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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services



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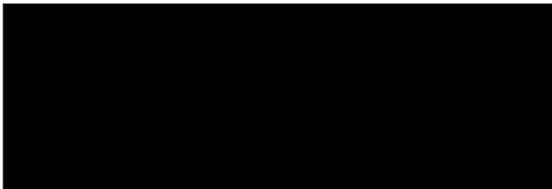
FILE: WAC 09 219 51079    Office: CALIFORNIA SERVICE CENTER    Date:

AUG 18 2010

IN RE:            Petitioner: [Redacted]  
                    Beneficiary: [Redacted]

PETITION:      Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(O) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O).

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, a private elementary school, filed this petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien of extraordinary ability in the field of education. The petitioner seeks to employ the beneficiary as a music teacher for a period of three years.

On October 14, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary has received "sustained national or international acclaim" or to demonstrate that he is one of the small percentage who has risen to the very top of his field of endeavor. Specifically, the director determined that the evidence submitted did not satisfy the criterion set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A) or at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the beneficiary is currently in O-1 status working for a different employer and as such was already recognized as an alien of extraordinary ability. The petitioner submits a copy of the prior petition filing and asserts that "because the difference in petitioners is the only difference between the petitions, your most recent adjudication is essentially a RE-adjudication of the beneficiary's eligibility." Counsel cites to an April 23, 2004 agency memorandum from ██████████, which states that in matters related to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts, deference should be given to an adjudicator's prior determination of eligibility.<sup>1</sup> Counsel further states that the director erred by determining that the evidence submitted does not satisfy the evidentiary criteria at 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(I) and (5).

## **I. The Law**

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), provides for the classification of a qualified alien who:

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, and seeks to enter the United States to continue work in the area of extraordinary ability . . . .

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part:

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<sup>1</sup> Memorandum of ██████████ Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity*, (April 23, 2004).

Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 FR 41818, 41819 (August 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts).

In a policy memorandum, the legacy Immigration and Naturalization Service (INS) emphasized:

It must be remembered that the standards for O-1 aliens in the fields of business, education, athletics, and the sciences are extremely high. The O-1 classification should be reserved only for those aliens who have reached the very top of their occupation or profession. The O-1 classification is substantially higher than the old H-1B prominent standard. Officers involved in the adjudication of these petitions should not "water down" the classification by approving O-1 petitions for prominent aliens.

Memorandum, [REDACTED], INS, "Policy Guidelines for the Adjudication of O and P Petitions" (June 25, 1992).

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) states, in pertinent part:

*Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business, or athletics.* An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

- (A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or
- (B) At least three of the following forms of documentation:
  - (1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
  - (2) 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 or international experts in their disciplines or fields;

- (3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
  - (4) Evidence of the alien's participation on a panel, or individually as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
  - (5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
  - (6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
  - (7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
  - (8) Evidence that alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.
- (C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(iii) provides:

The evidence submitted with an O petition shall conform to the following:

- (A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.
- (B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

The decision of U.S. Citizenship and Immigration Services (USCIS) in a particular case is dependent upon the quality of the evidence submitted by the petitioner, not just the quantity of the evidence. The mere fact that the

petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification. 59 Fed Reg at 41820.

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach recently set forth in a decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9<sup>th</sup> Cir. March 4, 2010). Similar to the regulations governing this nonimmigrant classification, the regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. Cf. 8 C.F.R. § 204.5(h)(3).

Specifically, 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 \*6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both 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," 8 C.F.R. § 204.5(h)(2), and "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)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

*Id.* at \*3.

Thus, ██████ sets forth a two-part approach where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination. The final merits determination analyzes whether the evidence is consistent with the statutory requirement of "extensive documentation" and the regulatory definition of "extraordinary ability" as "one of that small percentage who have risen to the very top of the field of endeavor."

Although the director's decision pre-dates the ██████ decision, AAO finds the ██████ court's two part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). Therefore, in reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the ██████ court. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

In the present matter, the petitioner has submitted evidence pertaining to several of the evidentiary criteria, but has not established that the beneficiary has risen to the very top of his field or that he has achieved sustained national or international acclaim. 8 C.F.R. §§ 214.2(o)(3)(ii) and (iii).

## **II. The Beneficiary's Eligibility under the Evidentiary Criteria**

The beneficiary in this matter is a citizen of Singapore. The beneficiary's educational credentials include a Doctorate of Musical Arts in violin performance from the University of Connecticut (2000), a Master of Music in violin performance from the Boston Conservatory of Music (1990), a Bachelor of Music in violin performance from the New England Conservatory of Music (1988), and a Performer's Licentiate Diploma in Violin from the Trinity College of Music in the United Kingdom. In addition, the beneficiary has a teacher certification in music (pre-K-12) from the Connecticut Department of Higher Education. He has been teaching string methods at the middle school, high school and collegiate level for various institutions since 1993. As a performer, the beneficiary has held the positions of concertmaster, assistant concertmaster, and principal second violinist with the Manchester Symphony Orchestra, Hartford Festival Orchestra, New Britain Symphony Orchestra, The Boston Conservatory Symphony Orchestra, and the University of Connecticut Symphony Orchestra. In this case, the petitioner seeks classification of the beneficiary as an alien with extraordinary ability in the field of education, specifically music education.

The director denied the petition, finding that the petitioner submitted evidence to meet only one of the eight regulatory criteria for establishing sustained national or international acclaim at 8 C.F.R. § 214.2(o)(3)(iii)(B). On appeal, counsel contends that the beneficiary meets at least two additional criteria, specifically, 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(1) and (5), and relies on the approval of a prior O-1 petition filed by a different employer as evidence that the beneficiary is eligible for classification as an alien of extraordinary ability.

After careful review of the record, it must be concluded that the petitioner has failed to overcome the grounds for denial. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. In order to establish eligibility for extraordinary ability, the statute requires evidence of "sustained" national or international acclaim and evidence that the alien's achievements have been recognized in the field of endeavor through "extensive documentation." The petitioner has not established that the beneficiary's abilities have been so recognized.

If the petitioner establishes through the submission of documentary evidence that the beneficiary has received a major, internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The regulations cite to the Nobel Prize as an example of a major award. *Id.* There is no evidence that the beneficiary has received any major awards in his field, and the petitioner does not claim that the beneficiary meets this criterion.

As there is no evidence that the beneficiary has received a major, internationally recognized award, the petitioner must establish the beneficiary's eligibility under at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).<sup>2</sup>

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

To meet the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1), the petitioner must submit evidence that the beneficiary has received nationally or internationally recognized prizes or awards for excellence in the field. At the time of filing, the petitioner stated that "[the beneficiary's] ensembles, bands, and orchestras have all received several platinum-level awards from music festivals around the country."

In support of this claim, the petitioner submitted 2008 results from "Great East Festivals" indicating that the middle school string orchestra, middle school chamber strings ensemble, high school symphony orchestra, and high school string orchestra directed by the beneficiary achieved "Platinum" performance ratings from judges at the event.

The beneficiary also lists the achievements of his students in his resume. The beneficiary indicates that his students won the Music Teachers National Association, Connecticut Chapter, competition in 2003. He states that a number of his students have successfully auditioned for the Northern Regional Music Festival, the Waterbury Youth Symphony, the Connecticut Eastern Regional Orchestra, the Connecticut Inter-elementary Orchestra, and Julliard Preparatory School. Finally, the beneficiary indicates that his students have included an overall winner and several first-place age-category winners at the Windham Regional Arts Association competition.

In a request for additional evidence ("RFE") issued on August 19, 2009, the director noted that the evidence submitted consisted of performance scores given to middle and high school students taught by the beneficiary, and that such awards appear to be local in nature, and were not given to the beneficiary. The director requested additional evidence regarding the beneficiary's receipt of nationally or internationally recognized prizes or awards the beneficiary received in his field of endeavor, including the origin, purpose, significance, scope of each award, the criteria used to nominate and judge award winners, and evidence identifying previous winners of each award.

In a response dated September 24, 2009, counsel for the petitioner stated that "[b]ecause [the beneficiary] is a music educator, the best evidence to prove his achievements are the awards received from the students under his teaching." The petitioner submitted a letter from Mr. [REDACTED], the past president of the American Choral Directors Association, in support of its assertion that "the awards are prestigious." Mr. [REDACTED] states:

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<sup>2</sup> The petitioner has not claimed to meet or submitted evidence relating to the criteria not discussed in this decision.

The Great East Musical Festival is a highly regarded institution that is attended by school districts throughout Northeastern America. Festivals such as NYSMA in New York, ACDA in Connecticut, and the Great East in Massachusetts serve to measure our music teachers and their students against a high standard of achievement.

With respect to the judging criterion for the Great East Festival, he states:

The Great East Festival's mission of supporting and evaluating school instrumental and choral programs is well-known among music educators. The standards that this festival upholds are of the highest order and as such, all musical ensembles – whether orchestras, bands or choirs, are judged, critiqued and coached by our most preeminent musicians. For example, last year's event featured adjudication by a college professor, a professional symphony conductor, and national [REDACTED] president, [REDACTED]

[The beneficiary's] chamber and symphony orchestras consistently earned platinum, the highest possible award at this festival. . . . His orchestras performed at an extremely mature level with musical accuracy and style approaching the professional level. He achieved these stellar results at two very different institutions: Farmington Middle School with its affluent, upper-class clientele and Manchester High School composed primarily of underprivileged urban children.

The director determined that the evidence submitted did not satisfy this criterion, as the evidence pertained to awards won by the beneficiary's students. The director observed that "this criterion clearly requires documentation of the alien's receipt of nationally or internationally recognized awards, not his students."

On appeal, counsel contests this finding stating:

The awards by the beneficiary's students should serve as a [sic] good evidence of the beneficiary's extraordinary teaching ability. Your office did not specify why students' awards can not reflect the extraordinary teaching ability of their teacher.

In the music teaching field, there is no national awards [sic] given out to individual music teachers. Since national individual award for music teachers are [sic] not available, we believe that the Service should seriously consider the awards received by the students as good evidence to provide the teacher's achievements in the teaching field.

Upon review, the AAO concurs with the director that the evidence submitted does not satisfy this criterion. The plain language of the regulations requires the petitioner to submit documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor. Counsel's unsupported assertion that there are no national awards for music teachers is not sufficient to establish that

such awards do not exist. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Although the record contains testimonial evidence from numerous experts in the beneficiary's field, none of them have commented on the existence of national or international awards in the music teaching profession, and the AAO cannot conclude that this criterion is inapplicable to the beneficiary's field.<sup>3</sup>

Furthermore, even if the AAO were to consider the awards achieved by the beneficiary's students, the petitioner has not established that receipt of a "platinum" score at the Great East Festival rises to the level of receipt of a nationally or internationally recognized "prize or award." Rather, the festival appears to be regional in nature. The petitioner did not fully respond to the director's request for evidence regarding the origin, purpose, significance, or scope of the festival and its awards. Mr. [REDACTED] statement that the festival is "well-known among music educators," is insufficient to establish that middle and high school orchestras that perform at this festival at the "platinum" level receive national or international recognition. Although the beneficiary lists other awards and honors achieved by his students in his resume, the petitioner has not provided primary evidence of such awards or the beneficiary's role in the students' training, nor has it claimed that he meets this criterion based on the listed achievements. Furthermore, based on the limited descriptions provided, these awards also appear to be regional in nature.

The AAO acknowledges counsel's assertion that the awards won by the beneficiary's students reflect upon his teaching abilities and will consider such achievements in the final merits determination.

2. *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 or international experts in their disciplines or fields*

The petitioner initially claimed that the beneficiary meets this criterion based on his membership in the National Music Honor Society – [REDACTED], which it describes as "an American honor society for undergraduate students, graduate students, and professors of music."

The petitioner submitted evidence that the beneficiary was elected to membership in [REDACTED] in May 1998 by the [REDACTED]. According to the evidence submitted, "[c]hapters of the Society annually

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<sup>3</sup> The AAO notes that a simple search of the term "music teacher national award" resulted in a link to the web site of the Music Teachers National Association's awards page, which indicates that this association awards both a Teacher of the Year Award and the MTNA Achievement Award to music educators. *See* "Awards Program," <http://www.mtna.org/Programs/Awards/tabid/284/Default.aspx> (accessed on August 9, 2010). MENC: The National Association for Music Education, also has an annual awards program "to honor teachers who are exemplars of the best efforts in the field of music education." *See* "MENC Announces Recipients of 2009 Teaching Music Awards," <http://www.menc.org/news/view/press-release-menc-announces-recipients-of-2009-teaching-music-awards> (accessed on August 9, 2010).

extend invitations to membership in [REDACTED] to the highest ranking students from junior, senior, and graduate classes." The elections are the responsibility of a Faculty Committee representing the active members of the chapter.

In the RFE, the director noted that the evidence submitted to establish this criterion suggests that [REDACTED] bestows membership upon top undergraduate and graduate students in music, rather than selecting its members from the top individuals in the field based on their individual achievements. The director requested additional evidence to establish that membership is chosen by national or international experts, and to demonstrate that the organization requires outstanding achievements of its members. The director also requested information regarding the current number of [REDACTED] members.

The petitioner's response to the director's request for additional evidence did not address this criterion. The director concluded that the petitioner had not demonstrated that [REDACTED] requires outstanding achievements of its members, or that its prospective members are judged by recognized national or international experts. Rather, the director concluded that election to membership is based on academic achievement, not outstanding achievement in the field, with elected membership limited to undergraduate and graduate students. Counsel does not challenge this conclusion on appeal and we concur with the director. Academic awards and honors received while preparing for a vocation fall substantially short of constituting a national or international prize or award for recognition in the field

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

At the time of filing, the petitioner submitted more than ten testimonial letters to establish that "[the beneficiary's] peers have the utmost respect and admiration for his outstanding teaching abilities." The petitioner did not specifically claim that the beneficiary has made original scholarly contributions of major significance in the field, pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(B)(5). The letters, while highly complimentary to the beneficiary and his abilities and accomplishments as a music teacher, did not address with specificity any original contribution of major significance in the field of music education.

The letters submitted included a letter from [REDACTED], Professor [REDACTED] at the University of Connecticut and Conductor Laureate, New Britain Symphony Orchestra. Mr. [REDACTED] stated that the beneficiary "possesses the qualities of an extraordinary music teacher and can demonstrate a seven-year history of extraordinary success in Connecticut," and that "he has had a significant impact on the lives of many students." He further states that the beneficiary's "education, experience and abilities are so unique that he can be considered in a class by himself" and that his "achievements make him an irreplaceable asset to music teaching in the United States."

Lan Shui, music director of the Singapore Symphony Orchestra, states that the beneficiary is "one of the finest music educators in the world," and "is now becoming a household name in the arena of music

pedagogy." In support of this statement, Mr. [REDACTED] noted that based on the beneficiary's success with students in Connecticut, "his reputation . . . has resulted in numerous job offers."

Dr. [REDACTED] current Chair of Performing Arts at Kingswood-Oxford School, states that he met the beneficiary when they were both doctoral students at the University of Connecticut, and later recruited him for the position of concertmaster with the Manchester Symphony Orchestra. He further states that he knows the beneficiary as an "outstanding educator" because he has attended festivals where the beneficiary's students have performed. Dr. [REDACTED] describes the beneficiary as "one of the best" in the field of music pedagogy.

[REDACTED] Professor [REDACTED] at the U [REDACTED] a friend of the beneficiary's and member of his Doctorate Committee, summarizes the beneficiary's career highlights and states that he is "an expert in his field." She states that his "credentials, talent and personal strength make him deserving of a permanent visa," and that "our country will be greatly enriched by his teaching."

Dr. [REDACTED], Assistant Superintendent of [REDACTED] states that the beneficiary is "a superior strings teacher," "an extraordinary educator," and "a major contributor" to the middle school's strings program. She states that she considers the beneficiary to be "one of the top 1% of professionals in this field."

[REDACTED] the former president of the [REDACTED], states that she has worked with the beneficiary over the last ten years, and indicates that, as a teacher, he has received "the admiration and wholehearted support from every parent and student." She describes the beneficiary as a "true pedagogue" who consistently achieves "a complete change in sound production, musical line and expressivity, fine intonation and ensemble playing," from his students.

[REDACTED] a professor of music at [REDACTED] states that the beneficiary asked her to write a letter in support of his application for an O-1 visa. She states that he is "a valued colleague who is greatly needed in Connecticut." The petitioner also submitted a letter from [REDACTED] Dean of the University of Connecticut's School of Fine Arts. He describes the beneficiary as "an outstanding and skillful musician, teacher and citizen," with "an enviable reputation as an outstanding artist and musician in the state of Connecticut and throughout New England."

Dr. [REDACTED] Conductor of the New York City Ballet, Opera, and Philharmonic, states that he has known the beneficiary since 1994 when he was teaching at the University of Connecticut. Dr. [REDACTED] states that the beneficiary is "an insightful and exemplary music teacher," who "seems to have a natural ability to maximize the capabilities and potentials of each of his students, regardless of their age, or their level of accomplishment." Dr. [REDACTED] describes the beneficiary as "an exceptional educator" and as "a colleague who is respected and beloved by the many students he has been a mentor to over the last decade."

The petitioner also submitted a letter from [REDACTED] of the University of Connecticut's Community School of the Arts. He states that the beneficiary "is a very positive and encouraging teacher and

his students show excellent progress." Mr. ██████ further states that the beneficiary's "dedication to education and excellence made him an integral part of our string program during his tenure" at the school.

Dr. ██████, Professor of Music at the University of Connecticut, states that he served as the beneficiary's major advisor during his doctoral degree matriculation at the school. He states that he has observed the beneficiary's "meteoric rise as a pedagogue in public schools." Dr. ██████ indicates that the beneficiary "sets a high standard of music excellence and professional maturity of behavior for his young students." Finally, he indicates that the beneficiary is "an outstanding educator" who could be ranked "in the top 5% of the profession."

Finally, the petitioner submitted letters from the two public school programs in which the beneficiary served as a music teacher. ██████, grade principal at Manchester High School, states that the beneficiary had "excellent rapport with all of his students," and a "comprehensive, deep and thorough" comprehension of music and teaching. ██████, principal of Irving Robbins Middle School, states that the beneficiary is "known for the quality of his instruction and the remarkable concerts given by his orchestra." She indicates that his teaching technique is based on developing strong technical ability and providing children with challenging music, and she describes him as "one of the most gifted teachers" with whom she's worked. Ms. ██████ states that the beneficiary's "knowledge of teaching far exceeds that usually found in music educators."

In the request for evidence, the director acknowledged receipt of the testimonial evidence, but noted that the letters are all from former employers and individuals who know the beneficiary personally, and, as such, carry little weight in satisfying this criterion. The AAO agrees that these letters, while highly complimentary to the beneficiary and his abilities as a teacher and musician, fall significantly short of identifying an original contribution of major significance in the field of music education. The AAO does not question the positive impact the beneficiary has had on the lives of individual students and the music programs of schools at which he has taught.

In response to the RFE, counsel stated that the beneficiary satisfies this criterion based on his selection as a lecturer/presenter/clinician in the National Association for Music Education's (MENC's) in-service conference held at the Connecticut Convention Center in 2006. In support of this claim, the petitioner submitted a peer opinion letter from Dr. ██████, president-elect of ██████. Dr. ██████ confirms the beneficiary's participation in the conference and states:

Lecturers and presenters from across the country are selected through a most exclusive and discriminating set of criteria. Only the most accomplished, preeminent and successful musicians, and music pedagogues are invited. A google search will verify this claim. [The beneficiary's] credentials warranted his presence at this conference. His topic on pedagogical techniques for teaching string music in secondary schools is a highly pertinent one for it serves many purposes for our schools in the United States: As string instruments are generally more challenging to play than band or percussion instruments, the attrition rate in schools across the country tends to be significantly higher. . . Coupled with the serious

shortage of well trained string music teachers who have sufficient performing experience at the professional level, [the beneficiary's] presentation is even more salient. Additionally, within the state of Connecticut and many other states, public school string music programs have yet another obstacle to overcome, and that is teacher retirements. [The beneficiary's] well-crafted lecture was accompanied by a performance by his middle school orchestra which he conducted and personally trained. The knowledge he imparted to all the music teachers present was invaluable as much of the technique he demonstrated via his orchestra were techniques one would only find only in professional orchestra and as such, these are techniques rarely, if not ever, found in textbooks.

Dr. [REDACTED] further notes that the beneficiary was selected in March 2009 to conduct the Connecticut Music Educator's Association's (CMEA) northern regional orchestra for middle school. He explains that CMEA is MENC's state organization in Connecticut and that selection to conduct the orchestra is a high honor reserved for the most accomplished musicians.

The petitioner also submitted a letter from [REDACTED] a music educator in the Hartford, Connecticut school system and previous State of Connecticut Music Teacher of the Year Award winner. Mr. [REDACTED] states that he attended the State of Connecticut, Music Educators Conference and describes his experience as follows:

I had the privilege of attending a workshop conducted by [the beneficiary]. He presented a workshop on how to dramatically vary the sound produced by a string orchestra by simply changing the bow technique that is used. [The beneficiary] had with him a group of middle school students who exemplified the highest quality of performance etiquette, behavior and authentic period performance practice.

All students performed with the same advanced bow technique which was taught to them by [the beneficiary]. They were able to demonstrate various other techniques which included changing the weight used on the bow, the angle by which the hand held the bow, the placement of the bow in relationship to the bridge and fingerboard, and the speed at which the bow was moved across the strings. The audience, which consisted of music educators from throughout the United States, was both amazed and impressed at the many timbres of sound that were created in this demonstration. Equally impressive was the ease at which the students were able to transition from one technique to the other, and the deep understanding that they each seemed to possess. It was clear to everyone in attendance that this demonstration was a result of excellent teaching and high standards.

Finally, the petitioner submitted a letter from [REDACTED] Music Director and Conductor of [REDACTED], and past Chairperson, CMEA Northern Region [REDACTED] Festival. Ms. [REDACTED]

After an extensive search [the beneficiary] was chosen to be the clinician for the 2009 CMEA Northern Region Middle School Orchestra Festival based upon a stringent set of criteria that includes knowledge of orchestral literature, conducting technique and application of pedagogical skills.

During my observations of [the beneficiary] over the course of the two day festival I saw teaching of the highest level. Extensive preparation for this event by [the beneficiary] was immediately evident. He demonstrated in-depth knowledge of the orchestral score, and conducting and rehearsal techniques that brought out the best in the student musicians. In addition, he inspired students with his professional level violin playing while demonstration [*sic*] passages from the music. All of those involved with the festival acknowledged the outstanding work done by [the beneficiary] and agreed that he is clearly in the top one percent of the teaching field.

The director determined that the evidence submitted does not meet the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5). The director acknowledged the testimonial evidence, but found that "the fact that the beneficiary is skilled at teaching students, as well as other teachers, indicates that the beneficiary is skilled and qualified in performing his inherent job duties and not that he has made original contributions of major significance." The director found that the evidence did not include evidence of "any major original contributions or changes that the beneficiary has made to his field as a whole."

On appeal, counsel asserts:

Your office did not recognize the beneficiary's presentations in the national conference as "contributions of major significance" in the field. Please note that the rest of the beneficiary's peers DO recognize that the beneficiary's presentations were of major significance. The president elect of [the] National Association for Music Education especially praised his teaching techniques, as well as his peers who attended his conference presentations. . . . Since these peers are experts in the music teaching field, we believe that the Service should give deference to their evaluation of the beneficiary's significant contributions.

In compliance with ████████, the AAO must focus on the plain language of the regulatory criteria. 596 F.3d at 1121. Here, the evidence must be reviewed to see whether it rises to the level of "original scientific, scholarly, or business-related contributions of major significance in the field." 8 C.F.R. § 214.2(o)(3)(iii)(B)(5).

Here, the petitioner's claim that the beneficiary has made an original contribution of major significance to the field of music education appears to be based in large part on his lecture, "Hands on Pedagogical Techniques for Secondary Strings," delivered at the CMEA's 62<sup>nd</sup> In-Service Conference held at the Connecticut Convention Center in March 2006. The record shows that the beneficiary was one of 47 clinicians invited to the conference. A review of the transcript of the beneficiary's lecture reveals that the beneficiary's workshop

was designed "to clearly demonstrate the many erroneous concepts that inundate our public school music programs," and to "demonstrate the efficacy of mainstream fundamental performance practices, which, when applied faithfully, without compromise, results in music making that is special and meaningful for the student and the music educator alike." He discussed three performance practices he utilizes in his teaching, including "sustaining sound via supination and pronation and using the whole bow," "equalization of bows," and "subdivision of rhythms as a means of galvanizing and holding an ensemble together." Following his lecture, his middle school students demonstrated the techniques.

The AAO acknowledges Dr. [REDACTED] statement that the knowledge the beneficiary imparted to the music educators present was "invaluable." However, Dr. [REDACTED] also noted that "much of the technique he demonstrated via his orchestra were techniques one would only find only in a professional orchestra" and as such are "rarely, if not ever, found in textbooks." Upon review, the AAO cannot find that mere selection for the conference, while apparently an honor reserved for accomplished music educators, is an original contribution of major significance, nor has the petitioner established that the beneficiary's one-hour lecture included content that could be considered "original" or that it has made a major impact on the field in the field of music education.

Rather, it appears that the beneficiary demonstrated bow techniques, that while perhaps rarely used in Connecticut's middle schools, are based on "mainstream fundamental performance practices." The petitioner has not explained how the techniques taught are original. Furthermore, the petitioner has not explained how the beneficiary's lecture can be considered to be of "major significance." Presumably he and the other conference attendees would not have been invited if they did not have useful information to share with the other attending music educators. While the testimonial letters indicate that the conference attendees were extremely impressed with the techniques the beneficiary taught to his middle school students and regarded the beneficiary as an excellent teacher, the record contains no demonstrable measure of the impact the beneficiary's lecture has had on the field of music education as a whole.

For example, Dr. [REDACTED] states that the beneficiary's topic on pedagogical techniques for teaching string music is "highly pertinent" and "serves many purposes for our schools in the United States." He notes that string instruments are more challenging to play and experience a higher attrition rate among students compared to other instruments. Dr. [REDACTED] indicates that these factors, combined with a shortage of well-trained string music teachers and teacher retirements, made the beneficiary's lecture "even more salient." However, Dr. [REDACTED] does not explain how the beneficiary's one-hour lecture has impacted string music programs, student attrition rates, or string teacher shortages. While it is possible to speculate that a widespread application of the beneficiary's chosen teaching techniques among school strings programs could lead to more enthusiasm among students, the petitioner has not shown that the beneficiary has already made a major impact on the field, or that his techniques have been adopted by any other teacher, much less by a significant segment of the music education field as a whole. Rather, his teaching techniques appear to be highly regarded by persons who have witnessed the performances of the beneficiary's students first-hand.

Therefore, the AAO agrees that the testimonial letters do not adequately describe with specificity any original contribution of major significance in the field. The phrase "major significance" is not defined in the statute or regulations. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. Looking to the applicable dictionary definition, the word "major" is defined as "greater in importance or rank." Webster's New World College Dictionary 867 (4th Ed. 2008). The word "significance" is defined as "importance, consequence, moment." *Id.* at 1334. While the testimonial letters discuss the value of the beneficiary's teaching techniques, and confirm that he has received some recognition among his peers, there is no evidence that the beneficiary's conference presentation on string techniques constituted an original contribution of "major significance" in his field.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l.*, 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. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility.<sup>4</sup> *Id.*; *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"). USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l.*, 19 I&N Dec. at 795. Furthermore, 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. at 1108.

The petitioner failed to demonstrate how the beneficiary's contributions as a music educator distinguished him from those of any other music educators. Without extensive documentation showing how the beneficiary's teaching methods have already impacted his field, that such methods have been unusually influential, or have otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

4. *Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation*

The petitioner did not initially claim to meet this criterion, although in its initial letter, it mentioned that the beneficiary has served as string methods specialist in the Connecticut Alternate route to certification (ARC) program, as a lecturer in string methods for undergraduate students training to become public school music teachers, as an adjunct professor in music at Central Connecticut State University, and as a music instructor at the University of Connecticut Community School of the Arts. In response to the RFE, counsel stated:

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<sup>4</sup> 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.*; *see also Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998) (noting that there is a greater need for corroborative evidence when the testimony lacks specificity, detail, or credibility).

The State of Connecticut Department of Higher Education operates an Alternative Route to Certification Program (ARC). The ARC is authorized by the Connecticut State Department of Education to prepare individuals to become certified as teachers in Connecticut. Over its 20-year history, ARC has prepared more than 3,800 teachers. Each applicant must already have earned a bachelor's degree. However, on average, more than 50 percent of ARC students have earned master's or doctoral degrees. Admission to the ARC program is highly competitive.

The beneficiary is one of only three music specialists in the program. . .

Dr. [REDACTED], noted the beneficiary's role as a lecturer-presenter at the above referenced CMEA conference, his role as conductor of the CMEA northern regional orchestra for middle school, and his duties with ARC. With respect to the latter, he stated:

[The beneficiary] has also performed a vital role in our highly successful Alternative Route to Teacher certification program run under the auspices of the Connecticut State Department of Education. Currently, he is the string music specialist for this program, a position he has held for a number of years. Please note that there are only three specialists in this program: One is a general music and vocal specialist, another is a band music specialist and [the beneficiary] is the string music specialist. His skills are therefore vital to the needs of our student teachers.

The director determined, without discussion or analysis, that the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(7) has been satisfied.

Upon review, the AAO disagrees with the director and will withdraw the director's determination that this criterion has been met. As discussed above, the AAO conducts its appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

At issue for this criterion are the position the beneficiary was selected to fill and the reputation of the entity that selected him. As an educator, the beneficiary has held the following roles: faculty member at the University of Connecticut College of Continuing Studies; director of orchestras for Farmington public schools; adjunct professor of music at Central Connecticut State University; lecturer at the above-referenced CMEA conference; director of orchestras at Manchester public schools; Instructor, Connecticut State Department of Higher Education ARC teacher certification program; and lecturer, University of Connecticut Music Department.

The petitioner appears to claim eligibility for this criterion based on the beneficiary's participation in the ARC teacher certification program, and his roles as lecturer for the 2006 CMEA in-service conference and as conductor for the 2009 CMEA Northern Region Middle School Orchestra Festival.

While the AAO recognizes the petitioner's statement that the beneficiary is the only strings specialist working on the music faculty of the ARC teacher certification program, and that entrance to the program is highly

competitive for prospective students, the petitioner has not established the beneficiary's critical and essential role in the ARC program or the distinguished reputation of the program within the field. The fact that the beneficiary was chosen to fill the sole strings position within the program's three-person music faculty is insufficient to establish that his role is critical or essential for the program. The petitioner's evidence does not demonstrate how the beneficiary's role as an instructor differentiates him from any other instructors within the program. The documentation submitted by the petitioner does not establish that the beneficiary is responsible for the success or standing of the ARC teacher certification program to a degree consistent with the meaning of "essential or critical capacity."

Furthermore, while the testimonial evidence submitted establishes that being selected to serve as a lecturer at the annual CMEA in-service conference is considered an honor among music educators, the petitioner has not established that the beneficiary's role as a lecturer, which involved a single one-hour conference presentation and demonstration, was in an essential or critical capacity. As noted above, a total of 47 music educators were invited to present or lecture at this conference. Again, the petitioner does not differentiate the beneficiary's role from that of other conference faculty or explain how he is responsible for the success or standing of CMEA or its annual conference.

The beneficiary's role as conductor of the CMEA Regional Music Festival middle school orchestra was likely a role that was critical to the success of the middle school students who performed at the festival, but the AAO is not persuaded that the beneficiary has played a significant role in the CMEA as a whole, or even that he has even been employed by CMEA. Rather, the evidence shows that CMEA has recognized the beneficiary with prestigious, but very temporary posts, on two occasions.

The beneficiary's roles as an adjunct assistant professor, lecturer and faculty member for the University of Connecticut and Central Connecticut State University, while notable, also have not been shown to be critical or essential positions within those institutions. The beneficiary appears to have held ordinary faculty positions, albeit for institutions of higher learning, and the record does not establish that the beneficiary has been responsible for the success or standing of the music department at either school, nor does it demonstrate that either school has a distinguished music program. Finally, while the beneficiary has held the critical position of orchestra director for two public school systems, the petitioner has not established that either school is recognized as having a distinguished music program.

Based on the foregoing discussion, the petitioner has not submitted evidence that satisfies the plain language of the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7).

#### ***B. Final Merits Determination***

█ sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. However, as discussed above, the petitioner failed to establish eligibility under any of the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

Notwithstanding the above, a final merits determination considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) that the beneficiary has achieved a level of expertise indicating that he is one of that small percentage who have risen to the very top of the field of endeavor pursuant to 8 C.F.R. § 214.2(o)(3)(ii); and (2) that the beneficiary has sustained national or international acclaim and that his achievements have been recognized in the field of expertise, pursuant to 8 C.F.R. § 214.2(o)(3)(iii). *See Kazarian*, 2010 WL 725317 at \*3.

In this case, we concur with the director's finding that the petitioner has not established that the beneficiary has "extraordinary ability" in the field of education, which has been demonstrated by sustained national or international acclaim, and whose achievements have been recognized in the field through extensive documentation. Section 101(a)(15)(O)(i) of the Act. The petitioner has not demonstrated that the beneficiary received a major internationally recognized award or that he meets at least three of the criteria that must be satisfied to establish the national or international acclaim necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 214.2(o)(3)(iii).

The specific deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). The submitted evidence is not indicative of the beneficiary's national or international acclaim and there is no indication that his individual achievements have been so recognized in the field or that he met the overall criteria for eligibility at the time this petition was filed.

The evidence as a whole establishes that the beneficiary is a well-educated and extremely capable musician and music teacher who has been an asset to his employers and students. However, any claims in the record that the beneficiary is among the top 1% or 5% of the profession appear to be based on individual assessments of his innate talents and personal attributes, rather than on his sustained national or international acclaim in the field of music education. At most, the evidence supports a finding that the beneficiary has garnered some degree of recognition as a music educator within the state of Connecticut, and a high degree of respect and appreciation from the students, teachers, school administrators and teaching organizations with whom he has worked.

The AAO acknowledges that the petitioner seeks to employ the beneficiary. Unlike recruiting and hiring decisions, however, eligibility for this visa classification is not based on a beneficiary's having specific professional competencies, but rather hinges on the beneficiary's sustained national or international acclaim and recognition in the field.

Furthermore, it must be emphasized that the favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim. Unusual in its specificity, section 101(a)(15)(O)(i) of the Act clearly requires "extensive documentation" of the alien's achievements. Again, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. 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 795-796; *see also Matter of*

*V-K-*, 24 I&N Dec. at 500, n.2. The content of the experts' statements and how they became aware of the beneficiary's reputation are important considerations. Here, many of the experts are personally acquainted with the beneficiary, and most have worked with him as a colleague or supervisor. 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 of sustained national or international acclaim.

The conclusion we reach by considering each evidentiary criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary, an experienced music educator, relies on his teaching career and the praise of his colleagues and experts in the fields of music and education. While the beneficiary has impressive educational credentials and extensive and varied teaching experience, the statute requires that we compare him to all others in the field of education, and not simply to the typical secondary school strings teacher.

On their own, some of the beneficiary's reference letters represent a sampling of individuals who may have risen to the "very top of the field of endeavor." For example, according to his biography, Dr. [REDACTED], president-elect of MENC, has received national awards, authored many publications and presented "countless" workshops on music program development, assisted in the development of America's National Standards in music, helped design and interpret the federal arts education survey, and served as president of the National Council of State Supervisors of Music. Thus, it appears that the highest level of the beneficiary's field is somewhat above the level the beneficiary has attained.

Review of the record does not establish that the beneficiary has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 101(a)(15)(O)(i) of the Act and the petition may not be approved.

### **III. Prior O-1 Petition Approval**

On appeal, counsel for the petitioner noted that the beneficiary was previously granted O-1 status and referred to the 2004 Yates memorandum to support her assertion that it is USCIS policy that prior approvals should be given deference in matters relating to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts. The memorandum provides that exceptions to this policy should be made where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. Counsel asserts that, although the instant petition was filed by a new employer, the facts that led the prior adjudicator to conclude that the beneficiary is an alien of extraordinary ability in the field of education remain the same. The petitioner submits a copy of the prior O-1 petition and supporting documentation in support of the appeal, and the AAO notes that the supporting documentation submitted in support of the prior petition is nearly identical to the initial evidence

submitted in this matter. However, a petition involving a new employer does not involve the "same parties," and it was well within the director's discretion to reassess the beneficiary's qualifications.

While USCIS previously approved a petition for O-1 status filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). As discussed above, the evidence submitted fails to meet the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iii)(A) or three of the eight evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B), and is thus insufficient to establish that the beneficiary qualifies as an alien of extraordinary ability in the field of education.

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. 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). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act.

This denial does not preclude the petitioner from filing a new immigrant or nonimmigrant visa petition, supported by the required evidence. As always, the burden remains with the petitioner to establish eligibility for the requested visa classification.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.