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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**

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

MAR 10 2011

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 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 requests that the beneficiary be granted O-1 classification for a period of three years so that he may perform in the United States as a trumpet player.

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 petitioner failed to establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), and submitted evidence to satisfy only one of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which three must be met to establish eligibility.

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 for the petitioner asserts that the director's decision contains a misstatement of fact, demonstrates a lack of understanding of the beneficiary's artistic field, and fails to adequately explain why the petitioner's evidence was insufficient to establish the beneficiary's eligibility under the O-1 evidentiary criteria. Counsel submits a brief and introduces a substantial amount of new evidence in support of the appeal. Counsel contends that the evidence submitted meets four of the evidentiary requirements set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B).

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.

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 . . . 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 set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9th 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 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."

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*. 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 *Kazarian* 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 failed to submit evidence that satisfies three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), and has not established 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 recognized as prominent, renowned, leading, or well-known in the field of music. 8 C.F.R. §§ 214.2(o)(3)(ii).

II. Discussion

The sole issue addressed by the director 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 beneficiary, a trumpet player in the salsa musical genre, is a native and citizen of Colombia who was last admitted to the United States in P-1 status as a member of the musical group [REDACTED]. The petitioner, which is described as an independent record label, production management and music publishing company, filed the petition on July 29, 2009. The director subsequently issued a request for additional evidence ("RFE") on September 8, 2009, to which the petitioner submitted responded on October 20, 2009.

In a letter dated August 6, 2009, counsel stated that the petitioner "intends to manage [the beneficiary's] performances and distribute his upcoming self-entitled album that will be released in the winter of 2009, as well as establish promotion and world-wide tour support for [the beneficiary] in the United States and abroad." The petitioner submitted an itinerary indicating that the beneficiary would be performing throughout the United States between August 2009 and July 2012, occasionally as a solo artist, but primarily with various groups and singers including [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

Counsel's letter provided background information regarding the salsa musical genre, noting that "the most important instruments in salsa are percussion and trumpet, which serve as the core to any and all musical pieces." Counsel indicated that the beneficiary has performed with several "pillars in the Latin music industry," including [REDACTED], [REDACTED] and [REDACTED].

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 petitioner did not claim that the beneficiary is eligible for this classification based on his nomination for or receipt of a Grammy award or comparable award in his field. The evidence of record demonstrates that the beneficiary performed as the trumpet player on the 2005 album "Alive" by [REDACTED]. Counsel indicates that [REDACTED] has won Latin Grammy awards and has been nominated for Grammy awards, but does not claim that the recording in which the beneficiary participated received such recognitions. In addition, counsel states on the Form I-290B, Notice of Appeal or Motion, that the beneficiary "has not yet earned a significant national or international award." Accordingly, the AAO concurs with the director's finding that the petitioner did not submit evidence to meet this criterion.

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). Counsel indicates that the beneficiary satisfies the criteria at 8 C.F.R. 214.2(o)(3)(iv)(B)(1), (3), (4) and (5). The remaining criteria will not be discussed.

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

At the time of filing and in response to the request for evidence, counsel for the petitioner indicated that the beneficiary meets this criterion based on his past performances with the salsa music groups [REDACTED] and [REDACTED]. Specifically, counsel stated:

[The beneficiary] participated as a musical executive and trumpet player in the recording of [REDACTED] 2005 hit album, [REDACTED] [REDACTED] is [REDACTED] award winning and [REDACTED] nominated salsa group founded by [REDACTED] and [REDACTED] in 1978 in Bogota, Colombia and currently based out of Cali, Colombia.

On July 20, 2001, [the beneficiary] performed live with [REDACTED] at Madison Square Garden before a crowd of 20,000 fans This group has helped bring Colombian salsa music to the forefront of the booming Latin music industry, a cultural explosion that has taken place over the past fifteen years.

The petitioner's supporting evidence included: the product page for [REDACTED] "[REDACTED]" album from the Amazon.com mp3 store; a list of other [REDACTED] albums available for purchase from Amazon.com; a *Wikipedia* article about [REDACTED] which lists the album "[REDACTED]" among their recordings; an article about [REDACTED] from the website *M-Audio* which discusses the group's history and principal accomplishments; and a letter from [REDACTED], the musical producer of [REDACTED]. [REDACTED] states that the beneficiary "participated as musical executive in the production '[REDACTED]'" and that his participation "consisted of playing the trumpet on all of the tracks in the album."

The petitioner enclosed a DVD and indicated that footage of the beneficiary's performance with [REDACTED] at Madison Square Garden was included, along with footage of other major performances. The petitioner submitted an artist biography for [REDACTED] from the *All Music Guide* website; a listing of [REDACTED] albums available for purchase from Amazon.com; a copy of the CD cover for the group's album [REDACTED] and photographs depicting the group's 2001 New York tour, in which the beneficiary appears with the band members.

Although the petitioner claimed eligibility under this criterion based only on the above-referenced performances, we note that the petitioner's initial evidence also included evidence that the beneficiary was credited with playing the trumpet on the album "[REDACTED]" by [REDACTED]. The petitioner submitted a letter from [REDACTED] who stated that the beneficiary "has organized and has directed my Salsa band as well as played the trumpet on many occasions, including concerts and special events." [REDACTED] also indicates that the beneficiary is producing his upcoming album "[REDACTED]" in Colombia.

Finally, the petitioner submitted evidence that the beneficiary's photograph is featured on the cover of the album "[REDACTED]" a compilation album published by [REDACTED] World Music CDs. The photograph appears to have been taken during a live performance and depicts the beneficiary among several members of a brass section. The petitioner submitted evidence that the CD is available for purchase on Amazon.com, but did not provide a track listing or the album's credits.

In the RFE issued on September 8, 2009, the director advised the petitioner that the evidence submitted did not clearly establish the beneficiary's lead or starring role in the above-referenced events or productions. The director requested evidence in the form of written reviews from critics, advertisements, publicity releases, publications, contracts, or endorsements to establish the beneficiary's leading, rather than supporting role, in events or productions which have a distinguished reputation. In response, counsel for the petitioner expressed "utter shock and disbelief" at receiving an RFE. Counsel reiterated his contention that the beneficiary meets this criterion based on his participation in the recording of "[REDACTED]," and based on his 2001 performance with [REDACTED] at Madison Square Garden. The petitioner re-submitted the evidence discussed above.

Upon review of the petitioner's response to the RFE, the director determined that "the evidence is not persuasive that the beneficiary's duties as a trumpet player have included a leading role in a production that has a distinguished reputation as evidenced by critical reviews."

On appeal, counsel once again claims that the beneficiary is eligible under this criterion based upon his participation in [REDACTED] album "[REDACTED]" and based upon his performance at Madison Square Garden with [REDACTED] on July 20, 2001.

The petitioner submits a letter dated October 13, 2009 from [REDACTED] of [REDACTED], who certifies that the beneficiary "has been associated with us as trumpet player during the following periods: June 2000 through July 2002; August 2008 through July 2009." [REDACTED] further states:

During these years, he performed with us in renowned national and international performances, such as: The 43rd Festival of Cali, 2001; The 44th Fair of Cali, 2002; Colombian Festival in Madison Square Garden, 2001; and touring for our albums . . . in different cities in Colombia, Ecuador, Venezuela, United States, Italy, Belgium, Germany and Spain.

The musical talent that [the beneficiary] possesses has allowed him to become our orchestra's [sic] best trumpet player. His greatest influences have been his innovation and ability to improvise, making his contributions to the orchestra [sic] of enormous value.

The petitioner submits photographs of the covers of various CD recordings of [REDACTED], and one critical review of their 1995 album "[REDACTED]" written by [REDACTED]. The review describes the band as a ten-piece act and identifies [REDACTED] as the head trumpeter. The beneficiary's name does not appear in the review, and, based on the letter from [REDACTED], the beneficiary was not a member of the band when this album was recorded.

The plain language of this criterion requires the petitioner to support its assertions regarding the beneficiary's lead or starring role in events or productions with a distinguished reputation by submitting evidence including critical reviews, advertisements, publicity releases, publications, contracts, or endorsements. The petitioner has submitted no such evidence with respect to the July 2001 [REDACTED] performance at Madison Square Garden or the [REDACTED] album "[REDACTED]," that would establish either the beneficiary's leading role in these productions or the distinguished reputation of the events or productions themselves. The petitioner appears to be relying on the reputation of the groups in lieu of providing specific documentary evidence relating to the concert and album in which the beneficiary participated. 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)).

On appeal, counsel claims for the first time that the beneficiary also meets this criterion based on his performance with singer [REDACTED] in "[REDACTED]" held at the Nokia Theater in Los Angeles, California in December 2006 and December 2007. Counsel

indicates that the beneficiary received an award from [REDACTED] in return for his charitable participation in the benefit concerts. In support of these claims, the petitioner submits a letter dated December 9, 2009 from singer-songwriter [REDACTED], who states:

[The beneficiary] performed alongside of me and singer/songwriter, [REDACTED], at [REDACTED] in December 2006 and December 2007. I am proud to say that this event has become Los Angeles' most anticipated holiday event galvanizing the entire community into a spirit of giving.

The petitioner submits two *Los Angeles Times* articles covering the holiday benefit concerts. One article mentions [REDACTED] while the other mentions "a brief appearance by gospel-salsa performer [REDACTED]." The petitioner submits photographs of the beneficiary with [REDACTED] and [REDACTED], in rehearsals for the show, and in a group band picture with [REDACTED]. The petitioner also provides a lengthy *Wikipedia* article about [REDACTED].

While the petitioner has established that [REDACTED]'s annual holiday benefit concert can be considered an event with a distinguished reputation, the evidence submitted fails to demonstrate that the beneficiary was a leading or starring participant in these events. The beneficiary performed as a member of the large band that accompanied singer [REDACTED]. There is no evidence that he was invited individually to participate in the event, that he was featured in any way, or that he received any media recognition for his appearance. Performers at these events included some prominent musical artists, including [REDACTED], [REDACTED], [REDACTED], [REDACTED], and others, all of whom likely brought supporting bands or musicians with them to the event. The AAO cannot conclude that every musician who took the stage in any capacity during these benefit concerts performed services as a "lead or starring participant" within the meaning of this criterion. The petitioner has not submitted evidence that would distinguish the beneficiary from any other supporting musician who performed at the event. Accordingly, the newly submitted evidence regarding the [REDACTED] holiday benefit concerts is insufficient to establish that the beneficiary meets this criterion.

Furthermore, although not addressed by the director, we emphasize that this regulatory criterion also requires the petitioner to submit evidence that the beneficiary "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.

The petitioner submitted an itinerary listing over 200 anticipated tour dates for the beneficiary for the requested three-year period of employment. The petitioner indicated that it is also representing the beneficiary in the recording of his first solo album titled [REDACTED], and indicates that he will tour individually as well as performing as lead trumpet player for the various acts listed in the itinerary. As noted above, the vast majority of the listed tour dates are with other acts including [REDACTED], [REDACTED], [REDACTED]. The itinerary identifies specific dates and cities for performances, but does not specifically identify any "events." The itinerary is not

accompanied by contracts between the beneficiary and any of the artists or groups listed therein. The petitioner submitted a letter from [REDACTED], who states that she looks forward to working with the beneficiary in the United States, but she offers no details regarding specific events or performances. The petitioner also submitted an e-mail message from [REDACTED], who expresses his need for the beneficiary's services in September 2009 [REDACTED] and [REDACTED].

The petitioner has not provided evidence in the form of advertisements, publicity releases, publications, contracts, or endorsements to establish that any of the productions or events in which the beneficiary will participate have a "distinguished reputation." As discussed further below, the petitioner has not established that the beneficiary has firm commitments for any of the performances listed in the itinerary, much less provided evidence that he will provide services as a lead or starring participant in such events. At most, the record confirms that the beneficiary will perform with [REDACTED] on two occasions in September 2009 and with [REDACTED] at some undisclosed time in the future.

On appeal, the petitioner supplements the record with promotional materials for the beneficiary's solo album, [REDACTED] including an announcement of the beneficiary's 2010 tour with two dates in December 2009 and one date in January 2010. Again, the petitioner has not submitted any critical reviews, advertisements, publicity releases, publications, contracts or endorsements to establish that the beneficiary's album or upcoming tour are considered to be productions or events with a distinguished reputation.

Based on the foregoing discussion, we concur with the director's conclusion that this criterion has not been met.

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.

Counsel asserts that the beneficiary has performed in lead, starring or critical roles for a number of Latin musical groups and solo artists during the course of his career.

The beneficiary began his professional career as a member of [REDACTED], an all-child salsa band. Counsel indicates that "this group gave birth to many child stars who are now recognized musicians not only in the realm of Colombian music, but some like [the beneficiary] have even become internationally recognized as leaders in Latin music." Counsel states that the band earned "many accolades on tours throughout Europe." The petitioner submitted several photographs of the beneficiary performing with the 10-12 member ensemble, and evidence that the beneficiary participated with [REDACTED] at the Festival de Musica del Pacifico in 1997. This evidence is insufficient to establish that the beneficiary performed in a lead, starring or critical role for this salsa band, nor does it demonstrate that the band has a distinguished reputation. The petitioner did not submit any published articles about the band, nor did it provide testimonial evidence relating to this period of the beneficiary's career.

The petitioner's evidence regarding the beneficiary's time with [REDACTED] did include one clipping from an unidentified newspaper or other publication. The clipping consists of a photograph of the beneficiary and refers to him as "the infant musician of Candelaria." The article indicates that the beneficiary "is only eight years old and he has become the new star of the all child band in this area that was selected to represent valle del cuaca in the National Band Contest that will take place in Paipa, Boyaca." Based on the beneficiary's biography submitted with the petition, the beneficiary "started his music career as a trumpet player at the age of 13 with [REDACTED]." Therefore, an article about the beneficiary at the age of eight does not appear to relate to the beneficiary's role with [REDACTED] or to his career as a trumpet player. It is unclear to what "child band" the article refers and, while the article refers to the beneficiary as a "star" it is insufficient to establish that he was the "star" of an organization that has a distinguished reputation.

The petitioner also relies on the beneficiary's participation in the recording of the [REDACTED] album "[REDACTED]" in support of its claim that the beneficiary meets this criterion. While it appears that [REDACTED] is a well-known salsa band, the petitioner has not provided any published or testimonial evidence regarding the beneficiary's lead, starring or critical role in the band. According to the information submitted, the band has a 30 year history and has recorded approximately two dozen albums. The petitioner submitted two general articles about the band and its history, but neither article mentions the beneficiary. Counsel has repeatedly asserted that "the most important instruments in salsa are percussion and trumpet," but this assertion is insufficient to establish that any trumpet player who appears on a group's album or in a group's live performance should be deemed to have performed in a lead, starring or critical role with the group. Based on the evidence of record, it can be concluded that the beneficiary played on a single album out of the two dozen or more recorded by [REDACTED]. There is no evidence that he ever performed in a lead, starring or critical role for the ensemble.

Counsel further asserts on appeal:

Any person with even the most remote musical knowledge understands that bands and orchestras are nearly always comprised of more than one musician who plays the same instrument in a musical section. Such a grouping does not imply that each musician cannot or does not possess extraordinary talent individually.

Counsel makes an analogy to the Los Angeles Lakers basketball team, noting that "anybody would be pressed to conclude that any single member of that particular team is not a star athlete in his own right."

The AAO emphasizes that we do not question the beneficiary's talent as a trumpet player. However, the plain language of the regulations requires the petitioner to establish through published articles or testimonial evidence that the beneficiary in this matter performed in a lead, starring or critical role for the various bands with which he has performed. With respect to counsel's professional sports analogy, we note that USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *See, e.g., Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.¹ Likewise, it

¹ While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

does not follow that any musician who has performed with a well-known musical group or in the supporting band of a solo artist in any capacity should necessarily qualify for a nonimmigrant visa as an alien of extraordinary ability. The permanent members of any band clearly gain more recognition than musicians who record as a guest artist on one album or occasionally tour with the band, and would be considered to perform in a lead, starring or critical role by comparison. If the beneficiary did in fact play a lead or critical role in the band [REDACTED] on the [REDACTED] album, then it is the petitioner's burden to establish this through submission of the evidence required by the regulations. Here, the only evidence of the beneficiary's role with the band is the mention of his name as the trumpet player in the album's liner notes, and a letter from the band's producer confirming that he played trumpet on the album.

Counsel further stated that the beneficiary has performed and will perform in a leading role for Colombian salsa band [REDACTED] as its lead trumpet player. Counsel identified [REDACTED] as "one of the most famous salsa groups in the world." Counsel indicates that the beneficiary has performed with [REDACTED] in the United States pursuant to a P-1 visa on several U.S. tours between 2001 and 2004, and last entered the United States to perform with this group in September 2008.

In support of these claims, the petitioner submitted a letter from [REDACTED], president of [REDACTED] who states that the beneficiary was associated with the band as a trumpet player from June 2000 through July 2002 and from August 2008 through July 2009. [REDACTED] states that "the musical talent that [the beneficiary] possesses has allowed him to become our orchestra's [*sic*] best trumpet player."

The petitioner has not established how the beneficiary's intermittent association with [REDACTED] is tantamount to performing in a lead, starring or critical role for the organization. The petitioner has not provided evidence that the beneficiary has recorded with the band, and, based on the evidence submitted, it appears that he has participated in the group as one of many touring musicians. The band appears to have four primary members. While [REDACTED]'s letter indicates that the group is impressed with the beneficiary's musical talent, it does not establish that the beneficiary is considered to be a lead, starring or critical member of the group.

The petitioner also attempts to satisfy this criterion based on the beneficiary's association with Grammy-award winning Mexican singer and songwriter, [REDACTED]. Specifically, the petitioner indicates that [REDACTED] performed with [REDACTED] in Los Angeles, California in June 2008, and that the beneficiary toured

[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

with [REDACTED] as his principal trumpet player throughout Mexico in mid-2003. Counsel indicates that the beneficiary has been invited to perform with [REDACTED] in the United States, as stated in the itinerary.

The record contains a photograph of the beneficiary with [REDACTED], two photographs that depict the beneficiary performing as a member of [REDACTED] band on a television soundstage, and a listing of [REDACTED]'s albums available for purchase on Amazon.com. The record does not include evidence in the form of articles in newspapers, trade journals, publications, or testimonials confirming the beneficiary's lead, starring or critical role with [REDACTED] band. As noted above, the petitioner has not submitted evidence in the form of contracts between the beneficiary and the artists who are claimed to have invited him to perform on their upcoming tours in the United States, therefore, the beneficiary's future performances with [REDACTED] are also unconfirmed.

The petitioner claims that the beneficiary has performed and will perform a lead, starring or critical role with the Colombian cumbia group, [REDACTED]. The petitioner provided photographs depicting the beneficiary as a member of the [REDACTED] and a *Wikipedia* article about the band, which describes it as a group with a 50-year history that has "always featured a strong female vocalist to accompany its ten-piece." As noted above, [REDACTED] the group's current singer, provided a letter indicating that the beneficiary "has worked with my band on numerous occasions in the past years in Colombia." While [REDACTED] confirms the beneficiary's association with the band, her statement is too vague to establish that the beneficiary has ever performed in a lead, starring or critical role for the organization. As the record contains no other testimonial evidence and no published articles that address the beneficiary's role with the band, the petitioner has not established that the beneficiary's association with [REDACTED] satisfies the plain language of this regulatory criterion.

Counsel indicates that the beneficiary is eligible under this criterion because he "collaborated with Colombian salsa group [REDACTED], in 2001 in the production of their twelfth album, [REDACTED]." Counsel describes [REDACTED] as "one of the most important salsa group[s] to emerge out of Colombia in the mid-1980s, and is sometimes upheld as an exemplar of a salsa band that actually originated from Cali." The petitioner submitted a photograph of four individuals that is labeled [REDACTED]. The beneficiary is not pictured. The petitioner also provided an undated newspaper or magazine article from an un-identified source, which includes a photograph of [REDACTED]. The beneficiary appears to be one of the thirteen people pictured, although the photograph is not captioned. The photograph is accompanied by a brief article which mentions that the group is working on its twelfth album. While the evidence submitted establishes the beneficiary's association with the band, the brief article does not document the beneficiary's performance in a lead, starring or critical role.

Finally, the petitioner claimed eligibility under this criterion based on his role as "one of the lead trumpet players in the production of [REDACTED] a popular album by [REDACTED], a salsa band from Cali, Colombia." The petitioner provided the credits for the album, which confirm that the beneficiary was one of two trumpet players included in the fifteen-member group. A photograph of seven individuals appears on the cover of the album, but the beneficiary is not included in the photograph. The petitioner did not submit any other evidence in the form of published articles or testimonials to establish the distinguished reputation of the band or the

beneficiary's role as a lead, starring or critical performer in the band. The album credits do not satisfy the plain language of this regulatory criterion.

Due to the evidentiary deficiencies discussed above, the petitioner has not established that the beneficiary has performed in a lead, starring or critical role with organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials. Furthermore, although not addressed by the director, we emphasize that this regulatory criterion also requires the petitioner to submit evidence that the beneficiary "will perform" in a lead, starring or critical role with organizations and establishments that have a distinguished reputation.

As discussed, the petitioner submitted an itinerary which indicates that the beneficiary will be touring or performing with [REDACTED] and [REDACTED] in the United States. Again, the itinerary is not accompanied by contracts between the beneficiary and any of the artists or groups listed therein. Only [REDACTED] and [REDACTED] have confirmed their intent to work with the beneficiary in the United States. The uncorroborated itinerary provides insufficient evidence of the beneficiary's upcoming performance in a lead, starring or critical role with the listed groups and solo artists.

For the foregoing reasons, the petitioner has not submitted evidence to meet the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

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

Counsel indicates that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) based on his "critically acclaimed success." Counsel cites four specific examples of such success.

First, counsel states that the beneficiary "recently finished recording his debut single [REDACTED] which he intends to release formally in the United States if granted O-1B status." Counsel indicates that the single "is currently being aired by radio stations in Peru, Mexico and Colombia as well as on YouTube and RumbaLounge.com." The petitioner submits promotional materials related to the single and evidence of the beneficiary's videos on YouTube. The AAO notes that this evidence is submitted for the first time on appeal, and there is no evidence that the beneficiary's first single was completed and being promoted at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Accordingly, evidence related to the release of the beneficiary's first single will not be considered. Regardless, the petitioner did not submit evidence of the single's commercial or critical success in the form of published evidence from trade journals, major newspapers or other publications.

Counsel also relies on the beneficiary's participation in [REDACTED] Annual House Full of Toys Benefit Concert as evidence of his "critically acclaimed success." The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) requires the petitioner's commercial or critically acclaimed successes to be "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 petitioner has not submitted any relevant evidence pertaining to this event.

Counsel further refers to the beneficiary's participation in the recording of [REDACTED]'s 2005 album "[REDACTED]" as evidence of his critically-acclaimed success. Again, the petitioner did not submit supporting documentary evidence that would meet the plain language of this evidentiary criterion. Counsel's assertion that the album was a "hit" is insufficient. 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. 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).

Finally, counsel asserts that "the beneficiary was the main musician featured on the cover of musical production, entitled [REDACTED]." Counsel notes that this CD is currently being sold worldwide by companies such as Amazon.com and Barnes & Noble. The AAO notes that the fact that the CD is available for purchase from major retailers does not provide evidence that the beneficiary has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, and other occupational achievements reported in trade journals, major newspapers, or other publications. Furthermore, while the beneficiary's photograph appears on the cover of this compilation CD, his level of involvement in or contribution to the CD itself has not been established through evidence. The petitioner has not provided the album's track listing or credits, or any other evidence that would establish why the beneficiary's photograph was chosen for the cover of the CD. 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. Commr. 1972)).

For the foregoing reasons, the petitioner has not submitted evidence that satisfies the evidentiary 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.

At the time of filing, the petitioner claimed eligibility under this criterion based on the letters of [REDACTED]. As noted above, [REDACTED], of [REDACTED], states that the beneficiary "participated as musical executive in the production 'Alive'" and that his participation "consisted of playing the trumpet on all of the tracks in the album."

states that the beneficiary "is one of the best in the Latin music industry, and one of the best if not the best trumpet player that I have ever had the pleasure to work with and know."

states:

[The beneficiary] is an excellent music producer and song writer. He is a very talented musician and has a long successful musical history in his home country. He is currently producing a music cd for me in Colombia. The music project will be titled " " Many Christian music and radio networks are asking and anticipating it's [sic] release. [The beneficiary] has been highly instrumental in spearheading this project. I highly recommend him for residency in the United States. He is a person of good moral standing and integrity. Since I've known him, he's always been a responsible and dependable musician.

On appeal, the petitioner introduces the above-referenced letters from , who describes the beneficiary as "a tremendously talented trumpet player," and from , who praises the beneficiary's "innovation and ability to improvise."

The director determined that the letters from and were sufficient to satisfy this requirement. The AAO disagrees and will withdraw the director's finding that this evidentiary criterion has been met. While the AAO recognizes that the individuals who provided letters hold a very high opinion of the beneficiary's talent as a musician, the submitted testimonials do not satisfy the plain language of the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5). None of the persons providing testimonials have clearly indicated their knowledge of the beneficiary's achievements. Rather, the majority of them opine that the beneficiary is a talented trumpet player, without specifically addressing his achievements or recognition in the field.

On appeal, the counsel states that the beneficiary is also eligible under this criterion based on his membership in The Recording Academy. Counsel notes that "the Grammy's are the only peer-presented award to honor artistic achievement, technical proficiency and overall excellence in the recording industry, without regard to album sales or chart position. The petitioner indicates that the beneficiary became a member of the Recording Academy on December 9, 2009. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Commr. 1978).

Furthermore, the petitioner has not established how membership in the Recording Academy constitutes "significant recognition for achievements" as required by the regulations. The petitioner has not submitted evidence to establish that The Recording Academy requires significant or outstanding achievement as an essential condition for membership or otherwise identified or documented the criteria for membership.

Based on the foregoing, the petitioner has not submitted evidence that satisfies the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5).

B. Final 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. However, as discussed above, the petitioner established eligibility under none of the criteria found under the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(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 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). It is claimed that the beneficiary has worked with and will work with singers and musical groups who are nationally and internationally recognized, and that he is on the verge of launching his own solo career as a musician. However, this classification focuses on the beneficiary's individual achievements and recognition within the field. The petitioner has provided little corroborating evidence of such recognition.

The favorable opinions of well-known artists who have worked with the beneficiary, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim.² Unusual in its specificity, section 101(a)(15)(O)(i) of the Act clearly requires "extensive documentation" of the alien's achievements. Letters from personal contacts that generally praise the beneficiary as a musician cannot form the cornerstone of a successful extraordinary ability claim. Further, USCIS may, in its discretion, use as advisory opinion statements

² 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. Blacks Law Dictionary 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about whether something occurred or did not occur, based on the witness' direct personal knowledge. *Id.* (defining "written testimony"); see also *id.* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, or 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).

submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts 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.

The AAO emphasizes that four out of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B) require the petitioner to submit various types of published materials to establish the beneficiary's recognition, such as critical reviews, advertisements, publicity releases, newspaper, magazine or trade journal articles. Therefore, it is significant that the petitioner has submitted little published evidence regarding the beneficiary. Absent evidence that the regulatory criteria are not applicable to the beneficiary's occupation, pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(C), the petitioner must submit some published materials "about" the beneficiary in order to establish his eligibility for this classification. 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.

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 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. Contract and Itinerary Requirements

Beyond the decision of the director, the AAO notes that, prior to the adjudication of the petition, the petitioner failed to submit any evidence to satisfy the regulation at 8 C.F.R. § 214.2(o)(2)(ii)(B), which requires the petitioner to submit copies of any written contracts between the petitioner and the alien beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed. The director issued a request for evidence ("RFE") in which she specifically instructed the petitioner to provide this required evidence. Although the petitioner responded to the RFE, it did not submit a copy of its contract with the beneficiary or otherwise acknowledge this request. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner has submitted a copy of its "representation/agency agreement" with the beneficiary. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the petition will be denied for this additional reason.

Another issue not addressed by the director is whether the petitioner satisfied the evidentiary requirements pertaining to agents as petitioners, pursuant to 8 C.F.R. § 214.2(o)(2)(iv)(E). At the time of filing, the petitioner provided an itinerary indicating that the beneficiary would be touring almost constantly during the requested three-year period of employment, occasionally as a solo artist, but primarily performing as a trumpet player with a number of different musical acts. The petitioner indicated that it will "manage [the beneficiary] as a performer and ensure that he meets his performance commitment." The petitioner did not indicate whether it was filing as an agent under 8 C.F.R. § 214.2(o)(2)(iv)(E)(1) or (2).

The regulation at 8 C.F.R. § 214.2(o)(2)(iv)(E)(2) states:

A person or company in business as an agent may file the petition involving multiple employers as the representative of both the employers and the beneficiary if the supporting documentation includes a complete itinerary of the event or events. The itinerary must specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues or locations where the services will be performed. A contract between the employers and the beneficiary is required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

The director specifically requested that the petitioner "provide a contractual agreement between the employer and the beneficiary for each event." As noted above, the director also requested a copy of the contract between the petitioner and beneficiary. Agents performing the functions of employers under 8 C.F.R. § 214.2(o)(2)(iv)(E)(1) must provide the contractual agreement between the agent and the beneficiary which specifies the wage offered and the other terms and conditions of employment of the beneficiary. The petitioner did not submit a copy of its contract with the beneficiary, or copies of contracts between the beneficiary and the various musical acts with which he is claimed to be touring extensively in the United States, according to the itinerary. As such, the petitioner has not complied with the documentary requirements applicable to petitions filed by U.S. agents. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

IV. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with

respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. at 1043.

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.