



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **NOV 08 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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 is a Colorado corporation formed by the beneficiary to promote and administer traveling African art exhibits in United States as well as a permanent sculpture garden in Loveland, Colorado. The petitioner filed this nonimmigrant visa 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)(i), as an alien with extraordinary ability in the arts. The petitioner seeks to employ the beneficiary as its president, asserting that he focuses on "formulating the specific goals, policies, and processes for the collection . . . negotiates contracts with venues . . . [and] oversees the transport of these works of art," among other responsibilities. With regard to the arts, the petitioner claims the beneficiary acts as an "impresario" and "exhibitor" of [REDACTED] Africa.¹

After issuing a request for evidence (RFE) and then considering the evidence of record, the director denied the petition focusing on three key elements. First, the director determined that the beneficiary is not primarily involved in a creative activity or endeavor that would qualify under the regulatory definition of arts. Second, the director found that the petitioner failed to establish that the beneficiary qualifies as an alien of extraordinary ability in the arts. Finally, the director determined that the petitioner is not a bona fide "United States employer" under 8 C.F.R. § 214.2(o)(2)(i), or otherwise an "importing employer" under section 214(c)(1) of the Act, as the beneficiary is "attempting to submit a nonimmigrant petition on behalf of himself."

On appeal, the petitioner asserts that sufficient evidence establishes the beneficiary's distinction in the field and that the director erred in her application of the regulations and her analysis of the evidence in this case. The petitioner submitted additional 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.

In the case of the arts, the term "extraordinary ability" means "distinction" or "a high level of achievement in the field of 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." Sec. 101(a)(46) of the Act; 8 C.F.R. § 214.2(o)(3)(ii).

Section 214(c)(1) of the Act further provides, in relevant part (emphasis added):

¹ The beneficiary is a South African citizen who twice was approved for a nonimmigrant L-1A visa as president for the petitioner from July 18, 2005 through June 8, 2010. USCIS denied a third L-1A petition on July 9, 2010. The petitioner seeks to employ the beneficiary again as its president, but with emphasis on promoting and administering traveling African art exhibits, rather than the managerial or executive duties required for L-1A classification. *See* sec. 101(a)(44)(A) and (B) of the Act.

The question of importing any alien as a nonimmigrant under subparagraph (H), (L), (O), or (P)(i) of section 101(a)(15) (excluding nonimmigrants under section 101(a)(15)(H)(i)(b)(1)) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, *upon petition of the importing employer*. Such petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

The regulation at 8 C.F.R. § 214.2(o)(2)(i) states, in pertinent part (emphasis added):

An O-1 or O-2 petition may only be filed by a United States employer, a United States agent, or a foreign employer through a United States agent. For purposes of paragraph (o) of this section, a foreign employer is any employer who is not amenable to service of process in the United States. A foreign employer may not directly petition for an O nonimmigrant alien but instead must use the services of a United States agent to file a petition for an O nonimmigrant alien. A United States agent petitioning on behalf of a foreign employer must be authorized to file the petition, and to accept services of process in the United States in proceedings under section 274A of the Act, on behalf of the foreign employer. *An O alien may not petition for himself or herself.*

The regulation at 8 C.F.R. § 214.2(o)(2)(ii) continues to state the general evidence required to accompany a petition:

- (A) The evidence specified in the particular section for the classification;
- (B) Copies of any written contracts between the petitioner and the alien beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed;
- (C) An explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities; and
- (D) A written advisory opinion(s) from the appropriate consulting entity or entities.

II. Discussion

A. The Field of Arts.

As a preliminary matter, the petitioner claimed eligibility under the evidentiary criteria for aliens of extraordinary ability in the “arts” at 8 C.F.R. § 214.2(o)(3)(iv)(B) and asserted that the beneficiary meets the standard of “distinction,” pursuant to the definition at 8 C.F.R. § 214.2(o)(3)(ii). The director determined that the petitioner failed to establish that the beneficiary is primarily involved in a creative activity or endeavor, such that he might qualify under the “distinction” standard for the arts.

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines the term arts:

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts. Aliens engaged in the field of arts include not only the principal creators and performers but other essential persons such as, but not limited to, directors, set designers, lighting designers, sound designers, choreographers, choreologists, conductors, orchestrators, coaches, arrangers, musical supervisors, costume designers, makeup artists, flight masters, stage technicians, and animal trainers.

The petitioner indicates that the beneficiary did not create the collection's works of art but instead administers, promotes, and transports the collection to shows or exhibitions. In the petitioner's letter dated September 16, 2010, Mr. [REDACTED] describes the beneficiary's position as follows:

In his position as [REDACTED] [the beneficiary] provides strategic leadership to the company in terms of formulating the specific goals, policies and processes for the collection. [The beneficiary] also identifies possible locations for exhibits, he then negotiates contracts with venues and he works with the company's professional Curator to decide which pieces, both large and small, will be included in each exhibit. He then oversees the transport of these works of art to the location of the exhibition. In addition, [the beneficiary] writes and compiles beautiful catalogues for each major exhibition, he also coordinates the artists that come from Africa to visit the exhibits and give demonstrations of their amazing artistic skills.

While the beneficiary's job duties as president may be related to the arts based on nature of the petitioner's business, the petitioner has not demonstrated that the beneficiary is primarily engaged in a "creative activity or endeavor" as a creator, performer, or an essential person similar to those occupations listed in the definition. *Id.* Instead, based on the petitioner's description of the job duties, the beneficiary is primarily engaged in the field of business as the president of the corporation.

While the petitioner emphasized the arts after the director's RFE, the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as an alien with extraordinary ability in the arts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The regulations prescribe different evidentiary criteria and standards of review for aliens of extraordinary ability in the arts versus in business. The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part: "Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor."

The extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 Fed. Reg. 41818, 41819 (Aug. 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the "distinction" standard for the arts); *see also* Memorandum, Lawrence Weinig, Acting Asst. Comm'r, INS, "Policy

Guidelines for the Adjudication of O and P Petitions” (June 25, 1992) (“[T]he standards for O-1 aliens in the fields of business, education, athletics, and the sciences are extremely high. . . . [o]fficers involved in the adjudication of these petitions should not ‘water down’ the classification by approving O-1 petitions for prominent aliens.”).

While the petitioner asserts that the beneficiary should be evaluated based upon the standard applicable to those engaged in a creative activity or endeavor, the petitioner’s description of the beneficiary’s job duties demonstrates that the beneficiary is primarily engaged, as the president of the corporation, in the field of business. The record presents a business person for consideration pursuant to the artistic “distinction” eligibility standard, as opposed to the “extraordinary ability” standard that applies to business professionals. *Compare* 8 C.F.R. §§ 214.2(o)(3)(iii) and (iv). Where, as here, a petitioner seeks to employ a beneficiary who is described as administering, promoting, and transporting an art collection to shows or exhibitions, extraordinary ability in the arts is not the applicable standard.

Upon review, the petitioner has not sought the appropriate O-1 visa classification for the beneficiary, nor has it claimed or submitted evidence to establish that the beneficiary meets the criteria and standards for individuals of extraordinary ability in business as set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A) or (B). Accordingly, the petition will be denied.

B. Extraordinary Ability in the Arts.

Despite this finding that the beneficiary is not engaged in the field of arts, the director appropriately reviewed the petition according to the classification requested on the Form I-129. USCIS will only consider the visa classifications that the petitioner annotates on the petition. The Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc. v. Chertoff*, 286 Fed. Appx. 963, 2008 WL 2743927 (9th Cir. July 10, 2008).

The 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). In denying the petition, the director determined that the evidence submitted meets none of these criteria. After careful review of the record on appeal, we conclude the petitioner has not established eligibility for the O-1 classification.

1. Consideration of the Evidentiary Criteria

The submission of evidence relating to at least three criteria does not, in and of itself, establish eligibility for O-1 classification. 59 Fed. Reg. at 41820; *cf.* *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination).

A petitioner may establish eligibility for O-1 classification by submitting 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, such as an Academy Award, an Emmy, a Grammy, or a Director's Guild award. 8 C.F.R. § 214.2(o)(3)(iv)(A). The petitioner does not assert and the record does not establish eligibility under this provision for significant awards. Thus, the petitioner must establish the beneficiary's eligibility under at least three of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B).

a. The Evidence of Record

Accompanying the initial petition, the petitioner submitted 16 letters either in support of the petition or in recognition of one of the petitioner's traveling exhibits.

In a letter from the General Manager of the [REDACTED] Colorado, [REDACTED] recognizes the beneficiary's "talents, business acumen and abilities." The record establishes that Mr. [REDACTED] is a businessman and colleague of the beneficiary; the petitioner's [REDACTED] was created on a part of [REDACTED] master-planned community. [REDACTED] states that the beneficiary enjoys a reputation of excellence in the field of arts and the beneficiary has made significant contributions to the United States art community. Nevertheless, the petitioner has not demonstrated [REDACTED] own expertise or knowledge necessary to give this endorsement substantial weight in this analysis.

The petitioner also submitted three letters from medical professionals associated with the [REDACTED]. According to the record, these individuals hosted local auctions featuring [REDACTED] donated or given at reduced cost by the petitioner in order to raise money for their project.

In the first letter, [REDACTED] credits the beneficiary with being one of the most generous donors of the [REDACTED]. [REDACTED] states that she sought out the beneficiary due to his expertise in [REDACTED] and notes that the beneficiary is "widely acknowledged as the leading national and international expert in [REDACTED]." [REDACTED] did not provide any evidence to substantiate her assertion that the beneficiary is a leading national and international expert. Curiously, rather than refer to the sculpture as [REDACTED] emanating from the indigenous [REDACTED] as noted throughout the petition, the writer refers to the art as [REDACTED]. [REDACTED] is the name of the beneficiary's sculpture park in Zimbabwe and in the United States. [REDACTED] description of the beneficiary as a sculpture expert is compelling but not reliable as her educational and professional background lies strictly in the realm of medical infectious disease as evidenced by her summary of qualifications.

The second letter is from [REDACTED] M.D., Professor of Medicine, [REDACTED] Denver. The writer states that the [REDACTED] project was established to raise funds through the sale of [REDACTED]. The writer also claims "[the beneficiary] is widely acknowledged as an expert in [REDACTED]." Again, no evidence is provided in support of this assertion and the writer's curriculum vitae reveals a robust career in medicine but no reference education or experience in the field of the arts to justify reliance upon his opinion.

The third letter was presented by [REDACTED] a friend of the beneficiary, whose self-described background is in executive positions in a high technology company. However, [REDACTED] explains that she is “surrounded by family members who are artists of outstanding international merit in sculpture, painting, music and the visual arts” and that she is “an artist by virtue of immersion.” This writer also recognized the beneficiary’s contribution to the [REDACTED] project’s auction fundraising through the use of ‘[REDACTED] Sculpture.’ This letter notes that the beneficiary “pioneered the promotion of [REDACTED] throughout the U.S. and Europe and has built up the most important permanent collection of this work in existence.” The letter states that he has accomplished this by “sharing his unique and deep expertise and passion for the work and the artists.” While there is no doubt as to the beneficiary’s contribution and value to the [REDACTED] organization and its cause, the letter does not support the position that the beneficiary has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation.

A letter from [REDACTED] recognizes the beneficiary as “a World Authority on [REDACTED]” and asserts that the beneficiary is “an expert in his field.” [REDACTED] further stated that over the last 20 years the beneficiary had run all of the major exhibitions of the [REDACTED] art form.

Beyond the personal testimonial letters, several letters from museums, gardens, and other venues offer recommendations and gratitude to the petitioning corporation and the beneficiary after hosting one of the petitioner’s traveling [REDACTED] exhibits. While some of the letters were addressed directly to the beneficiary, the praise and recognition was primarily bestowed upon the exhibition artwork and the artists. None of the letters addressed the beneficiary’s contribution to the artistic preparation of the exhibits, other than the beneficiary’s role relating to general management and logistics. Dating from 1996 to the time of filing, these letters do not demonstrate the petitioner’s assertion that the beneficiary performed an artistic or creative role in the exhibitions.

These letters may be summarized as follows:

- 1) In a letter from [REDACTED] Missouri, [REDACTED] recognized and thanked the beneficiary by expressing “[r]arely does one have the opportunity to explore such depth of artistry along with the personal interaction with the artists themselves.” The letter’s comments are directed to the exhibited sculptures and the artists.
- 2) In a letter from the [REDACTED] Michigan, [REDACTED] endorsed and recommended the exhibit titled [REDACTED] for its venue. [REDACTED] described the success of the sculpture exhibit at her venue but did not mention the beneficiary by name.
- 3) In a joint letter dated November 2003, [REDACTED] [REDACTED] praised the exhibit organized by the beneficiary along

with the sculptures and the sculpture workshops. The writers credited the beneficiary and his staff for "mounting and running the exhibit and sales gallery" noting also that "[e]veryone has been so supportive and willing to help give tours and to have the sales gallery open for special events." The writers especially credited the individual contributions of the artists, listing each of the nine artists by name. While the letter was addressed to the beneficiary, he was not specifically credited or recognized for any artistic contribution.

4) In an undated letter addressed to "To Whom it May Concern," Mr. [REDACTED] Chief Executive of the [REDACTED] recognized that the [REDACTED] displayed three exhibitions of the [REDACTED] over the previous two years. The note recognized the success of the exhibits and the media coverage it attracted. The note recognized that the "display within the unique landscape of the garden has had great impact." The writer concludes that it was a pleasure working with the director and staff of the park, however, it is unclear when this occurred and to whom the author refers.

5) Ms. [REDACTED] Interim Executive Director of the [REDACTED] wrote a letter of recommendation regarding the "[REDACTED] exhibit stating that the "impressive works were scattered over 25 acres in very natural settings." The writer noted there was exceptional interest in the accessibility of the on-site artists and the opportunity to see them work. She did not mention the beneficiary.

6) Dr. [REDACTED] Director of [REDACTED] Arizona, wrote a letter to relate the success of having hosted the exhibit titled "[REDACTED] [REDACTED] The letter recognizes the beneficiary and "his colleagues" as "persons of honor, ever cooperative an in general a pleasure to work with."

7) Mr. [REDACTED] Director of the [REDACTED] wrote that working with the beneficiary and his staff for an exhibition was "wonderful." He notes that the beneficiary was "reliable, kept to deadlines and the budget, in a way that was seamless." Mr. [REDACTED] recognized the beneficiary for his ability to ship the large sculptural exhibits, mount the exhibition, hold ceremonies, plan workshops and seminars, arrange for the attendance of the foreign artists, dismantle the exhibition, and leave the site in excellent condition. The beneficiary's contributions, as described, do not constitute artistic or creative expression. The letter indicates that the beneficiary's significant contributions were the business responsibilities of organizing, managing, and executing the moving parts of the exhibition.

8) Mr. [REDACTED] wrote a thank you note, recognizing the beneficiary for the professional and flexible way that the staff worked with the venue to put together a "beautiful, extensive and accessible exhibit of sculpture that [REDACTED] has ever seen in its 250 year history."

9) Mr. [REDACTED] wrote a letter recognizing the beneficiary's second successful exhibit and sales event. The letter described the beneficiary as a "good friend" and an "art gallerist of high professional caliber." The letter further described the beneficiary as having "admirable commitment to the African sculptors he represents along with having a deep understanding of their art." Finally, the author

notes that the beneficiary organized the exhibits in a competent and congenial way and met all the agreed terms and conditions in an efficient and timely manner. The letter establishes that the beneficiary effectively managed the business of exhibition and art sales, but does not recognize him for his own creative or artistic contribution.

10) In his letter, Dr. [REDACTED] noted that “[t]he almost magnetic attraction of this exhibition testifies to a widespread appreciation” of the art. The letter recognizes the art and the artists in attendance for their exceptional contribution. The letter does not reference or otherwise evaluate the beneficiary’s role in the exhibit.

11) In his letter, Mr. [REDACTED] noted that the “[REDACTED] carried out their commitments in setting up and manning the exhibition and in producing a memorable catalogue.” In the letter, the beneficiary was well regarded as the director of the [REDACTED]

The petitioner also submitted numerous articles with the initial petition discussing the [REDACTED] sculpture art form, its sculptors, and the [REDACTED]. While the beneficiary was interviewed, quoted, and sometimes referenced for many of these articles, he was not the primary focus of the articles. The articles do not feature or recognize the beneficiary for his individual contribution to the artistic development or presentation of the [REDACTED] exhibits. Primarily, the beneficiary provided background information about the sculptures and factored prominently in the opening, running, and coordinating the exhibits, consistent with the expected role of a gallery owner or director. The articles do not discuss the beneficiary’s creative or artistic role in the sculpture exhibitions, but instead primarily discuss the artists.

The petitioner further provided several written compilations, catalogue extracts, and other writings created or authored by the beneficiary. The catalogues were created to assist the visitor’s understanding of the exhibition. The petitioner also included many promotional documents including brochures, press releases, and other writings relating to the [REDACTED] and the petitioning corporation. None of these documents, however, support or establish that the beneficiary had a creative or artistic role in the productions or events.

Finally, the petitioner submitted the beneficiary’s [REDACTED] establishing that the beneficiary has no formal education in the area of the arts but started his first art gallery in 1970 while simultaneously running a business. In 1983, the beneficiary sold his business and fully focused his attention on his art gallery which, by 1985, had been renamed the [REDACTED]. In 2003, the beneficiary formed the petitioning company in the United States and then established the [REDACTED] Colorado in 2005.

In response to the director’s RFE, the petitioner submitted additional documentation, as follows:

1) The petitioner originally stated that a peer group did not exist for this petition. In response to the RFE, the petitioner submitted a “peer group consultation” letter from Dr. [REDACTED] an Assistant Professor of Art History at [REDACTED]. The professor refers to the beneficiary as an “internationally recognized expert on [REDACTED] sculpture from [REDACTED] and “an impresario of extraordinary ability.” She relates the beneficiary’s development of the sculpture parks in [REDACTED] Colorado. The author states that she relied on the beneficiary’s assistance during her training and research. The author does not, however, address how the beneficiary contributes in an artistic or creative manner to the presentation of the sculptural exhibitions.

2) In a letter, attorney [REDACTED] asserts that the beneficiary was designated an expert witness in Shona sculpture for a legal matter. While asserting the beneficiary’s knowledge and expertise, the author does not address whether or how the beneficiary has an extraordinary ability in the arts.

3) In a letter, Mr. [REDACTED] Public Affairs Counselor, [REDACTED] writes that while he held his position in the 1980s, he created relationships with artists and individuals involved in the arts throughout the country. Mr. [REDACTED] states “it is because of [the beneficiary’s] vision and extraordinary ability in the arts that [REDACTED] and in the United States have both enjoyed great success. [The beneficiary’s] position as impresario for [REDACTED] is the reason [REDACTED] sculptures are now known throughout the world.” Mr. [REDACTED] speaks to some artistic or creative aspect of the exhibition function. The author states that the beneficiary’s “ability to take these sculptures and tell a story within any exhibition setting has been the key to the success of the [REDACTED].”

4) Dr. [REDACTED] a sculptor, and collector of [REDACTED] states in a letter that when he first met the beneficiary, “it was quite apparent that he had an artist’s eye and a true passion for exhibiting and promoting [REDACTED] sculptors.” The writer credits the beneficiary with a deep knowledge of the [REDACTED] people and an intimate knowledge of all the important sculptors; Dr. [REDACTED] states this knowledge positions the beneficiary as an expert of [REDACTED] sculpture and culture.

5) In a letter, Mr. [REDACTED] speaks of the beneficiary’s role in researching, documenting, and recording the history and development of the [REDACTED] sculpture movement. This author refers to the beneficiary’s production of “extensive archives, photographic records, and highly regarded publications and, as a result, was often approached by other curators and gallery researchers for information and guidance.”

6) The petitioner also provided a DVD copy of a news report by a television station in Ohio, focusing on the exhibit [REDACTED] Ohio.

b. Analysis

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 to have met the criteria listed at subparagraphs (1), (2), (3) and (5); the remaining criteria will not be discussed in this decision.

(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.

On appeal, the petitioner asserts that it submitted evidence that the beneficiary is a starring participant in the production of Shona sculpture exhibits that have gained a distinguished reputation and critical acclaim. In support, the petitioner refers to the initial petition and supporting documentation in its entirety. The petitioner also refers to the evidence submitted in response to the director's RFE, specifically, the peer group consultation letter, the letter noting that the beneficiary had been accepted by a court of law as an expert witness in Shona art, other letters recognizing the beneficiary as a leading expert in this area of art, and a brochure describing the exhibits offered by the petitioner. Based on this evidence, the petitioner concludes that the beneficiary is "certainly prominent in his field and is recognized as a leading expert on [REDACTED] sculpture."

As noted by the director, while the evidence suggests that some of the exhibitions promoted and organized by the petitioner may have a distinguished reputation, there is insufficient evidence to document that the beneficiary has performed services in a lead or starring role. Instead, the testimonials speak to the role of the sculptors and the artwork as the lead focus of the exhibitions.

Although at least one letter, authored by Mr. [REDACTED] the former [REDACTED] spoke to the beneficiary's artistic role in the creation of exhibitions, this letter does not establish the expertise of the author to express an opinion on the subject. While the letter states that the author is a former government official in [REDACTED] the petitioner does not establish the author's credentials, the dates of his employment, or the authors' authority, expertise, and knowledge. Like a majority of the letters, the letter appears to have been authored by a personal acquaintance or business associate; the letter does not appear to be authored based on an independent and objective knowledge of the beneficiary's claimed artistic achievements.

Furthermore, Mr. [REDACTED] letter again focuses on the artists and exhibits, discussing the artists ability to obtain visas as a sign of the sculpture park's reputation, rather than specifically addressing the lead or starring role of the beneficiary in any productions or events. Like many of the submitted letters, the author speaks of the beneficiary's role in a nonspecific and conclusory manner. Specifics are clearly an important indication of a beneficiary's role or duties; otherwise meeting the criteria would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The majority of the letters speak of the beneficiary in terms of his business responsibilities, specifically the organizing, managing, transportation, and execution of the exhibitions. Other letters speak of the beneficiary's expertise and deep knowledge of Shona art and culture, along with his role in advancing the public's knowledge of the sculpture. While this might constitute an administrative support function of an

exhibition, it does not rise to the level of performing services as a “lead or starring participant” when compared to the featured sculptors and artwork.

The director properly concluded that, as the petitioner seeks to classify the beneficiary as an alien of extraordinary ability in the “arts,” the evidence must show that the beneficiary has performed, and will perform, services as a lead or starring “artist” in productions and events with a distinguished reputation. *See* 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). If the petitioner had sought the beneficiary’s classification as a business person or an expert in Shona sculpture, then it would be appropriate to consider the beneficiary’s role as a business person or as a scholar under the criteria at 8 C.F.R. § 214.2(o)(3)(iii).

The director specifically asked for an organizational chart and evidence of the petitioner’s corporate structure, which may have served to demonstrate whether the beneficiary is responsible for artistic functions or whether there might be other personnel, such as an Artistic Director, with this responsibility. The petitioner’s failure to submit the requested evidence precluded a material line of inquiry and is thus an independent ground for denying the petition. 8 C.F.R. § 103.2(b)(14).

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’l Comm’r 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. *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).

Upon review, while some of the petitioner’s exhibitions have demonstrated a distinguished reputation, the evidence does establish that the beneficiary, as president of the corporation with responsibility for organizing, managing, transporting, and executing the exhibitions, has performed a lead or starring role in them as contemplated in the regulations governing extraordinary ability in the arts. The petitioner has not established that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

(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

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.

The petitioner asserts that many of the articles submitted in support of the petition are printed in newspapers or periodicals that qualify as major media, such as the [REDACTED]. While many of the submitted articles enjoy broad circulation, the beneficiary's artistic contributions are not specifically recognized or discussed in the articles. As such, the articles do not demonstrate the beneficiary's national or international recognition.

The petitioner also submitted evidence of two awards recognizing the landscape of the [REDACTED] in Colorado. The petitioner has not established that these awards are national or international awards. The awards recognize the landscape planning and design work for the sculpture park but do not recognize the beneficiary himself or his involvement with Shona sculpture.

The petitioner has not satisfied the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iv)(B)(2) that the beneficiary has achieved national or international recognition for achievements.

(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.

The director determined that the petitioner neither claimed nor submitted evidence to establish that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3). For the reasons discussed above with respect to the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1), the evidence does not establish that the beneficiary has performed and will perform in a lead, starring or critical role for organizations and establishments that have a distinguished reputation.

Accordingly, the petitioner has not submitted evidence to satisfy the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

(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.

After weighing the submitted evidence, the director declined to find in favor of the petitioner on this criterion. Specifically, while the director recognized that the authors of the letters speak highly of the beneficiary, the testimonial letters do not recognize him for any specific or significant achievements in the arts. Instead, the letters speak of either the beneficiary's knowledge of [REDACTED] artwork or his skills at organizing, managing, and transporting the sculptural exhibitions.

Furthermore, the director noted that the petitioner did not provide adequate evidence of the authors' authority, expertise, and knowledge. A majority of the letters are authored by personal acquaintances, business associates,

and charitable organizations that rely on the petitioner for fundraising. None of the letters appear to be authored based on an independent and objective knowledge of the beneficiary's claimed artistic achievements.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of testimonial or 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) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l.*, 19 I&N Dec. at 795.

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

2. Final Merits Determination

As previously discussed, eligibility is determined in a two-part analysis where the evidence is first counted and then considered in the context of a final merits determination. In the present matter, the petitioner established eligibility under none of the six enumerated criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which three are required as a minimum evidentiary threshold.

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

In this case, the petitioner has not established that the beneficiary is prominent to the extent that he could be considered renowned, leading or well-known in the field of arts.

The specific deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). Four of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B) require the petitioner to submit various types of published materials to establish the beneficiary's individual recognition, such as critical reviews, advertisements, publicity releases, newspaper, magazine or trade journal articles. The majority of the published evidence of record focused on the Shona sculpture and the artistic exhibitions, and not on the beneficiary himself.

Absent evidence that the regulatory criteria are not applicable to the beneficiary's occupation, pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(C), the petitioner must submit some published materials "about" the beneficiary in order to establish his eligibility for this classification. As the petitioner has not shown that the beneficiary has received significant independent recognition based on his reputation or achievements, the record does not establish that he should be included among the group of individual artists who are recognized in the field as leading, renowned or well-known.

As discussed above, the favorable opinions of experts and professionals, while not without evidentiary weight, do not necessarily establish a successful extraordinary ability claim.² Unusual in its specificity, section 101(a)(15)(O)(i) of the Act clearly requires “extensive documentation” of the alien’s achievements. While USCIS may consider advisory opinion statements submitted as expert testimony, *Matter of Caron International*, 19 I&N Dec. at 795, USCIS is ultimately responsible for determining an alien’s eligibility for the benefit sought. *Id.*

The petitioner has not established that the beneficiary has a high level of achievement in the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that he is renowned, leading, or well-known in the field of arts. 8 C.F.R. § 214.2(o)(3)(ii). Nor has the petitioner demonstrated that that the beneficiary is recognized as being prominent in his field. 8 C.F.R. § 214.2(o)(3)(iv). For this additional reason, the petition must be denied.

C. Failure to Fully Respond to USCIS Request for Evidence; Bona Fide U.S. Employer.

As noted by the director, the regulations governing O-1 nonimmigrants expressly preclude an “O alien” from petitioning for himself or herself. 8 C.F.R. § 214.2(o)(2)(i); *see also* 59 Fed. Reg. at 41829 (citing to the “importing employer” requirement at section 214(c) of the Act for the proposition that an O alien may not self-petition). The regulations interpret the statute to permit petitions filed by a United States employer, a United States agent, or a foreign employer through a United States agent. 8 C.F.R. § 214.2(o)(2)(i). The regulations provide conditions and evidentiary requirements for each of these filing circumstances. *See* 8 C.F.R. §§ 214.2(o)(2)(ii) and (iv).

The petitioner filed the present petition as an employer, not as a United States agent or a foreign employer. Accordingly, the petition is governed by the general evidentiary requirements at 8 C.F.R. § 214.2(o)(2)(ii) and (iii). Regarding the beneficiary’s employment, the regulation requires evidence of written contracts or, if there is no such contract, a summary of the terms of the oral agreement under which the beneficiary will be employed. *Id.* at (B).

² Letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one’s qualified belief or idea, rather than direct knowledge of the facts at issue. Black’s Law Dictionary 1614 (9th Ed. 2009) (defining “opinion testimony”). Written testimonial evidence, on the other hand, is testimony about whether something occurred or did not occur, based on the witness’ direct personal knowledge. *Id.* (defining “written testimony”); *see also id.* at 1613 (defining “affirmative testimony”).

Depending on the specificity, detail, of credibility of a letter, USCIS may give the document more or less persuasive weight. 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).

In the initial submission, the petitioner failed to submit a copy of a contract or a summary of any oral agreement that would define the beneficiary's employment. Prior to entering a decision, the director requested additional evidence and offered the petitioner an opportunity to submit the contracts and otherwise establish that it is a bona fide United States employer under 8 C.F.R. § 214.2(o)(2)(i).

In the RFE, the director requested "Additional Evidence" to include, among other items, copies of "any written contracts" between the employer and the beneficiary. The director also requested evidence identified as "Employer Information," including: signed copies of the petitioner's 2008 and 2009 federal income tax filings; quarterly wage reports; business licenses; a line-and-block organizational chart demonstrating the corporate structure; a list of owners; the articles of incorporation; evidence that the petitioner is conducting business, such as utility and telephone bills; and a copy of the petitioner's lease agreement.

The petitioner's response to the RFE did not include all of the requested evidence. Without explanation, the petitioner failed to submit a copy of a contract or a summary of any oral agreement, despite the requirement at 8 C.F.R. § 214.2(o)(2)(i)(B). With respect to the requested "Employer Information," the petitioner stated that the request for business documents was not relevant. Aside from a certificate of good standing from the State of Colorado, an industrial warehouse business lease, a sales tax license, and utility bills, the petitioner declined to submit the requested evidence. Specifically, the petitioner did not submit the petitioner's federal income tax filings, quarterly wage reports, an organizational chart demonstrating the corporate structure, a list of owners, or the petitioner's articles of incorporation.

Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Here, the requested evidence was material to the beneficiary's eligibility. Without the evidence, USCIS is unable to determine whether there is a bona fide "United States employer" under 8 C.F.R. § 214.2(o)(2)(i). *See also* section 214(c)(1) of the Act (referencing an "importing employer"). Similarly, without any evidence of a contract or similar documents as required under 8 C.F.R. § 214.2(o)(2)(ii)(B), USCIS is unable to determine the actual terms and conditions of beneficiary's employment.

The record reflects that the beneficiary owns the petitioning corporation. By itself, the beneficiary's ownership of the petitioning company does not lead to the conclusion that he is petitioning for himself, as prohibited by 8 C.F.R. § 214.2(o)(4)(i). To the contrary, it is well established that a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Therefore, despite the beneficiary's ownership, the corporate petitioner remains a separate legal entity existing apart from the beneficiary.

However, given the lack of required evidence, it was appropriate and reasonable for the director to inquire beyond the corporate form and examine the bona fides and standing of the legal entity as a "United States employer" under the regulations. As the visa classification requires a bona fide United States employer and definite, non-speculative employment associated with the beneficiary's extraordinary ability, the purpose and process of the O-1 nonimmigrant visa would not be served by the skeletal documentation in this particular case. *See* 8 C.F.R. §§

214.2(o)(2)(i), (ii), and (iii). In this regard, the director's request for the documents requested in the RFE was reasonable and material to the petitioner's eligibility.³

The petitioner has proffered additional evidence with the appeal, including documents that the director specifically requested through the RFE. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). In such a case, if the petitioner desires further consideration, he or she must file a new petition. *Soriano*, 19 I&N Dec. at 766.

For this additional reason, the petition may not be approved.

III. Conclusion

Accordingly, the appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.

In visa petition proceedings, the burden of proving eligibility for the benefit sought is with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not satisfied that burden. The petitioner is not precluded from filing a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is entitled to the status sought under the immigration laws.

ORDER: The appeal is dismissed.

³ Utilizing the common law test, the director continued to evaluate whether the petitioner qualifies as an "employer" having an employer-employee relationship with the beneficiary. *See Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003); *see also Barfield v. New York City Health & Hospitals Corp.*, 537 F.3d 132, 141 (2d Cir. 2008) (quoting *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992)). As the grounds discussed above are dispositive of the petitioner's eligibility, the AAO will not address and will instead reserve its determination on this additional issue.