercial success of [the petitioner] and his band [REDACTED] is evident. [REDACTED] received a nomination as [REDACTED] by [REDACTED] Principales" in 2011 year. Other nominated artists by [REDACTED] that same

year included international superstars such as [REDACTED]

and [REDACTED]

Moreover, since 2008 [the petitioner's] music has been in regular rotation in [REDACTED] radio stations not only in Spain but also in countries like Mexico, Panamá, Puerto Rico, Colombia and Chile. At the same time, five of [the petitioner's] songs have charted in Spain's [REDACTED]

[REDACTED] . . . [The petitioner] and his band have also been featured on various occasions in [REDACTED] the monthly companion magazine to [REDACTED] . . . [The petitioner] and his band have also been featured on our musical television station "[REDACTED]" .

The fact that the petitioner's music charted on the [REDACTED] countdown programs and that the companion magazine and television station had featured the petitioner's band does not mean that the petitioner performed in a leading or critical role for their organization or establishment. There is no evidence in the record to suggest that the petitioner ever directly performed work or services on behalf of [REDACTED]. A multi-media company such as [REDACTED] features numerous artists and musicians as part of its regular course of business. The petitioner and his band were one of many musicians that [REDACTED] featured or recognized in one of its many media platforms. Thus, the petitioner did not establish that he served in a leading or critical role for [REDACTED].

Accordingly, the petitioner did not satisfy the plain language requirements of 8 C.F.R. § 204.5(h)(3)(viii).

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales. 8 C.F.R. § 204.5(h)(3)(x).

The director concluded that the petitioner did not establish his eligibility for this criterion. On appeal, the petitioner asserts that he satisfied the requirements of the regulation by submitting evidence relating to his participation in the [REDACTED] music festivals in [REDACTED], Spain, and Brazil, as well as his participation in the [REDACTED]. The record includes evidence showing that over 700,000 people attended the [REDACTED] in Brazil. The petitioner also mentions the number of internet users who watched the festival through official websites and social networks. The petitioner also asserts that the [REDACTED] is one of the most renowned jazz festivals in the world with an attendance of 200,000. The background information provided in the record indicates that both music festivals have been established and developed their reputations prior to the petitioner's participation in them. Moreover, both music festivals highlighted numerous musicians and performances in addition to the petitioner and his band. The petitioner did not submit promotional materials that feature his band as one of the headlining groups. Consequently, the petitioner has not established that the commercial success of the two music festivals is directly attributable to the petitioner.

The petitioner also highlights the fact that [REDACTED] nominated the petitioner's band in 2011 for [REDACTED] as evidence of commercial success and references the letter that [REDACTED] wrote, quoted above. Mr. [REDACTED] asserts that five of the petitioner's songs have charted as

commercially successful songs. The petitioner did not submit the official charts listing these songs or other evidence of the sales data for these songs. The primary evidence required by the plain language of this criterion includes album sales and/or box office receipts for performances. With the exception of attendance information about concerts that featured many artists in addition to the petitioner, he has not submitted such evidence or documented that such evidence is either unavailable or does not exist. 8 C.F.R. § 103.2(b)(2).

Accordingly, the petitioner did not meet this criterion.

B. Summary

The petitioner has failed to submit sufficient relevant, probative evidence to satisfy the regulatory requirement of three types of evidence.

III. CONCLUSION

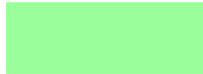
The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. §§ 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.⁴ Rather, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.* at 1122. The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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

⁴ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I-&-N- Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).

(b)(6)



Page 13

NON-PRECEDENT DECISION

ORDER: The appeal is dismissed.