



U.S. Citizenship  
and Immigration  
Services

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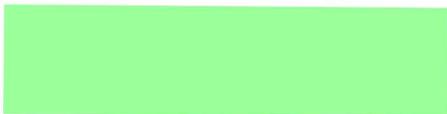
DATE: **JUN 25 2013** Office: CALIFORNIA SERVICE CENTER

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 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 is a management and consulting law firm and the beneficiary is a violinist/fiddle player. The petitioner seeks to employ the beneficiary as a performer 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 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 two 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 contends that the evidence submitted meets at least three of the evidentiary requirements set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). Counsel submits a brief and additional 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 . . . 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 FR 41818, 41820 (August 15, 1994).

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 final 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*. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> 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).

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 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 petitioner filed the petition and supporting documentation on November 11, 2008. The director subsequently issued a request for additional evidence ("RFE") on December 2, 2008 to which the petitioner responded on December 19, 2008.

In a memorandum dated October 15, 2008, counsel for the petitioner, a consulting and management law firm, stated the petitioner is "focusing on music and management of musical artists." Counsel states that the petitioner intends to secure for the beneficiary a number of performance dates around the United States and that the beneficiary "already has many anticipated shows lined up across the U.S. with the promise of many more for years to come."

The petitioner, through counsel, describes the beneficiary, a native and citizen of Canada, as a violin performer with "a unique Irish influenced folk sound that is highly praised" who is "well-known throughout Canada and has won many awards for her talent as a fiddle player over the course of many years." The petitioner further stated that the beneficiary has "worked with many various artists who are outstanding in their fields," including working with the bands [REDACTED]. The petitioner asserts that the beneficiary has "a reputation as one of the best fiddle players in the world."

### 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 has won or been nominated for a Grammy award or comparable national or international award, and counsel raises no objection to the director's finding that this criterion was not met.

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).

***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, the petitioner's counsel indicated that "[the beneficiary's] band [REDACTED] has received wide recognition and is well respected as an exceptional folk influenced band. They have traveled across many countries and were part of a [REDACTED] gaining much popularity." As evidence of specific events or productions in which the beneficiary has appeared, the petitioner submitted posters, flyers, press releases and articles. The submitted documentation includes a listing of performances of [REDACTED] in Canada in [REDACTED] which specifically name the beneficiary as a performer with the band.<sup>1</sup> The documentation also contains a picture of the beneficiary as a member of [REDACTED] while on tour for the [REDACTED]

Several submitted articles from local Canadian publications mention the beneficiary's prior performances with [REDACTED]. The petitioner submitted an undated article from [REDACTED] which briefly mentions that the beneficiary will be playing fiddle and piano for [REDACTED] in an upcoming show with another band, [REDACTED]. The petitioner submitted several articles regarding [REDACTED] nomination for an [REDACTED] in the category Roots/Traditional Group Recording of the Year [REDACTED]. An article dated February 19, 2004 in the [REDACTED] notes the band's nomination for the same award the prior year. The article contains a picture of the members of [REDACTED] including the beneficiary, but does not mention the beneficiary by name. The petitioner also submitted an article dated January 7, 2004 from the [REDACTED] mentioning the band's nomination for an [REDACTED], and interviewing the beneficiary about her experiences with the band and her own career. The beneficiary explains that because she is in her first year of college in Boston, she doesn't have as much time to work with [REDACTED] as she would like. The article further states, "When [the beneficiary] is at school, one of her former fiddle students, [REDACTED] of Memramcook, fills in." An advertisement for the [REDACTED] awards in [REDACTED] briefly mentions the beneficiary and [REDACTED]. The record contains a press release stating that [REDACTED] will perform at the [REDACTED] and contains a picture of the beneficiary as part of the group. The record also contains a press release dated summer 2004 stating that [REDACTED] will perform at the [REDACTED], and contains a picture of the beneficiary as part of the group.

Additional articles from local Canadian Publications review the beneficiary's musical recordings with [REDACTED]. The petitioner submitted an undated review from an unknown source of [REDACTED] first album titled "[REDACTED]" also mentioning the beneficiary as a fiddle player with impressive musical skill. An additional undated article from [REDACTED] contains a favorable review of "[REDACTED]" and the beneficiary as a performer and musician. The petitioner also

<sup>1</sup>Although the itinerary lists performances of [REDACTED] in Canada in 2003 and 2004, the majority of the performances only list siblings [REDACTED] and do not list the beneficiary. In addition, as noted above, the record contains an article dated January 7, 2004 from the [REDACTED] which states "When [the beneficiary] is at school, one of her former fiddle students, [REDACTED] fills in." The itinerary specifically mentions [REDACTED] in performances held on October 30, 2003, February 3, 2005 and July 24, 2005.

submitted a July 16, 2003 article from [REDACTED] which contains a favorable review of [REDACTED] second compact disc titled [REDACTED]. An article dated November 25, 2004 from [REDACTED] also mentions [REDACTED] release of their second album titled [REDACTED] and describes the beneficiary as a vocalist, fiddle and piano player with the group. The petitioner also submitted a review dated July 6, 2007 from an unknown source, which contains a favorable review of the song called [REDACTED] performed by the beneficiary with [REDACTED] and included in a compact disc titled [REDACTED]. The petitioner further submitted an article dated May 9, 2007 from the [REDACTED] titled [REDACTED] which is about the beneficiary's fiddling career and future plans upon graduation from music school.

The petitioner further submits press releases from [REDACTED] manager, promoter and booking agent. The promotional materials state that siblings [REDACTED] and [REDACTED] met the beneficiary in 2001, at which time the group [REDACTED] was formed. The materials state [REDACTED] has released three studio compact discs titled [REDACTED]. The materials describe the band as being "fronted by siblings [REDACTED] with the beneficiary as fiddler.

With respect to the beneficiary's upcoming performances in the United States, at the time of filing the petitioner, through counsel, indicated that "[the beneficiary] already has many anticipated shows lined up across the U.S. with the promise of many more for years to come."

In the request for evidence (RFE) issued on December 2, 2008, the director advised the petitioner that the initial evidence failed to establish that the beneficiary has performed or will perform services as a lead or starring participant in productions or events which have a distinguished reputation. The director noted that the advertisements submitted for previous events did not provide sufficient evidence to establish the beneficiary's lead or starring role in productions or events with a distinguished reputation. The director instructed the petitioner to provide additional evidence with respect to prior performances in the forms of written reviews from critics, advertisements, publicity releases, contracts or endorsements.

In a response to the RFE received December 19, 2008, counsel for the petitioner stated that the beneficiary performs "primarily as a lead performer in the group [REDACTED] but also as a solo artist." With respect to the beneficiary's past performances the petitioner submitted a letter from [REDACTED] of [REDACTED], stating the company has represented the beneficiary since 2004 "as a live musician (fiddle, keyboards, step dancing), session recording musician, arranger, composer and industry professional" for work in Canada, the U.S. and abroad.<sup>2</sup> The letter also states "while [the beneficiary's] primary role exists within the group [REDACTED] we have also worked with [the beneficiary] on a variety of solo projects." The petitioner submitted an advertisement for a live performance by the beneficiary at the [REDACTED] and a history of [REDACTED] downloaded from the venue's website [REDACTED]. The petitioner also submitted a letter from [REDACTED], chairman of [REDACTED] AKA the [REDACTED]

<sup>2</sup>As noted above, the submitted documentation reveals that [REDACTED] has been a member of the group [REDACTED] since its creation in [REDACTED]

addressed to Mr. states that the band " performed at the festival in and was well received. He also states the festival had approximately 25,000 attendees. The petitioner also submitted a photograph of the beneficiary stated as being during a live performance at and a page downloaded from the venue's website . The petitioner further submitted a photograph stated to be of promotional materials regarding the beneficiary's April 17, 2007 performance at the bar and lounge in Ireland, and a page describing the venue downloaded from the website . The petitioner further submitted an advertisement for the beneficiary's appearance at Tennessee.

With respect to the beneficiary's upcoming performances, counsel submitted a listing of the beneficiary's anticipated performances in 2009, including performances at several and folk festivals in the U.S. and Canada. The petitioner also submitted a letter from musical director and guitar player for the band stating the beneficiary is the leader of that band. He states that her role in the band is as lead instrumentalist and primary songwriter and lists tentative dates and venues for performances of the band from contingent upon the approval of this petition.

The director determined that the submitted evidence failed to meet the plain language of the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(I). In denying the petition, the director emphasized that the petitioner failed to establish through evidence that the beneficiary's prior performances were for events or productions that have a distinguished reputation. The director found the evidence similarly lacking with respect to the beneficiary's upcoming performances, and noted that the petitioner is obligated to establish the distinguished reputation of the performances through submission of critical reviews, advertisements, publicity releases, publications, contracts or endorsements.

Upon review, the AAO concurs with the director's determination that the petitioner has not submitted evidence to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(I).

The submitted evidence fails to establish that the beneficiary performed services in a lead or starring role in those productions or events with a distinguished reputation. The evidence of record indicates that the beneficiary has been a fiddler, piano player and vocalist for the band on an intermittent basis for the years from approximately 2003 to 2007 while she attended college in Boston. The petitioner has provided posters, press releases and articles, many specifically mentioning the beneficiary by name, which indicate that is fronted by siblings . This evidence fails to establish that the beneficiary performed services in a lead or starring role in those productions or events.

In addition, the AAO concurs with the director's determination that the petitioner failed to establish through evidence that the beneficiary's prior performances were for events or productions that have a distinguished reputation. As described above, the posters, press releases and articles regarding events at which the beneficiary has performed do not establish that the band's 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 will perform, record, write original music and tour with country music superstars as a fiddle player. The petitioner submitted a three-year performance schedule showing the beneficiary will be touring the U.S. and Canada, but the schedule does not list specific performance venues. On appeal, the petitioner submits an updated schedule of upcoming performances at venues in the U.S. and Canada. 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 with a distinguished reputation.

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.

The director concluded that the petitioner submitted sufficient evidence to meet this criterion. While the AAO agrees with the director that the petitioner submitted published material about the beneficiary in the form of several published articles and a book excerpt, the petitioner failed to establish that these materials were published in major newspapers, magazines, or other publications as required by the plain language of the regulations.

As stated above, the petitioner submitted several articles from local Canadian publications that mention the beneficiary's prior performances and musical recordings with [REDACTED]. In the majority of the articles the beneficiary is mentioned only in passing; the articles but are not primarily about the beneficiary as required by the plain language of the regulation. This evidence is also insufficient to establish that the beneficiary has received national or international recognition as a fiddle player, because the petitioner has not provided evidence that the publications, namely [REDACTED] have a significant national or international distribution or otherwise qualify as "major" magazines or newspapers.<sup>3</sup>

<sup>3</sup> The AAO notes that on appeal the petitioner has submitted articles primarily about the beneficiary published after the date of filing this petition, including a blog posting [REDACTED] dated November 12, 2008 titled [REDACTED] reviewing the beneficiary's new single titled [REDACTED] from her upcoming EP, and

In addition, the petitioner submitted a book excerpt and several articles which *are* primarily about the beneficiary published in local Canadian publications, and three articles from sources which the petitioner contends are major publications: the [REDACTED] and [REDACTED]. Upon review, the AAO finds this evidence deficient because the petitioner has not established that these articles were printed in major newspapers, magazines or other major publications.

The submitted articles published in local Canadian publications include an article published in [REDACTED] about the beneficiary's fiddle performance at the [REDACTED] and referring to the beneficiary as '[REDACTED]'. An article in the [REDACTED] which has been designated as published on [REDACTED] discusses the beneficiary's performances at community events and [REDACTED], most importantly "when [the beneficiary] took first place in the 12 and under category in the [REDACTED]". A captioned photograph of the beneficiary published in [REDACTED] notes that the beneficiary, at age 12, is [REDACTED]. An article printed in [REDACTED] on [REDACTED] reports the beneficiary's performance at a school benefit, referring to her as '[REDACTED]' and '[REDACTED]'. A captioned photograph of the beneficiary published in [REDACTED] notes the beneficiary one first place in a fiddle and step dance contest in [REDACTED], Ontario, and has twice won [REDACTED] and of the [REDACTED]. An article which appears to have been printed in the [REDACTED] on a date designated as [REDACTED] contains a picture of the beneficiary and notes that she won the 12 and under category of the [REDACTED] and has been competing for five years. The petitioner also provided a copy of two pages of a book titled "[REDACTED]" which contains information about the beneficiary's career up until 2006.

Regarding the submitted articles from sources which the petitioner contends are major publications, the petitioner submitted an article containing a notation that it was printed in the [REDACTED] on [REDACTED], mentioning the beneficiary in passing as the winner of the [REDACTED] 12 and under class. The petitioner also submitted an article printed in [REDACTED] on [REDACTED] mentioning the beneficiary in passing as a contestant at the [REDACTED]. The petitioner further submitted an article printed in the [REDACTED] in October 2000, in the section '[REDACTED]' about the beneficiary's fiddle performance at the [REDACTED].

In the RFE issued on December 2, 2008, the director acknowledged the petitioner's submission of the articles, but noted that the petitioner failed to establish that the interviews were published in major magazines or newspapers with a national or international circulation. The director further found that the interviews themselves do not sufficiently attest to the beneficiary's achievement of national or international recognition.

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an undated press release regarding that single downloaded from [REDACTED] website [REDACTED]. 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).

In its response dated December 15, 2008, the petitioner submitted demographic readership information provided by the [REDACTED] daily/weekly circulation information provided by [REDACTED] and weekly circulation information provided by [REDACTED].<sup>4</sup> Regarding the circulation information provided by the [REDACTED] counsel stated “the population density is reached proportionately to the adult demographics.”

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>5</sup>

The petitioner has not provided sufficient evidence of the print circulation and internet readership of any of the publications in which the articles appeared. The record does not contain evidence (such as *objective* circulation information or internet readership statistics from an *independent* source) showing the distribution or readership of any of these publications relative to other print or online media to demonstrate that these publications can be considered "major" newspapers or magazines. Counsel's unsupported assertion, that the publications are major magazines or newspapers, is not sufficient. 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).

While the director determined that the petitioner established eligibility for this criterion, the AAO must withdraw the decision of the director based upon a review of the record of proceeding. 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). While we do not lightly withdraw a favorable finding by the director, the evidence simply does not support the director's conclusion regarding this criterion.

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<sup>4</sup> The AAO notes that although the record contains an article about the beneficiary in [REDACTED] the petitioner submits publication statistics for a publication called [REDACTED]. The AAO is unable to determine from the record that these two publications are the same.

<sup>5</sup> Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county. The article about the beneficiary published in [REDACTED] in October 2000, in the section [REDACTED] would appear to be an article that would not serve to spread the beneficiary's reputation outside of the [REDACTED] area.

Upon review, the AAO finds 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.***

To meet the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3), the petitioner relied on essentially the same evidence submitted with regard to 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

In response to the director's request for additional evidence to meet this criterion, the petitioner submitted testimonial letters in support of its claims that the organizations and establishments that have hosted and will host the beneficiary's performances have a distinguished reputation.

The petitioner submitted a letter from [REDACTED], a supervisor in the Music Works Department of [REDACTED] stating the [REDACTED] is "one of the most famous venues in [REDACTED] TN," where internationally known performers have performed. He states he has shared the stage with the beneficiary at the Station Inn "numerous times."

[REDACTED] musician and band director, states that he has performed as a drummer in [REDACTED] for the past four years. He states the beneficiary has performed at [REDACTED] and that "musicians from all across the U.S. dream to be invited into [REDACTED]"

[REDACTED] studio owner and publishing veteran, states he has been interested in working with the applicant "for some time now" and that he plans "on utilizing [the beneficiary's] fiddle skills on demos and for live performances across the country in the 2009 year and beyond."

The testimonial letters of [REDACTED] while addressing the reputations of the [REDACTED] do not set forth in factual terms the basis for the opinions, or state the manner in which they acquired such information. Therefore, the letters are not sufficient evidence to establish that the organizations and establishments that have hosted and will host the beneficiary's performances have a distinguished reputation.

The petitioner also submitted additional documentary evidence in support of its claims that the organizations and establishments that have hosted and will host the beneficiary's performances have a distinguished reputation. The petitioner submitted a history of [REDACTED] downloaded from the venue's website at [REDACTED]. The petitioner also submitted a page downloaded from the website of the [REDACTED]. The petitioner further submitted a photograph of promotional materials regarding the beneficiary's April 17, 2007 performance at the [REDACTED] Ireland and a page downloaded from [REDACTED] describing the venue. The petitioner further submitted advertisements for the beneficiary's upcoming appearances at other venues in 2009, including [REDACTED] Tennessee, and several [REDACTED] in the U.S. and Canada.

The director determined that the petitioner's evidence fails to satisfy this criterion, noting that the petitioner did not support its claims that the organizations and establishments that have hosted and will host the beneficiary's performances have a distinguished reputation.

On appeal, counsel asserts that that the organizations and establishments that have hosted and will host the beneficiary's performances have a distinguished reputation. On appeal, counsel submits from [REDACTED] a brief description of a 1995 movie titled [REDACTED]. In the movie description, the lounge is described as "the small club with the big names that made it a second home." The petitioner also submitted a listing from the [REDACTED] internet site, listing notable songwriters who performed at the venue. The petitioner also submitted, from the website of the [REDACTED] an article dated [REDACTED] from the [REDACTED] titled [REDACTED] in which the café is described as one of many songwriter venues. The petitioner further submitted a January 17, 2009 article from the [REDACTED], titled [REDACTED].

The article lists the [REDACTED] as "places to play your music and get recognized," according to [REDACTED] readers. Upon review, counsel's assertions are not persuasive. The record remains devoid of any independent evidence to establish that the organizations and establishments that have hosted the beneficiary's performances have a distinguished reputation.

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

The petitioner has not submitted any documentary evidence that would establish that [REDACTED] enjoys a distinguished reputation in the field, nor has it articulated or documented how the beneficiary will serve in a lead, starring or critical role that would set her apart from other artists [REDACTED] employs. In addition, 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. In a memorandum dated October 15, 2008, counsel for the petitioner, which is a consulting and management law firm, stated the petitioner is "focusing on music and management of musical artists." Counsel states that the petitioner intends to secure for the beneficiary a number of performance dates around the United States and that the beneficiary "already has many anticipated shows lined up across the U.S. with the promise of many more for years to come." 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.

Accordingly, the petitioner has not submitted evidence required 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***

The director found that the petitioner did not submit sufficient evidence that the alien has a record of major commercial or critically acclaimed successes.

At the time of filing, the petitioner, through counsel, described the beneficiary as a violin performer with “a unique Irish influenced folk sound that is highly praised” who is “well-known throughout Canada and has won many awards for her talent as a fiddle player over the course of many years.” The petitioner further stated that the beneficiary has “worked with many various artists who are outstanding in their fields,” including working with the bands [REDACTED] and has “a reputation as one of the best fiddle players in the world.” The petitioner submitted several articles about the beneficiary, mentioning that the beneficiary recorded two cassettes, ‘ [REDACTED] ’ and ‘ [REDACTED] ’ and a compact disc titled ‘ [REDACTED] ’. The record also contains evidence of the beneficiary’s upcoming EP titled ‘ [REDACTED] ’. Further the documentation shows the beneficiary recorded three CD’s as a member of [REDACTED] titled [REDACTED].

In the RFE the director observed that the submitted documentation does not address whether the beneficiary has a record of major commercial or critical success.

In response to the RFE, the petitioner submitted evidence of six songs for which the beneficiary is entitled to a percentage of royalties through [REDACTED]. The petitioner has not provided evidence that the beneficiary has received royalties for the songs.

The petitioner also submitted a synchronization agreement made on January 17, 2007, between licensor [REDACTED] the beneficiary’s management company, and a producer. The synchronization agreement pertains to the use of the beneficiary’s single ‘ [REDACTED] ’ as background music in a “lifestyle series” titled ‘ [REDACTED] ’. As noted by the director, the license does not guaranty that the beneficiary’s single will be used. As stated at part 16 of the license, “. . . Producer shall have no obligation under this License to in fact utilize the Composition.” Part 17 of the license states that if the beneficiary’s composition is included in the production, the producer may accord screen credit in the end titles of the production as “ [REDACTED] ”. The petitioner has not provided evidence that the beneficiary’s song was used on the show pursuant to the synchronization license, or evidence of the beneficiary’s actual earnings, if any, from the use of this composition.<sup>6</sup>

<sup>6</sup> In an undated letter, [REDACTED] states the show [REDACTED] did go on the air in 2007 and 2008, “with the [REDACTED] and all parties have been compensated accordingly for said synchronization license.”

The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) requires the beneficiary'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." In the beneficiary's field, evidence satisfying this criterion would reasonably include evidence of album or single sales, radio airplay rankings and similar evidence of tangible achievements in the music industry. The beneficiary's interviews with magazines and newspapers of undocumented circulation do not provide direct evidence of the beneficiary's commercial or critically acclaimed success. Rather, such evidence is more appropriately considered under the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2), and has been considered above. None of the information provided could be construed as objective evidence of commercial or critical success.

The submitted evidence that the beneficiary has performed on several CDs is not accompanied by evidence such as reliable documentation of sales figures. The AAO notes that the fact that a CD is available for purchase 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.

Likewise, the evidence that the beneficiary is entitled to a percentage of royalties for some of her work with Banshee, or that her single may be utilized in a production entitling her, as a member of [REDACTED] to be receive screen credit does not provide sufficient evidence that the beneficiary has a record of major commercial or critically acclaimed successes. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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.***

The petitioner submitted eight testimonial letters in support of its claim that the beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field.

[REDACTED] states he is "a musician, performer, producer, songwriter, studio owner and touring company owner of 17 years." He states he has worked with the beneficiary on numerous occasions, both as a studio musician and live performer. He describes the beneficiary as "an incredibly talented

fiddle player and musician.” He states she is “reliable, responsible, polite, on-time, and has a top-level command of her instrument.”

Vice President, states he has been in the music industry for more than 30 years in a management and performing capacity. He does not state how he first became aware of the beneficiary’s fiddle playing. He states “not only is [the beneficiary] technically an exceptional musician, her performances and interaction with the audience are captivating.”

a professional harpist and singer, states she has known the beneficiary since 2005. She states the beneficiary has the ability “to tastefully cross stylistic borders, while still retaining her own unique sound.” She praises the beneficiary’s “beautiful tone” and “great intonation.”

a country recording artist, does not state how he first became aware of the beneficiary’s fiddle playing. He uses almost identical language to that of in stating “not only is [the beneficiary] technically an exceptional musician, her performances are captivating.” This use of very similar language is consistent with a common source. We acknowledge that the authors signed their letters, affirming the contents. Nevertheless, the use of slightly modified boilerplate language somewhat reduces the evidentiary weight of these letters.

Creative Director, states she has been in the U.S. country music industry since 1996. She does not state how she first became aware of the beneficiary’s fiddle playing. She praises the beneficiary’s uniqueness as a fiddle player and knowledge of various musical styles.

owner of states she has known the beneficiary since 2004 as a professional musician with exceptional ability.

a manager of the does not state how he first became aware of the beneficiary’s fiddle playing. She states the beneficiary has exceptional tone and “an understanding of her instrument that goes far beyond her 23 years.” She states the beneficiary has the ability “to captivate an audience and leave them feeling as though they have witnessed what I consider to be a unique talent.”

states he is a music producer, engineer and musician. He states he has seen the beneficiary perform live and has employed her as a session musician on recordings for other artists and writers. He praises her “depth of talent and technical proficiency as well as her ability to captivate, both live and in the studio. He states the beneficiary has that indefinable, innate gift of musicality.

The regulation at 8 C.F.R. § 214.2(o)(2)(iii)(B) provides that affidavits written by present or former employers or recognized experts certifying to the alien’s 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.

Upon review of the letters, the AAO finds that they attest to the beneficiary's talent and technique, rather than her achievements in the field, and as such, do not constitute "significant recognition of the beneficiary's achievements in the field of arts." While the letters praises the beneficiary's artistic talents their testimony fails to describe the beneficiary's recognition and achievements in factual terms.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 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. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the experts' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of an artist whose achievements have received "significant recognition."

For the above reasons, the AAO finds that the submitted testimonial letters fail to establish that the beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field.

While the director determined that the petitioner established eligibility for this criterion, upon review the AAO must withdraw the decision of the director based upon a review of the record of proceeding. 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). While we do not lightly withdraw a favorable finding by the director, the evidence simply does not support the director's conclusion regarding this criterion.

The AAO finds that the submitted testimonials and other documentary evidence do not satisfy the plain language of the evidentiary criterion 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 has submitted the following:

- The petitioner submitted monthly statements of amounts paid to the beneficiary for sales of [REDACTED] CD's in 2008. in the total amount of \$2,344.45 The petitioner also submitted invoices payable to the beneficiary for performances and rehearsals at venues 2008, in the total amount

of \$5,475. The AAO notes the petitioner has not submitted evidence of the beneficiary's actual earnings in 2008, when the petition was filed.

Upon review of the submitted evidence, the AAO finds that, other than proof of amounts paid or payable to the beneficiary in 2008 for goods and services in the total amount of \$7820, 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 fiddle player were considered high or substantial in relation to others in the field.

As evidence the beneficiary will command a high salary, the petitioner has submitted the following:

- The petitioner submitted a document titled "UPDATED Upcoming Schedule 2009 and Potential Revenue" containing an updated listing of anticipated performances and potential revenue from those performances, projected teaching revenue, and projected CD sales. The total projected revenue for the beneficiary for 2009 is \$32,250, which converts to an hourly wage of \$15.50.
- The petitioner submitted salary information as of May 2007 for "Musicians and Singers" from an Occupational Employment Statistics (OES) survey stated as being obtained from the U.S. Department of Labor, Bureau of Labor Statistics (BLS). According to the national employment and wage data contained in the OES survey, as of May 2007, the middle 50 percent of musicians and singers in the United States earned between \$19.92 hourly and \$27.27 hourly, while the top 10 percent earned more than \$60.02 per hour.
- The petitioner has also submitted salary information as of May 2006 for "Musicians and Singers" from the website of the U.S. Department of Labor, BLS. According to the national BLS data, as of May 2006, the middle 50 percent of musicians and singers in the United States earned between \$10.81 and \$36.55, while the top 10 percent earned more than \$57.37 per hour. Median hourly earnings of wage-and-salary musicians and singers were \$19.73 in May 2006. Median hourly earnings were \$23.37 in performing arts companies.
- The petitioner has also submitted employment statistics from the website Simply Hired ([www.simplyhired.com](http://www.simplyhired.com)), stating the average median income for all females employed on a full-time basis in Nashville from April 1, 2007 to September 30, 2008 is \$27,659. The AAO finds that this evidence is insufficient to meet this criterion, since it does not evidence the range of salaries in the beneficiary's field. Therefore this evidence will be given no weight.

The petitioner has not indicated a wage for the proffered position. If the petitioner establishes through the submission of corroborating evidence that 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 projected hourly wage for 2009 of \$15.50 can be considered a "high salary" compared to others in her 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 are considered high or substantial in relation to other musicians in the field.

The petitioner has not submitted evidence that it has offered the beneficiary a wage, salary and/or other compensation that would be considered "high remuneration" in relation to others in the field. In addition, as stated above, the petitioner failed to establish that the beneficiary's projected hourly wage of \$15.50 for 2009 can be considered a "high salary" compared to others in her field. While the petitioner and counsel have submitted unsupported claims that the beneficiary's future earnings and merchandise sales establish the beneficiary will receive high remuneration in relation to others in her 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.

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)).

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 she meets at least three of the eight categories of evidence that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 214.2(o)(3)(iii).

### **III. Conclusion**

Review of the record does not establish that the beneficiary has distinguished herself to such an extent that she may be said to be renowned, leading, or well-known in the arts. 8 C.F.R. § 214.2(o)(3)(ii). Therefore, the petitioner has not established eligibility pursuant to section 101(a)(15)(O)(i) of the Act and the petition may not be approved.

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 at least three of the evidentiary criteria specified in the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B). The AAO will not conduct a final merits determination.<sup>7</sup>

<sup>7</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.

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.