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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

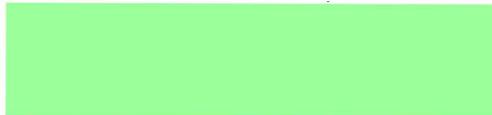


DATE: **FEB 26 2013**

Office: CALIFORNIA SERVICE CENTER

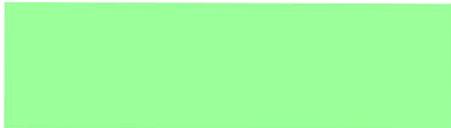
FILE: 

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting 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, self-described as an organization engaged in "audio-visual services, music writing, recording [and] publishing," filed this nonimmigrant petition seeking to classify the beneficiary pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act ("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 drummer/musician for a period of three years.

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 the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), or three of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(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 for the petitioner asserts that sufficient evidence was presented attesting to the beneficiary's distinction in the field, and the petitioner asserts that the director did not carefully review the facts of the case. 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.

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* Fed Reg. 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*, 596 F.3d 1115 (9th Cir. 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). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion. The court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet two of the criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(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 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 this matter, the AAO has reviewed the evidence under the plain language requirements of each criterion claimed. As 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), the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence.

## 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 beneficiary, a drummer, is a native and citizen of Australia who was last admitted to the United States as a B-2 visitor for pleasure. The petitioner, which is described as a music publisher, filed the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation on December 16, 2010. The director subsequently issued a request for additional evidence ("RFE"), to which the petitioner promptly responded. The AAO has considered the evidence of record in its entirety in reaching its decision.

In a letter submitted in support of the petition, the petitioner's chief executive officer, [REDACTED] stated that the beneficiary "is an incredible drummer" who will "fill a much needed gap in [the petitioner's] production office." He states that the petitioner composes music for film, television and corporate branding." He states that the petitioner intends "to record at least 30 new songs with [the beneficiary] over the next three years . . . for film and television distribution."

### 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.

Counsel asserts that the petitioner has submitted evidence that the beneficiary has been nominated for or has been the recipient of, significant national or international awards or prizes in the field. Counsel submits documentary evidence that the beneficiary attended [REDACTED] from 1998 to 2005, which school is self-described as "Australia's World-Renowned Drum & Percussion Headquarters." However, the petitioner has not submitted evidence that being granted admission to this school constitutes an award or prize, under the plain language requirements of this criterion.

Counsel states that at age 12 the beneficiary was chosen to perform with the [REDACTED] which counsel describes as "Australia's largest drumming event." However, the petitioner has not submitted documentary evidence of the beneficiary's participation in this event. 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).

Counsel has submitted evidence that the beneficiary competed at the [REDACTED] held in Melbourne, Australia. The petitioner has not submitted evidence that the petitioner won an award or prize at this competition, to satisfy the plain language requirements of this criterion.

Further, the petitioner submitted documentary evidence that at age 15 the beneficiary, along with his former band, finished in first place in [REDACTED] competition in Melbourne, Australia, which counsel describes as a national competition. The beneficiary received an engraved plaque and professional recording time. The petitioner did not claim that this award nomination was comparable to a Grammy award nomination.

We agree with 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). The petitioner claims that the beneficiary meets the following criteria:<sup>1</sup>

*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;*

The evidence of record indicates that the beneficiary has been a drummer for touring bands including [REDACTED]. The petitioner has provided posters, press releases and articles regarding events at which the petitioner asserts the beneficiary has appeared with various bands in Australia. None of the posters specifically mention the beneficiary by name. Two press releases from local Australian newspapers briefly mention the beneficiary's drumming in an upcoming show with [REDACTED] and in a recent show with [REDACTED] respectively. A third article titled [REDACTED] published 2004 in a local Australian paper the [REDACTED] states that the beneficiary and his former band will compete in the [REDACTED] competition [REDACTED]. This evidence fails to establish that the beneficiary performed services in a lead or starring role in those productions or events.

Although counsel has also submitted a list of additional websites and publications in which counsel contends the beneficiary is mentioned, counsel has not submitted copies of the materials mentioning the beneficiary. As stated 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

<sup>1</sup> The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

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).

In addition, the petitioner has not submitted critical reviews, advertisements, publicity releases, publications or other evidence to establish that the events themselves have a distinguished reputation, as required pursuant to the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). As described above, the posters, press releases and articles regarding events at which the beneficiary has performed do not establish that the bands' live shows have distinguished reputations among industry publications that cover the bands' genre of music.

Further, in order to meet this criterion, the petitioner must establish that the beneficiary *will perform* services as a lead or starring participant in productions or events which have a distinguished reputation upon approval of the petition. The evidence of record indicates that if the requested classification is granted the beneficiary, as drummer, shall record at least three records for film and television distribution. The evidence submitted by the petitioner also indicates that the beneficiary intends to form a new band, [REDACTED] (also referred to in the record as [REDACTED] to include the beneficiary as drummer, and rhythm and lead guitarists who have worked with [REDACTED] respectively. The petitioner has also submitted a three-year performance schedule showing the beneficiary will be touring with the new band, but the schedule does not list specific performance venues. The petitioner has not submitted critical reviews, advertisements, publicity releases, publications or other evidence to establish the identity of any upcoming events at which the beneficiary will perform, or to establish that the events themselves have a distinguished reputation, as required pursuant to the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). Therefore, the petitioner has offered no information regarding the beneficiary performing services as a leading or starring participant in any upcoming events or productions.

In sum, the petitioner has neither identified nor documented, through submission of the evidence prescribed by regulation, the beneficiary's previous or forthcoming lead or starring role in events with a distinguished reputation. Therefore, the AAO agrees with the director that the petitioner has not established that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

*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>

The director determined that the petitioner failed to submit any published materials about the beneficiary from major newspapers, trade journals, magazines or other publications. As stated above, the beneficiary was mentioned casually in some articles as a member of the bands China Angels and Sebasrockets, but that evidence is insufficient to establish that he has received national or international recognition as a drummer. In addition, the petitioner has not submitted any published article in which the beneficiary is quoted extensively, as opposed to being merely mentioned in passing.<sup>3</sup>

On appeal, counsel asserts:

. . . [the beneficiary] is nationally famous in Australia as a drummer and composer and has toured with three most famous rock bands in Australia:

Massive number (sic) of posters supporting these tours and performances were previously submitted . . . With drummers rarely reviewed or critiqued in the newspapers or radio or internet, these (sic) supporting evidence would indicate the fame and distinction that [the] beneficiary has achieved in the rock band world, especially at a very young age. . . The media coverage in the radio and internet has a broader dissemination area than Sydney, Australia's daily newspaper, thus, [the] beneficiary's reputation has reached international stature.

The petitioner has not submitted any published materials that are specifically "about" the beneficiary as an individual, despite counsel's claims that the beneficiary's talent has earned him national and international fame and distinction. Counsel refers to the beneficiary's early individual achievements stating that he is a "child prodigy drummer," and refers to his current achievements stating "only a few drummers earn this reputation and achieve this level of talent, skill and competence." However, the record remains devoid of any such individual achievements or any evidence to support the statements made above. As previously stated, 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). 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,

<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.

<sup>3</sup> On appeal the petitioner has submitted articles concerning the beneficiary published after the date of filing this petition. In these articles, the beneficiary is quoted extensively. However, 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'r 1978). Regardless, the articles, generally, consist of interviews with the beneficiary regarding his musical influences and his upcoming DVD "Stage Presence." While the articles are complementary of the beneficiary, they fail to recognize the beneficiary's individual achievements as a musician or the national and international recognition he received for such achievements.

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165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

On the Form I-290B, notice of appeal, counsel further states:

When there is a review of the band (sic) performance, the musical critics do not mention the drummer but the band as a whole (rarely does a drummer is (sic) mentioned in a music critique or newspaper publications.) Thus, this does not *per se* exist in writing.

In light of counsel's claims regarding the beneficiary's individual reputation, counsel's assertion that it is rare, if not impossible, 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.

Upon review, the AAO agrees with the director's determination that 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 petitioner has failed to establish that the beneficiary has performed a critical role for an organization that has a distinguished reputation as a drummer for bands such as

As stated above, the beneficiary has been a drummer for touring bands including [REDACTED]. The petitioner has provided posters, press releases and articles regarding events at which the petitioner asserts the beneficiary has appeared with various bands in Australia. None of the posters specifically mention the beneficiary by name. Two press releases from local Australian newspapers briefly mention the beneficiary's drumming in an upcoming show with [REDACTED] and in a recent show with [REDACTED], respectively. A third article titled, [REDACTED] published 2004 in a local Australian paper the [REDACTED] states that the beneficiary and his former band will compete in the [REDACTED] competition. [REDACTED] This evidence fails to establish that the beneficiary performed services in a lead or starring role for these organizations.

Further, the petitioner has not submitted evidence that any of the bands with which he has performed been featured in national or international music publications or are in demand for national or and international tours. As noted by the director, although the record shows that [REDACTED] was listed under the "New Australian Releases" category of Australia's Aria chart (2004), the chart lists only the band's name and its album release date, and is, thus, not indicative of the band's achievements. Therefore, the evidence of record is sufficient to establish that the bands with which the beneficiary has performed enjoy a distinguished reputation in the music industry.

Moreover, the petitioner has not established that the beneficiary will perform in a lead, starring or critical role for an organization or establishment that has a distinguished reputation under the approved petition.

In support of counsel's assertion that the petitioner is a very reputable music producer, counsel submits the following:

- The support letter of the petitioner's chief executive officer, [REDACTED] stating that the petitioner is represented by the [REDACTED]
- A document from the [REDACTED] website showing that, between 1979 and the date of filing the petition, [REDACTED] received the [REDACTED] and, [REDACTED]
- An online Internet Movie Database (IMDb) printout for [REDACTED]. The printout, in the form of [REDACTED] resume, shows that he has worked as a music composer and graphic designer for multiple television productions. However, information submitted by the petitioner about IMDb states that in 2006, "IMDb introduced its 'Resume subscription service', where actors and crew can post their own resume and upload photos of themselves for a yearly fee." As there are no assurances about the reliability of the content from this open, user-edited Internet site, the AAO will not assign weight to information from IMDb.

However, the petitioner has not submitted documentary evidence, in the form of articles in newspapers, trade journals or publications, in support of its claim that its organization has a distinguished reputation in the field.

Moreover, the petitioner has not established that the beneficiary will perform in a lead, starring or critical role for the petitioner. As stated above, in the support letter [REDACTED] states that the beneficiary "is an incredible drummer" who will "fill a much needed gap in [the petitioner's] production office." He states that the petitioner composes music "for film, television and corporate branding." He states that the petitioner intends "to record at least 30 new songs with [the beneficiary] over the next three years . . . for film and television distribution." He states that he finds the beneficiary to be "a valuable asset to my music catalog, and the future of my company." The AAO agrees with the director that the petitioner has not articulated or documented how the beneficiary will serve in a lead, starring or critical role. Furthermore, the plain language of the regulations requires the submission of evidence in the form of published articles or testimonials in support of this criterion. Although the petitioner has submitted testimonial evidence, none of the testimonials establish that the beneficiary will perform a lead, starring or critical role within the petitioner's business, upon approval of the petition.

Based on the foregoing, the AAO concurs with the director that the submitted evidence does not satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

*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 eight testimonial letters in support of the petition, seven from the beneficiary's immediate circle of mentors, colleagues and collaborators. 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 submitted a letter from [REDACTED] the beneficiary's former instructor at the [REDACTED] [REDACTED] states that he trained the beneficiary "at intervals over the 11 years that I have known him." He acknowledges the beneficiary's talent as a student drummer. He states that he has seen the beneficiary perform many times, both in original projects and projects with bands and with ensembles, and states that the beneficiary "is certainly one of the very best drummers & his abilities are most certainly world class." However, [REDACTED] fails to specify the beneficiary's achievements.

The petitioner submitted a letter from [REDACTED] a band member with [REDACTED] He states that during the band's second national tour they hired the beneficiary to replace their original drummer, and the band was impressed with the beneficiary's ability to learn the various elements of the band's live show. He states the beneficiary was also a great success after their tour, as their session drummer for "pre-production for [the band's] next release." He states that during the time that the beneficiary was with the band he "worked very hard on all aspects of his performance." Mr. Mahar fails to specifically describe the beneficiary's achievements in factual terms.

The petitioner provided a letter from [REDACTED] [REDACTED] states that he has used the beneficiary many times as a session drummer, and that the beneficiary makes "the music for other artist (sic) or clients come alive and make it feel like I wanted it to feel." He states the beneficiary's musicianship is always great, and that the beneficiary is a professional.

The petitioner has also provided a letter from [REDACTED] a production designer for film and television in Los Angeles. He states that over the years he has worked art-directing over 250 music videos for many rock music artists. He states "over the last few months I have had the privilege getting to know the beneficiary on a personal and professional level." He states that he considers the beneficiary to be "one of the rising stars in the current music industry" and that the beneficiary has "extraordinary drumming ability" and "a unique style of playing."

The petitioner has submitted a letter from [REDACTED] an artist manager with [REDACTED] [REDACTED] in Los Angeles, who states that the beneficiary "is a naturally talented drummer with the skill and drive to take the U.S. music industry by storm." He states, "after viewing his drumming promo and getting to know [the beneficiary] on a personal and professional level" he would recommend him to any of the bands he manages.

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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." The letters of [REDACTED] fail to establish the witnesses' credentials as recognized experts and fail to specifically describe the beneficiary's achievements in factual terms. Moreover, [REDACTED] fail to explain the manner in which they acquired information about the beneficiary.

The petitioner submitted a letter from [REDACTED], a freelance band manager in Australia who states she first met the beneficiary when he was hired as a replacement and session drummer in a band that she was managing in Melbourne. She states the beneficiary "fulfilled the bands headlining interstate tours and radio commitments."<sup>4</sup> She states that her team found the beneficiary to be "more creative and professional than we ever expected." [REDACTED] fails to specifically describe the beneficiary's achievements in factual terms.

The petitioner has provided a letter from [REDACTED] a professional musician/guitarist. He states that the beneficiary is "one of the very best young drummers and musicians in the country," and that the beneficiary's "exceptional abilities certainly deserve to be called 'Extraordinary'." He states he auditioned the beneficiary for a new recording and performing band he was forming and the beneficiary exceeded his expectations. He states the beneficiary's drumming promo was "one of the best I've seen." He states that the beneficiary's drumming rehearsals "perfectly accompanied the songs, and his ability and depth of playing greatly enhanced the music," receiving high praise from the band's management and investor. He states that the beneficiary is one of the best young talents in the country. [REDACTED] does not specifically identify the beneficiary's achievements and the significant recognition he has received for those achievements in the field.

Finally, the petitioner submitted a letter from [REDACTED] a business development manager with the [REDACTED] in Los Angeles who stated:

[The beneficiary] is truly an exceptional musical talent. By achieving worldwide notoriety through his live performances and online videos, [the beneficiary] has reached a very high level of achievement . . . [The beneficiary's very high level of achievement is] reflected by the tremendous public reaction to and demand for his music and professional services. A percussionist of remarkable talent, acclaim, experience and energy, [the beneficiary] has collaborated with a wide range of major recording artist (sic) and events over his years of professional work and has proven to be a unique force in Australian music. . . [The beneficiary] has been a leader in the Australian music industry for several years, I am confident that his exceptional talent will only enhance the already considerable demand for him in the USA.

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

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<sup>4</sup> It appears the band [REDACTED] is referring to is the [REDACTED] as her letter describes first meeting the beneficiary in a manner similar to that described by [REDACTED] above, using similar language.

factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information." [REDACTED] letter fails to explain the manner in which he acquired information about the beneficiary. In addition, the letter consists of general assertions regarding the beneficiary's international acclaim and renown, but fails to detail the beneficiary's specific achievements in factual terms. Furthermore, the letter does clearly indicate [REDACTED] authority, expertise and knowledge of such achievements.

As a matter of discretion, USCIS may accept expert opinion testimony.<sup>5</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.'").

The director determined that the beneficiary met his criterion, without discussion. The AAO disagrees with the director's determination. 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>6</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*

As evidence the beneficiary has commanded a high salary in the past, the petitioner submitted a letter from the CEO of the [REDACTED] confirming the beneficiary was paid \$5,000 plus GST

<sup>5</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).

<sup>6</sup> *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108; *Avyr 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).

(Goods and Services Tax) for his performance at the event. On appeal, the petitioner has also submitted the following:

- An Artist Performance Contract between the beneficiary and [REDACTED] listing performance dates in February 2008, and stating that the beneficiary will be paid "\$2,000 at the conclusion of each event at which the artist has actually performed." The petitioner has not submitted evidence of the beneficiary's actual earnings, if any, paid pursuant to this contract.
- Undated bank account statements, the owner of which accounts are unidentified, showing a total of \$200 credited to the beneficiary.
- A copy of a 2008 Band Contract between the [REDACTED] stating payment terms. The petitioner has not submitted evidence of the beneficiary's actual earnings, if any, paid pursuant to this contract.
- Copies of several of the beneficiary's compositions for use in television and film productions and for "educational purposes." The petitioner has not submitted evidence of the beneficiary's actual earnings, if any, from the use of these compositions.
- Counsel refers to past merchandise sold at concerts at which the beneficiary performed, as well as the beneficiary's [REDACTED] which counsel states has been selling on the internet. The petitioner has not submitted evidence of the beneficiary's actual earnings, if any, paid as proceeds of the sale of these items. Counsel also refers to the beneficiary having been paid to endorse a clothing brand, hair and beauty products, however, counsel has not submitted evidence of the beneficiary's actual earnings, if any, from these endorsements.

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).<sup>7</sup>

Upon review of the submitted evidence, the AAO finds that, other than proof of having earned \$5,000 in 2009, the petitioner has provided no corroborating evidence as to how much the beneficiary has earned in the past from performances, sales, royalties, merchandise or other revenue streams. Therefore, based on the evidence submitted the petitioner failed to establish that the beneficiary's past earnings as a drummer were considered high or substantial in relation to others in the field.

The petitioner has submitted a copy of its agreement with beneficiary, but, as noted by the director, the petitioner 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, which pertains to "future musical compositions to be composed by both parties," indicates that the beneficiary would receive: (1) \$1,500 dollars per week; (2) 50% of net publishing receipts, less deductions for enumerated expenses; (3) 50% of net earnings from royalties from [REDACTED] recordings; (4) 25% of gross earnings from live performances with invested projects;

<sup>7</sup> On appeal counsel states she has submitted a copy of [REDACTED] touring performance contract dated July 12, 2009, however, the record of proceeding does not contain this document.

and (5) 20% of gross earnings from touring performances with invested projects.<sup>8</sup> Thus, the petitioner has offered the beneficiary an annual salary of \$78,000, plus other compensation. The AAO notes that the beneficiary's annual salary converts to \$37.50 per hour.

The petitioner has submitted salary information as of May 2009 for "Fine Artists, Including Painters, Sculptors, and Illustrators" from the website of the U.S. Department of Labor, Bureau of Labor Statistics (BLS). According to the national BLS data, the 90<sup>th</sup> percentile annual wage for fine artists in 2009 was \$86,650 or \$41.66 per hour. However, this does not appear to be the appropriate classification for the beneficiary's proffered position. The more appropriate classification would appear to be "Musicians, Singers and Related Workers." According to the national BLS data, as of May 2010, the middle 50 percent of musicians and singers in the United States earned between \$12.94 and \$39.54, while the top 10 percent earned more than \$60.02 per hour. If the petitioner establishes through the submission of corroborating evidence that under the proffered contract the beneficiary will earn significantly more than the top 10 percent of musicians and singers in the United States, then this criterion would be met. Based on this information, the petitioner has not established that the beneficiary's offered wage of \$37.50 per hour can be considered a "high salary" compared to others in his field. The salary offered could be characterized as average compared to typical working musicians and singers. Therefore, the director correctly determined based on the evidence submitted that the petitioner failed to establish that the beneficiary's earnings under the proposed agreement with the petitioner, including other compensation, are considered high or substantial in relation to other musicians in the field.

On appeal, the petitioner attempts to overcome the director's finding by submitting evidence related to earnings from two of the beneficiary's projects. The petitioner also submits evidence that the beneficiary has secured an investor.

The petitioner submitted an additional letter from [redacted] a research student at the [redacted] stating that a DVD he co-created with the beneficiary titled [redacted] a [redacted] will be shown at two venues in 2011. The petitioner also submitted an agreement between [redacted] and the beneficiary, stating that the beneficiary would be paid \$5000 to be a drummer in the [redacted]. The petitioner further submitted an undated letter from [redacted] associated with the band [redacted] stating that the band recently employed the beneficiary as its drummer, and confirming that the band will play a two-week position at the [redacted] in Los Angeles and that "[the beneficiary's] usual fee of \$2,000 will be met depending on the caliber of the performance." Finally, the petitioner has submitted an Investor Agreement between the beneficiary and investor [redacted] wherein [redacted] agrees to pay the beneficiary \$50,000 as "an investment in his/her career," in return for receiving a percentage of the beneficiary's profits.

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<sup>8</sup> The petitioner also submitted a Performance Schedule, which includes lists of cities and states for concert tours and includes the statement, "Proposed cities and states for North American Tour 2011. Dates and Route TBC [to be confirmed]. The Performance Schedule also provides a list of venues and a statement that the beneficiary *may* perform at music venues *similar* to those listed. [Emphasis added.] The AAO agrees with the director that the petitioner's estimate of the beneficiary's earnings from live and touring performances has not been substantiated because the petitioner has not submitted evidence of contracted shows or concerts.

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. The petitioner has not submitted any documentary evidence of the beneficiary's earnings, such as Australian tax forms, checks or other reliable evidence showing the beneficiary's actual earnings for any specific period of time. Again, we emphasize that, 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). In addition, 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)).

While the petitioner and counsel have submitted unsupported claims that the beneficiary's weekly earnings and anticipated royalties, along with future merchandise sales establish the beneficiary will receive high remuneration in relation to others in his field, the AAO agrees with the director that the petitioner has provided no substantiated estimates of how much the beneficiary 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 drummer for the petitioner are considered high or substantial in relation to others in the field. In light of the above, the petitioner has not submitted evidence to satisfy this criterion.

#### ***B. 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).

#### **III. Conclusion**

The documentation submitted in support of a claim of extraordinary ability in the field of arts must clearly establish that the beneficiary is prominent to the extent that he could be considered renowned, leading or well-known in his field.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a consideration of the evidence in the context of a final merits determination. However, as discussed above, the petitioner failed to establish eligibility under any of the criteria found under the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B). The AAO will not conduct a final merits determination.

For the above-stated reasons, the petitioner has not established the beneficiary's eligibility pursuant to the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), and the petition may not be approved.

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.

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<sup>9</sup>The AAO maintains *de novo* review. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding on motion or as a result of litigation, the AAO maintains the jurisdiction to conduct a final merits determination as the official who made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* Section 103(a)(1) of the Act; Section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii)(2003); *Matter of Aurelio*, 19 I & N Dec. 458, 460 (BIA 1987)(holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).