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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



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DATE: JUL 11 2011 Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

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

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 \$630. 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 record label, filed this nonimmigrant petition seeking to classify the beneficiary pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O) as an alien with extraordinary ability in the arts. The petitioner seeks to employ the beneficiary as a musician/drummer and member of the U.S.-based hardcore band [REDACTED] for a period of five years.<sup>1</sup>

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary qualifies as an alien of extraordinary ability in the arts. The director determined that the evidence submitted was insufficient to establish that the beneficiary's achievements and recognition have reached the level of "distinction" as defined at 8 C.F.R. § 214.2(o)(3)(ii). The director observed that the evidence submitted failed to meet any of the evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(A) or (B).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel refers to the evidentiary criteria applicable to immigrant petitions for aliens of extraordinary ability pursuant to 8 C.F.R. § 204.5(h)(3), and asserts that the petitioner has established the beneficiary's eligibility under at least four of these criteria. Finally, counsel asserts that new evidence submitted on appeal establishes that the beneficiary "is in fact a drummer with extraordinary ability in the field of punk music." Counsel submits a brief and documentary evidence in support of the appeal.

## **I. The Law**

Section 101(a)(15)(O)(i) of the Act provides classification to 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, whose achievements have been recognized in the field through extensive documentation, and who 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:

*Arts* includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts.

*Extraordinary ability in the field of arts* means distinction. Distinction means a high level of achievement in the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

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<sup>1</sup> Pursuant to 8 C.F.R. § 214.2(o)(6)(iii)(A), an approved petition for an alien classified under section 101(a)(15)(O)(i) of the Act shall be valid for a period of time determined by the Director to be necessary to accomplish the event or activity, not to exceed 3 years.

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

*Evidentiary criteria for an O-1 alien of extraordinary ability in the arts.* To qualify as an alien of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

- (A) Evidence that the alien has been nominated for, or the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or
- (B) At least three of the following forms of documentation:
  - (1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;
  - (2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;
  - (3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;
  - (4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;
  - (5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

- (6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or
- (C) If the criteria in paragraph (o)(3)(iv) 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 . . . of the alien 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. *See* 59 Fed. Reg. 41818 (August 15, 1994)(Final Rule).

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach set forth in a 2010 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 *Kazarian* 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, *Kazarian* 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 merits determination. The 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."

The AAO finds the *Kazarian* 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*.

## II. Discussion

The sole issue to be addressed is whether the petitioner submitted evidence to establish that the beneficiary satisfies the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), or at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation on September 23, 2010. The director issued a request for additional evidence (RFE) on September 29, 2010, to which the petitioner replied on October 4, 2010. The AAO has considered the evidence of record in its entirety in reaching its decision.

In a letter dated September 22, 2010, counsel stated that the beneficiary is a classically-trained musician in both drums and piano, who graduated from the Brighton Institute of Modern Music in the United Kingdom. Counsel noted that, following graduation, the beneficiary joined [REDACTED] and performed throughout Europe and the United States before leaving the band at the end of 2008. Most recently, the beneficiary joined the New York-based hardcore punk band, [REDACTED] which signed a contract with the petitioner's record label in September 2009. The evidence of record shows that [REDACTED] released its third studio album on the petitioner's label in June 2010, and has been engaged in a national and international tour throughout 2010.

Counsel asserts that the beneficiary has "a high level of achievement within the field of independent musicians and bands." Counsel further claims that the beneficiary "is known throughout the world as a gifted and revolutionary musician by virtue of his participation in his former band, [REDACTED], and as a current member of [REDACTED]" Counsel contends that the beneficiary and [REDACTED] "are fast becoming household names among America's youth and among music industry insiders."

In a letter submitted in support of the petition, the petitioner's general manager, [REDACTED], stated that [REDACTED] is "currently on the peak of exploding to a high level of fame in the national and international market," and "is on the cusp of making serious money from its tour ticket sales and merchandise and CD sales." [REDACTED] further stated that the band is "among the top 200 bands in the U.S. and in their particular genre number 33 overall."

**A. The Evidentiary Criteria**

If the petitioner establishes through the submission of documentary evidence that the beneficiary has been nominated for or has been the recipient of, significant national or international awards or prizes in the particular field pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The regulation lists an Academy Award, an Emmy, a Grammy, or a Director's Guild award as examples of qualifying significant awards or prizes.

The beneficiary's former band, [REDACTED] was nominated in the category [REDACTED] in the 2008 annual Kerrang! Awards. *Kerrang!* is a British music magazine of unknown circulation. The petitioner did not claim that this award nomination was comparable to a Grammy award nomination, and raised no objection to the director's finding that the evidence submitted does not establish the beneficiary's eligibility under 8 C.F.R. § 214.2(o)(3)(iv)(A).

Therefore, the petitioner must establish the beneficiary's eligibility under at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). We note that neither counsel nor the petitioner has specifically addressed the beneficiary's eligibility under the applicable regulatory criteria. The AAO will consider the beneficiary's eligibility under each of the six criteria below.

*Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;  
and*

As noted above, the evidence of record indicates that the beneficiary has been the drummer for the hardcore bands [REDACTED] and [REDACTED], and will continue to be a member of [REDACTED] if the requested classification is granted.

The petitioner submitted evidence that [REDACTED] debut full-length album, [REDACTED] received highly favorable reviews in the alternative music press, positive reviews for live shows, and a nomination as [REDACTED] in the 2008 Kerrang! Awards held by the British rock music magazine *Kerrang!* The director determined that, based on his experience as the drummer and a founding member of [REDACTED], the petitioner established that the beneficiary has performed in a lead or starring role for productions or events which have a distinguished reputation.

With respect to [REDACTED], the director acknowledged that the petitioner submitted evidence that the band "has received coverage in magazines such as the American Music Press and coverage on several Internet websites." The director found that the evidence "did not establish a distinguished reputation."

Upon review, the AAO disagrees with the director's determination. The petitioner has submitted sufficient evidence in the form of critical reviews, advertisements and publications to establish that the beneficiary satisfies the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) based upon his role as the drummer for the studio recordings and live performances of Dead Swans and This is Hell.

[REDACTED] has been invited to join [REDACTED] sponsored by [REDACTED] music magazine as one of six featured bands on the national tour's roster. According to the evidence of record, the Fall 2010 tour was set to take place in October and November 2010 with dates at well-known venues such as House of Blues, Hard Rock Live, Starland Ballroom and the Nokia Theatre, and the band was featured in the magazine as a result of its selection for the tour. The petitioner has also submitted articles and reviews from alternative music magazines that are sufficient to establish that the band's recordings and live shows have a distinguished reputation among industry publications that cover the band's genre of music.

*Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications*

The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2) requires the petitioner to demonstrate that the beneficiary has achieved national or international recognition for achievements through submission of critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications. In general, in order for published material to meet this criterion, it must be primarily about the beneficiary and, as stated in the regulations, be printed in major newspapers, magazines or other major publications. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.<sup>2</sup>

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<sup>2</sup> Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

The director determined that the petitioner failed to submit any published materials about the beneficiary from major newspapers, trade journals, magazines or other publications. The director observed that the beneficiary was mentioned casually in some articles as a member of the bands [REDACTED] and [REDACTED], but that such evidence is insufficient to establish that he has received national or international recognition as a drummer.

On appeal, counsel asserts:

[The beneficiary's] national and international recognition for achievement in the arts is derived from his participation in the ensemble groups, [REDACTED] (former band) and [REDACTED] (current band). USCIS erred in finding that the petitioner provided insufficient evidence to establish that [the beneficiary], individually, has gained national or international recognition as a drummer. The position of drummer does not allow for individual recognition. It is not the position of lead singer or lead guitarist, positions within a band that lend themselves to individual recognition. Rather, the drummer provides the background for the overall band sound. The drummer provides the beat and emphasizes the other instruments and the vocals. The drummer is essentially a band "member" and is a required and influential part of the overall band sound and performance. The drummer is not, however, a member of the band that garners individual media attention and/or critical review. Accordingly, USCIS erred in finding that the petitioner failed to demonstrate the beneficiary's individual ability as a drummer and that the petitioner was errant in providing supporting documentation that ". . . only mentioned casually [the beneficiary] in articles as a member of the band . . . ."

Upon review, the AAO agrees with the director's determination that the petitioner has not submitted evidence to satisfy this criterion.

The petitioner has not submitted any published materials that are specifically "about" the beneficiary as an individual, despite counsel's initial claims that the beneficiary's "talent has earned him rave reviews from critics across the nation" and that "he and his band are fast becoming household names." Counsel further claimed that the evidence would establish that the beneficiary is "among the very most distinguished and extraordinary drummers of any kind in the hardcore punk genre." Counsel also refers to the beneficiary's "early individual international achievements," stating that he is a "drum prodigy" but the record remains devoid of any such individual achievements or any evidence to support the statements made above. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

In light of counsel's claims regarding the beneficiary's individual reputation, counsel's assertions that it is not possible for a drummer to gain individual recognition or attention based on his or her own abilities and

achievements is simply not credible. There are entire magazines and websites devoted to drumming and drummers which feature musicians who, like the beneficiary, play in bands.

The petitioner submitted one published article in which the beneficiary is quoted extensively and not merely mentioned in passing. The article is titled [REDACTED]. . . ." The title of the publication and date of the publication were not provided and thus it cannot be determined that it appeared in a major newspaper or magazine. The article consists of background information regarding the musical roots of the band and an interview with the band members regarding the recording of their debut album [REDACTED]. While the author of the article speaks very positively of the album, referring to it as "one of the year's most exciting UKHC releases," the article fails to recognize the beneficiary's individual achievements as a musician or the national and international recognition he received for such achievements. Accordingly, the petitioner has not submitted evidence that meets the plain language of the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iv)(B)(2).

*Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials*

The director determined that the beneficiary has performed a critical role for an organization that has a distinguished reputation as a member of [REDACTED]. However, the director concluded that the evidence submitted was insufficient to establish that the beneficiary will perform similar critical roles for the petitioner as it failed to establish that its record label has a distinguished reputation. Accordingly, the director concluded that the petitioner had not submitted evidence to satisfy the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

The AAO will withdraw the director's finding with respect to this criterion. We note that the director's reasoning was inconsistent, as he concluded that the band [REDACTED] is an "organization or establishment" with a distinguished reputation, but did not consider the reputation of the band [REDACTED], instead choosing to consider whether the petitioner established the distinguished reputation of the band's record label. The petitioner has submitted evidence that both [REDACTED] and [REDACTED] have been featured in national American and British alternative music publications and are in demand for national and international tours. The record shows that [REDACTED] was nominated by the British rock music magazine *Kerrang!* as the [REDACTED] in 2008 among bands of many genres. [REDACTED] has been on the cover of *American Music Press* and *Alternative Press* magazines. The evidence of record is sufficient to establish that both bands enjoy a distinguished reputation in the alternative music industry.

The evidence submitted meets the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3). Therefore, this criterion has been satisfied.

*Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion*

*picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications*

The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) requires a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications. In the beneficiary's field, evidence satisfying this criterion would reasonably include evidence of album or single sales, radio airplay rankings, evidence of concert revenues and similar evidence of tangible achievements in the music industry.

At the time of filing the petition, counsel indicated that the beneficiary and his band have been propelled to "national and international fame and commercial success." Counsel further stated that [REDACTED] is "hugely popular on the internet, on My Space and You Tube and is fast becoming a record holder for CD and merchandise sales." In addition, the petitioner's general manager indicated that [REDACTED] is "among the top 200 bands in the United States and in their particular genre number 22 overall," and he indicated that [REDACTED] album is one of his company's "best-selling records."

However, the supporting evidence contained no documentation to corroborate the band's claimed best-selling status, and no objective rankings to support the petitioner's statements were submitted prior to the adjudication of the petition. Similarly, the petitioner has not submitted evidence of the major commercial or critically acclaimed success of the beneficiary's work with [REDACTED]. On appeal, counsel for the petitioner assert that "according to [REDACTED], [REDACTED] has sold over 20,000 CDs to date." The petitioner did not submit any documentary evidence in support of this claim. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)). Regardless, even if the petitioner did submit evidence of the band's CD sales, the petitioner has not established that the sale of 20,000 CDs constitutes major commercial success, particularly if this figure applies to the band's entire catalog. The petitioner indicates that its label has sold over 1 million CDs to date inclusive of all of their artists, a figure which undermines the claim that the petitioner is among the label's top sellers. As noted by the director, the fact that [REDACTED] CD is distributed in major retail stores alone is insufficient to establish that the band has a record of major commercial success.

While we have acknowledged that the critical reviews the beneficiary's bands have received for their live shows and recordings have given them a distinguished reputation among critics and industry writers in the hardcore punk genre of alternative rock music, the record does not demonstrate that either band or the beneficiary individually has achieved *major* critically-acclaimed successes, as required by the plain language of the regulation. For example, an article in *American Music Press* about [REDACTED] indicates that their current album "could very well be the release that sees [REDACTED] step out of the shadow of their more heavily fancied peers [REDACTED] and into the mainstream spotlight." In another article submitted on appeal, titled [REDACTED] the band's

lead guitarist mentions that the group is "hardly making any money" despite near constant national and international touring and frequent opportunities to tour with bigger acts, thus undermining claims of the band's commercial success.

Based on the foregoing, the petitioner has not submitted evidence to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4).

*Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements;*

The petitioner has provided a total of three testimonial letters in support of the petition. For the reasons discussed below, the letters do not satisfy the plain language of the regulatory criterion at 8 § C.F.R. 214.2(o)(3)(iv)(B)(5).

The petitioner provided a peer review letter from [REDACTED], an artist manager with [REDACTED] [REDACTED] stated:

[REDACTED] is an internationally acclaimed hardcore punk band from New York. The band's drummer is [the beneficiary], a gifted British musician known throughout Europe and the United States for his association and work with [REDACTED] and [REDACTED].

[The beneficiary] is a musician of international renown, who is well-known in his native England and internationally. Both [REDACTED] and [REDACTED] have toured extensively in Europe and the United States. Accordingly, [the beneficiary] and his band, [REDACTED], have gained an international following and international critical acclaim.

As noted above, the regulation at 8 C.F.R. § 214.2(o)(2)(iii)(B) requires that affidavits written by recognized experts "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." [REDACTED] letter fails to establish his credentials as a recognized expert, fails to explain the manner in which he acquired information about the beneficiary, and fails to specifically describe the beneficiary's achievements in factual terms. The letter consists of general assertions regarding the beneficiary's international acclaim and renown, but fails to detail the beneficiary's specific achievements. Furthermore, it is not in a form which clearly indicates [REDACTED] authority, expertise and knowledge of such achievements.

The petitioner submitted a second letter from [REDACTED], the beneficiary's former instructor at [REDACTED]. [REDACTED] states that the beneficiary achieved his Diploma and Professional Diploma qualifications in drumming "to a good standard" and refers to him as a "studious and reliable member of his class, who worked hard to improve his playing." While he acknowledges the

beneficiary's talent as a student drummer and praises his character, [REDACTED] fails to specify the beneficiary's achievements beyond graduation from the Brighton School of Modern Music.

Finally, the petitioner submitted the above-referenced letter from its own general manager, [REDACTED], who stated:

[REDACTED] is currently on the peak of exploding to a high level of fame in the national and international market. [The beneficiary] has been a pivotal and extremely talented member of [REDACTED] . . .

[The beneficiary] is an extremely gifted drummer. He ranks among the best young talents with which my company works. [The beneficiary] is classically trained, but he is also a creative and instinctive musician. As of today, [the beneficiary] and his band are among the Top 200 bands in the U.S. and in their particular genre number 33 overall. [REDACTED] newest album has quickly become one of my company's best selling record[s]. This is an unbelievable achievement.

The only achievements referenced in [REDACTED] letter are uncorroborated claims of record sales and band rankings from an unidentified source. As a matter of discretion, USCIS may accept expert opinion testimony.<sup>3</sup> USCIS will, however, reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'").

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<sup>3</sup> Letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. Black's Law Dictionary 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about facts, such as whether something occurred or did not occur, based on the witness' direct knowledge. *Id.* (defining "written testimony"); see also *id.* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The letters considered above primarily contain bare and unsupported assertions regarding the beneficiary's talent, achievements or recognition, without specifically identifying his achievements and the significant recognition he has received for those achievements in the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.<sup>4</sup>

In light of the above, the petitioner has not submitted qualifying evidence that meet the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5).

*Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence*

The petitioner has not claimed that the beneficiary has commanded a high salary in the past. The petitioner has submitted a copy of its exclusive recording agreement with This is Hell, but, as noted by the director, failed to submit reliable evidence that the financial arrangements set forth under the terms of the agreement are considered "high remuneration" in relation to others in the field.

The agreement indicates that the band would receive: (1) an advance of \$6,000 for its first album and \$8,000 for its second album; (2) a \$2,000 advance against merchandise royalties for the first album only; (3) a 14% share of royalties for most album sales in the United States and a slightly higher rate if the album exceeds sales of 50,000 to 100,000 units; and (4) additional royalties from other methods of distribution. While the petitioner and counsel have submitted unsupported claims regarding the band's "best-selling status," the petitioner has provided no corroborating evidence as to how much the band has earned from sales, royalties, performances, merchandise or other revenue streams since signing with the petitioner's label, and no substantiated estimates of how much the band is likely to earn during the requested period of approval. Therefore, the director correctly determined based on the evidence submitted that the petitioner failed to establish that the beneficiary's earnings as a member of This is Hell are considered high or substantial in relation to others in the field.

On appeal, the petitioner attempts to overcome the director's finding by submitting a statement from its general manager, [REDACTED]. He states that "our Recording contract with the artist, [REDACTED] is substantial in the alternative music industry."

The plain language of this regulation requires that the petitioner submit "reliable evidence" to establish that the beneficiary has commanded or will command a high salary or other substantial remuneration for services in relation to others in the field. Clearly, an unsupported statement from the petitioner alone is insufficient to meet this criterion. Further, as noted above, the record contains an interview with the band's songwriter and lead guitarist, [REDACTED] titled "[REDACTED]" The article was published in

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<sup>4</sup> *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

October 2010 [REDACTED] three months after the release of the band's latest "best selling" record. [REDACTED] states repeatedly in the interview that the band makes very little money.

In addition, the record remains devoid of any documentary evidence comparing the beneficiary's remuneration to that of other musicians, so as to establish that his remuneration for services is high when compared to others in his field. In light of the above, the petitioner has not submitted evidence to satisfy this criterion.

### *Summary*

In this case, we concur with the director's determination that the petitioner has failed to demonstrate the beneficiary's receipt of a major, internationally recognized award, or that he meets at least three of the six categories of evidence that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability in the arts. 8 C.F.R. §§ 214.2(o)(3)(iv)(A) and (B). A merits determination that considers all of the evidence follows.

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

*Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. As discussed above, the petitioner established eligibility under only two of the criteria found under the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(A) or (B).

Notwithstanding the above, a merits determination considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) that the beneficiary has a high level of achievement in the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that he is renowned, leading, or well-known in the field of arts, pursuant to 8 C.F.R. § 214.2(o)(3)(ii); and (2) that the beneficiary is recognized as being prominent in his field, pursuant to 8 C.F.R. § 214.2(o)(3)(iv). *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 is prominent to the extent that he could be considered renowned, leading or well-known in the field of music.

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)(iv)(B). The beneficiary has served as the drummer for two hardcore bands that have earned the respect of the alternative music industry press in the United States and the United Kingdom. As acknowledged above, the bands [REDACTED] and [REDACTED], despite the lack of evidence of apparent commercial success, have earned critical reputations that allow them to tour nationally and internationally on "underground" tours and sometimes join the larger tours of more established or well-known acts.

However, the record does not support a finding that the beneficiary's performance with these bands has led to the type of widespread recognition that would be expected of a rock musician who could be described as renowned,

leading or well-known in the field, even if the field is narrowed to the hardcore punk genre of music. While the published evidence submitted suggests that the band [REDACTED], after overcoming some struggles, may be on the verge of broader or even mainstream success achieved by other acts in their genre, the claim that the beneficiary is becoming a "household name" is simply not supported by the evidence submitted.

Moreover, the record does not contain qualifying evidence of any individual recognition the beneficiary has received for his achievements as a drummer, either in the form of published evidence or in the form of testimonials from recognized experts or others in the field. The vast majority of the published evidence submitted regarding [REDACTED] and [REDACTED] mentions the beneficiary only in passing. As discussed above, the assertion that it is impossible for a drummer to receive individual recognition apart from the band is simply not persuasive. It is not reasonable to include the beneficiary among the group of musicians recognized in the field as leading, renowned or well-known if the petitioner does not establish that he has received significant independent recognition based on his own reputation or achievements.

Further, the record remains devoid of any objective documentary evidence of the beneficiary's major critical and commercial success as a musician or evidence that has received or will receive substantial remuneration in relation to others in his field. The petitioner's claims of eligibility in these regards suffer from an overreliance on unsupported assertions regarding the level of success and recognition achieved by the beneficiary's bands within the music industry.

Therefore, 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 a singer or musician who has achieved a level of distinction to the extent that he can be deemed to be renowned, leading, or well-known in the field of music. 8 C.F.R. § 214.2(o)(3)(ii). Accordingly, the appeal will be dismissed.

### **III. Conclusion**

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.