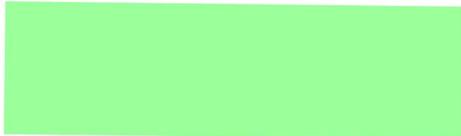


(b)(6)

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



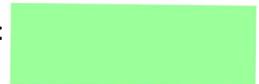
U.S. Citizenship
and Immigration
Services



DATE: JAN 12 2015

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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner seeks classification as an “alien of extraordinary ability” as a violinist and violin instructor, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), which makes visas available to aliens who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation. The director determined that the petitioner had not satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3), which requires documentation of a one-time achievement or evidence that meets at least three of the ten regulatory criteria.

On appeal, the petitioner submits a brief and additional evidence. For the reasons discussed below, upon review of the entire record, the petitioner has not established his eligibility for the exclusive classification sought. Specifically, the petitioner has not submitted qualifying evidence of a one-time achievement pursuant to 8 C.F.R. § 204.5(h)(3), or evidence that satisfies at least three of the ten regulatory criteria set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x). As such, the petitioner has not demonstrated that he is one of the small percentage who is at the very top in the field of endeavor, and that he has sustained national or international acclaim. *See* 8 C.F.R. § 204.5(h)(2), (3). Accordingly, we will dismiss the petitioner’s appeal.

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) sets forth a multi-part analysis. First, a petitioner can demonstrate the alien’s sustained acclaim and the recognition of the alien’s achievements in the field through evidence of a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit this evidence, then a petitioner must submit sufficient qualifying evidence that meets at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The submission of evidence relating to at least three criteria, however, does not, in and of itself, establish eligibility for this classification. See *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination). See also *Rijal v. USCIS*, 772 F.Supp.2d 1339 (W.D. Wash. 2011) (affirming USCIS’ proper application of *Kazarian*), *aff’d*, 683 F.3d 1030 (9th Cir. 2012); *Visinscaia v. Beers*, 4 F.Supp.3d 126, 131-32 (D.D.C. 2013) (finding that USCIS appropriately applied the two-step review); *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the “truth is to be determined not by the quantity of evidence alone but by its quality” and that USCIS examines “each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true”).

II. ANALYSIS

A. Standard of Proof

On appeal, and in response to the director’s request for evidence, the petitioner asserts that, instead of applying the preponderance of the evidence standard of proof, the director “commits legal error by holding [] [the petitioner] and his submitted proof to an unreasonably higher standard of proof.” The record, however, does not support the petitioner’s assertion that the director held the petitioner’s evidence to an elevated standard beyond that which is required by most administrative immigration cases; the preponderance of the evidence standard of proof. The most recent precedent decision related to the preponderance of the evidence standard of proof is *Matter of Chawathe*, 25 I&N Dec. at 369. This decision, and this standard, focuses on the factual nature of a claim; not whether a claim satisfies a regulatory requirement. *Id.* at 376. The preponderance of the evidence standard does not preclude USCIS from evaluating the evidence. The *Chawathe* decision also stated:

[T]he “preponderance of the evidence” standard does not relieve the petitioner or applicant from satisfying the basic evidentiary requirements set by regulation...Had the regulations required specific evidence, the applicant would have been required to submit that evidence. *Cf.* 8 C.F.R. § 204.5(h)(3) (2006) (requiring that specific objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability). 25 I&N Dec. at 375 n.7.

NON-PRECEDENT DECISION

Page 4

As the director concluded that the petitioner had not submitted relevant and probative evidence satisfying the regulatory requirements, the director did not violate the appropriate standard of proof.

B. Prior O-1

The petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that he was last admitted to the United States as an O-1B nonimmigrant. 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). “Distinction” is a lower standard than that required for the immigrant classification, which defines extraordinary ability as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 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 an alien 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.

Applications or petitions are not required to be approved 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’r 1988). Agencies 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, our 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, we 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).

We may deny an application or petition that does not comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 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).

C. Evidentiary Criteria

In the initial filing, the petitioner claimed to meet the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(v), (vii) and (viii). The petitioner did not claim to meet any additional criteria in response to the director's request for additional evidence. The director addressed the three criteria the petitioner claimed. On appeal, the petitioner states that "the adjudicator's omission of a thorough review of all of the criteria possible to qualify as an extraordinary alien was legal error." The petitioner specifically mentions the criteria set forth at 8 C.F.R § 204.5(h)(3)(i) and (vi). We will address the five criteria that the petitioner has claimed below. A review of all the evidence reveals no documents that satisfy the plain language requirements of the remaining five criteria and the appellate brief provides no bases to conclude otherwise. Therefore, this decision need not further address those remaining five criteria.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

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." Moreover, it is the petitioner's burden to establish that the evidence meets every element of this criterion. Not only must the petitioner demonstrate his receipt of prizes and awards, he must also demonstrate that those prizes and awards are nationally or internationally recognized for excellence in the field of endeavor, which, by definition, means that they are recognized beyond the awarding entity.

The petitioner did not specifically claim to satisfy this criterion in his initial filing or submit any copies of awards or prizes. That said, counsel's initial letter references the petitioner's first place finish in "a [n]ational [c]ompetition sponsored by Jeunesses Musicales" The unsupported assertions of counsel, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The director's request for evidence noted that the petitioner had only submitted evidence pertaining to three criteria, none of which were the awards criterion. In response, the petitioner did not challenge this conclusion or submit copies of any awards or prizes. Accordingly, the director did not err by not addressing this criterion.

On appeal, the petitioner submits a certified translation of the petitioner's biography from a previously submitted program from the [REDACTED] " which states that the petitioner "merits the [REDACTED] Award granted by the [REDACTED] for his artistic aptitude and his work with the [REDACTED] Orchestra."¹ It is not clear if the [REDACTED] Award and the [REDACTED] award are the same

¹ A petitioner may submit anything in support of an appeal, including new evidence; however, where a service center has requested specific evidence in a request for evidence, and the petitioner failed to comply with the request, that particular evidence will not be considered on appeal. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal or on motion. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner wishes

NON-PRECEDENT DECISION

Page 6

award. The program further states that the petitioner is a “winner of the competition organized by the [REDACTED] with the collaboration of [REDACTED]” The petitioner did not, however, submit primary evidence of his receipt of the award. 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 an affidavit.

Further, the petitioner did not submit any evidence that the petitioner won an award that is nationally or internationally recognized for excellence in the field of endeavor. A national pool of competitors is not determinative. The issue, rather, is the national or international recognition in the field. Without evidence of such recognition, for example notable media coverage of the selection, the petitioner has not established that it is more likely than not that the award is so recognized.

In light of the above, the petitioner has not established that he meets the plain language requirements of the regulation.

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

On appeal, the petitioner asserts that he satisfies this criterion because 1) his “instructional program is an original synthesis of traditional regional music and classical violin instruction,” 2) his “method is original because it is an agent of social and economic change,” and 3) his “instructional program is original and has national impact because of its methodology and ability to be replicated [from] school system to school system and region to region.”

The record contains a number of letters of recommendation. In general, the letters praise the petitioner and some describe the petitioner’s methods as unique and original. However, as stated by the director in his decision, the plain language of the criterion requires that the “contributions are not only original, but that they are 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. 2003). The plain language of the phrase “contributions of major significance in the field” requires evidence of an impact beyond the petitioner’s students and the locations where the petitioner has taught. *See Visinscaia*, 4 F. Supp. 3d 126, 134-35 (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). Although some of the letters recognize the potential future applications of the petitioner’s teaching methods, the record does not contain any evidence that anyone besides the petitioner has implemented his methodology. [REDACTED]

[REDACTED] Professor of Violin and [REDACTED] references the “path-breaking educational work [the petitioner] has developed in order to stimulate public school music education.” This assertion is not adequate to

evidence to be considered, it must submit the documents in response to the director's request for evidence. *Id.*

NON-PRECEDENT DECISION

Page 7

establish that his methodology is already recognized as a major contribution in the field. Ms. [REDACTED] does not identify other school districts applying the petitioner's methodology and the unsigned letter purportedly from Ms. [REDACTED] on appeal indicates the petitioner's "unique principles are not being applied elsewhere nationwide." [REDACTED], an orchestra conductor, describes the petitioner's program as a "model initiative that, in [Mr. [REDACTED]] opinion, deserves national attention." [REDACTED] the General and Artistic Director, [REDACTED], confirms that the petitioner's program is the "only of its kind," suggesting that no other district has implemented it. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The plain language of the regulation requires evidence of original contributions of major significance; original contributions that have yet to impact the field are insufficient.

While the letters praise the petitioner and his teaching methods, the record lacks corroborating evidence of original contributions of major significance, such as letters from others who have changed their own teaching methods based upon the petitioner's methods. Contrary to the petitioner's assertions on appeal, the director specifically discussed the deficiencies in the letters in his decision and his request for evidence. Vague, solicited letters that repeat the regulatory language but do not explain how the petitioner's contributions have already influenced the field are 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. Moreover, the letters fail to provide specific examples of how the petitioner's contributions rise to a level consistent with major significance in the field. 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.).

Having a lengthy career and creating a unique or original curriculum and/or teaching method are not contributions of major significance in and of themselves. Rather, the record must be supported by evidence that the petitioner has already used those unique skills to impact the field at a significant level.

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 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"). 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 [occupation] who has made original contributions of major significance in the field. Cf. *Visinscaia*, 4 F.Supp.3d at 135 (concluding that USCIS' decision to give little weight to uncorroborated assertions from professionals in the field was not arbitrary and capricious).

NON-PRECEDENT DECISION

Page 8

The Board of Immigration Appeals (the Board) has held 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 cases). The Board also held, however: “We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available.” *Id.* If testimonial evidence lacks specificity or detail, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

We note that the petitioner also submits two articles, [REDACTED]

[REDACTED] written respectively by a professor and an assistant professor of Music Education at [REDACTED]

On appeal, the petitioner asserts that “[t]he theoretical underpinnings of [the beneficiary]’s pedagogy and the objective evidence of its original application are contained in myriad academic papers like th[e]se.” Based upon the information in the articles, the petitioner’s teaching methods closely follow those discussed in the article. Neither article, however, mentions the petitioner or even cites his work. Thus, the articles are of no probative value of the petitioner’s influence.

In light of the above, the petitioner has not established that he meets the plain language requirements of the regulation.

Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The petitioner, for the first time on appeal, asserts that his blog satisfies this criterion. The director advised the petitioner in the request for additional evidence that the petitioner had only submitted evidence relating to three criteria, not including this one. This notice was the petitioner’s opportunity to address this conclusion, and the petitioner’s response did not challenge it. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). For the reasons discussed below, it is not apparent that the petitioner’s blog satisfies the plain language requirements of this criterion. As the petitioner did not claim to meet this criterion and the evidence upon which the petitioner now relies does not relate to this criterion, the director was justified in not discussing this criterion. Regardless, we will address the evidence below.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires “[e]vidence of the alien’s authorship of scholarly articles in the field.” Generally, scholarly articles are written by and for experts in a particular field of study and are peer-reviewed. In this instance, there is no documentary evidence demonstrating that the petitioner’s blog is peer-reviewed or was otherwise considered “scholarly.” For example, there is no evidence that scholars have taken note of this blog.

In addition, the plain language of the regulation requires the articles to be in professional or major trade publications or other major media. On appeal, the petitioner asserts that his blog “represents a modern equivalent of ‘other major media,’” but fails to establish how the petitioner’s self-published blog equates to major media, consistent with the plain language of the regulation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of

NON-PRECEDENT DECISION

Page 9

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)). Without evidence of a following consistent with major media, the petitioner's blog cannot be found to satisfy this criterion.

In light of the above, the petitioner has not established that he meets the plain language requirements of the regulation.

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

The director determined that the petitioner established 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." A review of the record of proceeding, however, does not reflect that the petitioner submitted documentary evidence establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

On appeal, the petitioner incorrectly asserts that the director's positive finding for this criterion is "binding on this case for the purpose of appeal." Our authority over the service centers is comparable to the relationship between a court of appeals and a district court. We are not 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). Moreover, we may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. Significantly, we conduct appellate review on a *de novo* basis. See *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; see also *Soltane*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

When the petitioner is playing the violin, he is not displaying his music in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing his work; he is not displaying his work. Not every performance is an artistic exhibition designed to showcase the performer's art. Considering a performance under this criterion would effectively collapse the criterion at 8 C.F.R. § 204.5(h)(3)(x) into this one. See *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 ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

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).

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 established eligibility for this criterion and the record supports the director's conclusion. Specifically, the petitioner's roles, including associate concert master, for distinguished orchestras meet this criterion.

D. Summary

As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to demonstrate that he satisfies 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 has risen to the very top of his or her 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 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. As the petitioner has not done so, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of presenting evidence that satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3) and (4). *Kazarian*, 596 F.3d at 1122. Nevertheless, although we need not provide the type of final merits determination referenced in *Kazarian*, a review of the evidence in the aggregate supports a finding that the petitioner has not demonstrated the level of expertise required for the classification sought.²

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

ORDER: The appeal is dismissed.

² We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep't of Justice*, 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* INA §§ 103(a)(1), 204(b); 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).