

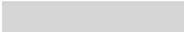


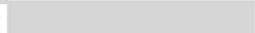
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 24 2015**

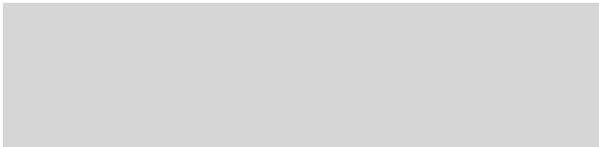
FILE #: 

PETITION RECEIPT #: 

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner filed an appeal to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner seeks classification as an alien of extraordinary ability 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), which makes visas available to petitioners who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation. Section 203(b)(1)(A)(i) of the Act limits this classification to petitioners with extraordinary ability in the sciences, arts, education, business, or athletics. 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 asserts that he meets the criteria under the regulations at 8 C.F.R. § 204.5(h)(3) (iii), (vii) and (viii). For the reasons discussed below, we agree with the director that 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 his sustained acclaim and the recognition of his 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 he 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. Evidentiary Criteria¹

Under the regulation at 8 C.F.R. § 204.5(h)(3), the petitioner, as initial evidence, may present evidence of a one-time achievement that is a major, internationally recognized award. In this case, the petitioner has not asserted or shown through his evidence that he is the recipient of a major, internationally recognized award at a level similar to that of the Nobel Prize. As such, as initial evidence, the petitioner must present at least three of the ten types of evidence under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x) to meet the basic eligibility requirements.

¹ We have reviewed all of the evidence the petitioner has submitted and will address those criteria the petitioner claims to meet or for which the petitioner has submitted relevant and probative evidence.

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 found that the petitioner met this criterion. The evidence in the record supports this finding. For example, the petitioner has submitted a January 3, 2012 article entitled "[REDACTED]". The article notes that the petitioner formed [REDACTED] a hardcore metal band, and discusses the petitioner's music, performance and history. According to an online printout, the circulation of the publication and its relation to other publications in Nepal is consistent with a major media publication. Accordingly, the petitioner has submitted published material about him in professional or major trade publications or other major media, relating to his work in the field for which classification is sought. The petitioner has met this criterion. See 8 C.F.R. § 204.5(h)(3)(iii).

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

The director found that the petitioner met this criterion. The record does not support this finding. We may deny an application or petition that does not comply with the technical requirements of the law even if the director 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. Dep't of Justice*, 381 F.3d 143, 145-46 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

The plain language of the criterion suggests that it is limited to evidence relating to the visual arts. This interpretation is longstanding and has been upheld by a federal district court. See *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ, 2008 WL 10697512, at *1, 4 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under the regulation at 8 C.F.R. § 204.5(h)(3)(vii)). In this case, the petitioner is not a visual artist and has not created tangible pieces of art that were on display at artistic exhibitions or showcases. Accordingly, the petitioner has not presented evidence of the display of his work in the field at artistic exhibitions or showcases. The petitioner has not met this criterion. See 8 C.F.R. § 204.5(h)(3)(vii).

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

On appeal, the petitioner asserts that he meets this criterion. The petitioner asserts that his role in the bands [REDACTED] and [REDACTED] establishes that he meets this criterion. The evidence in the record does not support this assertion. Specifically, although the petitioner has shown that he has performed a leading or critical role for these two bands, he has not shown that either of the two bands constitutes an organization or establishment that has a distinguished

reputation. An ability to secure performance opportunities and produce favorably reviewed albums is indicative of a band's viability; which is not, by itself, indicative of a distinguished reputation.

First, as relating to [REDACTED] the petitioner has not shown that it has a distinguished reputation. The petitioner has submitted evidence showing that in [REDACTED] the band was nominated for a [REDACTED] Award in the Best Song in a Foreign Language category. According to an April 2, 2014 letter from [REDACTED] a copy editor for [REDACTED] and a former [REDACTED] band member, the award is a "prestigious" award in Nepal. Notwithstanding this conclusory statement, the evidence shows that the band did not receive the award. The petitioner has not shown that a nomination in that category, without receipt of the award, establishes that the band has a distinguished reputation. For example, while the petitioner submitted published material about the winners and nominations in categories other than the one in which [REDACTED] was nominated, the only publication that listed the nominees of the Best Song in a Foreign Language category was a website for which the petitioner submitted no information about its viewership.

In addition, although the petitioner has submitted reference letters that state, in a conclusory manner, that the [REDACTED] Award is prestigious, the evidence in the record does not support a conclusion that a nomination in the Foreign Language category is evidence of the band's prestige. According to an April 6, 2014 letter from [REDACTED] a journalist for [REDACTED] being nominated for a [REDACTED] Award is "one of the highest honors a music group can receive" and that the award is "comparable to an American Music Award or Grammy Award." Mr. [REDACTED] however, does not provide any specific evidence that support his assertions. For example, Mr. [REDACTED] does not provide any information on the size of the candidate pool who are eligible to be nominated and/or selected for the award, the criteria under which a band is nominated and/or selected for the award, the extent of media attention given to the award, or the recognition of the award in the music industry or the general population.

An online printout entitled "[REDACTED]" provides that, according to the radio station, "singles, albums and music video registered at [the radio station] [REDACTED]" are eligible to be nominated for the award and that preliminary nominations are based on "an extensive nationwide listener poll" conducted on the radio station's website. The petitioner has not shown the reach or coverage area of the radio station such that its website poll was likely to attract national participation. According to an online source [REDACTED] the "[REDACTED] awards . . . [are c]onsidered one of the most coveted awards in the Nepali music industry." The petitioner, however, has not shown the reliability or accuracy of these online sources. In short, the petitioner has not shown that [REDACTED] nomination for an award from a radio station is indicative of the band's distinguished reputation.

The petitioner has submitted materials from [REDACTED] including a [REDACTED] 2005 editorial article, stating that [REDACTED] has been one of "two bands [that] have been integral in the underground movement that has prevailed during the past few years." A [REDACTED] cover story entitled "[REDACTED]" mentions [REDACTED] a handful of times in its 6-page article, which provides a chronical of bands in Nepal. This article is not about [REDACTED] Rather, it is about the history of Nepal's music scene, of which [REDACTED] is a

part. The petitioner has not submitted evidence showing the reach of the magazine or the influence or impact of the magazine in the music industry in Nepal. In short, the petitioner has not shown that the opinion of the editor in [REDACTED] is indicative of the band's distinguished reputation in the music field or among the general public.

Similarly, a [REDACTED] article entitled "[REDACTED]" which discusses the formation and the music of the band, is insufficient to demonstrate that [REDACTED] has a distinguished reputation. The article provides information about the band, but does not characterize it in a manner consistent with a distinguished reputation. According to an online article entitled "[REDACTED]" music magazine [REDACTED] which the petitioner asserts is [REDACTED] "claims to sell 42,000 copies an issue on average, although media excess [sic] insist the actual number is far lower." The petitioner has not shown that the level and content of coverage in [REDACTED] with its unverified level of circulation, is indicative of or consistent with a band that has a distinguished reputation. The petitioner has also not submitted evidence showing that [REDACTED] impact in the field is at a level that demonstrates that bands discussed in the magazine are accepted as bands with a distinguished reputation. In short, materials from [REDACTED] and [REDACTED] demonstrate an interest from two publications; but are insufficient to demonstrate that [REDACTED] has a distinguished reputation.

According to Mr. [REDACTED], a former member of the band, [REDACTED] was one of the first punk rock bands in Nepal and "performed and recorded prolifically, and received positive attention in the media." Mr. [REDACTED] also states that [REDACTED] "had made a considerable impact on the music scene in Nepal." Mr. [REDACTED] does not provide details on the impact [REDACTED] has had in Nepal or explained why he concludes that [REDACTED] impact was "considerable." Going on record without supporting documentary evidence is not sufficient for the 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)).

Second, as relating to [REDACTED], the petitioner has not shown that it has a distinguished reputation. On appeal, the petitioner has submitted a number of reference letters, including letters from [REDACTED] who interviewed the petitioner and runs a music blog called "[REDACTED]"; [REDACTED] a music promoter who arranged [REDACTED] performances; [REDACTED], an owner of [REDACTED], a music label that signed [REDACTED], owner of [REDACTED] who recorded [REDACTED] album [REDACTED] and [REDACTED], the lead singer of a Nepali rock band, [REDACTED] that performed in shows with [REDACTED]. While the reference letters all praise the petitioner and [REDACTED] musical talent, they are insufficient to establish that the band has a distinguished reputation. The reference letters are authored by those who are associated with the petitioner's bands, [REDACTED] and/or [REDACTED].

In addition, the published materials that the petitioner has submitted do not establish that [REDACTED] has a distinguished reputation. The petitioner has submitted a [REDACTED], 2012 article entitled "[REDACTED]." The article concludes by characterizing [REDACTED] as "a little known band that still sings in Nepali." The petitioner has not shown that

articles that categorize the band as “a little known band” establishes that the band has a distinguished reputation.

The petitioner has submitted other published materials. He has submitted an interview entitled “[REDACTED]” published in [REDACTED] on [REDACTED] 2014. During the interview, the petitioner answered questions about the band, including its music and its aspirations. According to an online printout, [REDACTED] is a weekly publication that targets urban readers in Nepal and has a weekly circulation of 30,000. The petitioner has not shown that being interviewed by a publication with a weekly circulation of 30,000 is indicative of the band’s distinguished reputation.

The petitioner has submitted a 2014 [REDACTED] interview. The interview includes an introduction that states that [t]hough [the musicians are] from New York, [REDACTED] has made a permanent spot in Nepal’s Punk and Hardcore scene.” During the interview, the petitioner discussed the band’s formation and music. At the end of the interview, when asked about fans, the petitioner answered: “We do not have fans, all we have [are] our family and friends that support us and relate to our music and I certainly hope the new album will help to connect to [sic] us in a more defined way.” The petitioner has not shown that a band without fans or without many fans who are not family or friends has a distinguished reputation. The petitioner has also not submitted information relating to [REDACTED], such as circulation level and impact in the music industry.

Third, the petitioner has not shown that the materials posted on blogs establish either [REDACTED] or [REDACTED] has a distinguished reputation. On appeal, the petitioner submits a page from [REDACTED] book [REDACTED] with the following sentence: “In North America, music blogs are replacing print music-journalism.” This statement might be true, but it does not establish that contents on all blogs are accurate and reliable or that all blogs have the same impact in the music field. Blogs can be started by anyone who is connected to the internet. Contents in blogs represent the opinions of the particular bloggers. Unlike articles in major media, blog materials do not usually go through an editorial or verification process. They do not, therefore, carry the same weight as materials published in major media without evidence of the significance of the individual blog. In this case, the petitioner has submitted materials posted on blogs, including [REDACTED] (during an interview with the petitioner, the blogger states that his blog has 12 readers), and [REDACTED]. These blogs discuss [REDACTED] and the petitioner’s involvement with the two bands. There are many music blogs. The petitioner has not shown that being interviewed or referenced by some of the blogs is indicative of his bands’ distinguished reputation. Specifically, the petitioner has not submitted sufficient evidence showing that these blogs’ influence and impact in the music field rise to such a level that their interest in the petitioner’s band is indicative of its distinguished reputation.

Finally, the petitioner has filed a number of materials published or posted on the blogs after he filed his petition on April 18, 2014. These materials do not establish the petitioner’s eligibility for the petition. It is well established that the petitioner must demonstrate eligibility for the visa petition at the time of filing, in this case, on or before April 18, 2014. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). In other words, the petitioner cannot secure

a priority date based on the anticipation of future roles that meet this criterion. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977); *Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Assoc. Comm'r 1998) (adopting *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition.") On appeal, the petitioner asserts that a [REDACTED] 2014 [REDACTED] article quoting from a blog interview with the petitioner should be considered as evidence establishing the petitioner's eligibility. As the article is posted after the petitioner filed his petition, it may not be considered to establish the petitioner's eligibility, even if the article discusses [REDACTED] album, which was released before the petitioner filed the petition. In addition, at the conclusion of an interview, posted on [REDACTED] 2014 on the blog "[REDACTED]," when asked if the petitioner had any closing thoughts, he thanked the interviewer for interviewing him, "a little known dude from an unknown hardcore band." This self-assessment is not indicative of [REDACTED] distinguished reputation.

Accordingly, the petitioner has not presented evidence that he has performed in a leading or critical role for an organization or establishment that has a distinguished reputation. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(viii).

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. 8 C.F.R. § 204.5(h)(3)(ix).

The director concluded that the petitioner did not meet this criterion. On appeal, the petitioner has not asserted that he meets this criterion. Accordingly, the petitioner has abandoned this issue, as he did not timely raise it on appeal. *Sepulveda v. United States 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 United States District Court found the plaintiff's claims to be abandoned as he failed to raise them on appeal). Moreover, the petitioner has not submitted any evidence relating to his earnings, or earning information of others in the same field. Accordingly, the petitioner has not submitted evidence that he has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(ix).

B. Summary

The evidence in the record demonstrates that the petitioner has been a band member for [REDACTED] and [REDACTED]. And he, as a member of [REDACTED] has recorded music with [REDACTED] at his studio, [REDACTED] in [REDACTED] Massachusetts. The evidence further shows that [REDACTED] and [REDACTED] have been performing in various venues. Notwithstanding evidence showing that the petitioner has been a part of bands that have had some success in Nepal, for the reasons discussed above, we agree with the director that the petitioner has not submitted the requisite initial evidence, in this case, evidence that satisfies three of the ten regulatory criteria.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the petitioner has achieved sustained national or international acclaim and is one of the small percentage who have 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 on which the petitioner relies, including the evidence he references on appeal in the aggregate supports a finding that the petitioner has not demonstrated, through the submission of extensive evidence, 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).