



U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date: **NOV 12 2014** Office: VERMONT 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:

SELF-REPRESENTED

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 Acting Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. We will dismiss the appeal.

The petitioner, acting as an agent, seeks to classify the beneficiary, a “Drummer/Percussionist/Composer,” as an O-1B nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(O)(i), as an alien of extraordinary ability in the arts.

After issuing a request for evidence and then considering the evidence of record, the acting director denied the petition, finding that the petitioner did not establish that the beneficiary qualifies as an alien of extraordinary ability in the arts. The acting director determined that the petitioner did not establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), and that the submitted evidence satisfied only one of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which the petitioner must meet three to establish the beneficiary’s eligibility.

On appeal, the petitioner submits a brief. For the reasons discussed below, we will uphold the acting director’s decision and dismiss 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.” Section 101(a)(46) of the Act; 8 C.F.R. § 214.2(o)(3)(ii).

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

*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.

## II. Discussion

### A. Evidentiary Criteria<sup>1</sup>

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

The acting 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)(1). It is the petitioner's burden to establish that the evidence submitted on behalf of the beneficiary meets every element of this criterion. Not only must the petitioner demonstrate that the beneficiary has performed, and will perform, as a lead or starring participant in productions or events, the petitioner must also demonstrate that the productions or events have a distinguished reputation.

In both the decision and the request for evidence, the acting director stated that some of the submitted documents "are in a foreign language with only the beneficiary's name and role translated...and therefore, it is unclear the meaning of the published pieces."

The regulation at 8 C.F.R. § 103.2(b)(3) provides:

*Translations.* Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

As quoted above, the regulation specifically requires that any foreign language document that a petitioner submits to USCIS must be accompanied by a full and certified English language translation. In response to the acting director's request for evidence and on appeal, the petitioner states that three articles were fully translated and the remaining documents only translated the relevant portions "which should be sufficient for a reasonable person to understand the meaning of the entire published pieces." There remain, however, a number of pieces of evidence where the beneficiary's name only was translated and which lack a translator's certification and, thus, have no evidentiary value.

Regarding the [REDACTED] event, only one of the two articles about this event mentions the beneficiary. The translator did not specifically certify this translation and it does not appear complete. Without the full, certified translation to put the inclusion of the beneficiary's name in context, the petitioner cannot establish that the mention of the beneficiary's name demonstrates her lead or starring participation with the event. The third article, a promotional

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

review Club Evans, the venue where the beneficiary performed, posted on the Internet, does not establish that the event had a distinguished reputation.

Regarding the promotional material documenting the beneficiary's performances with [REDACTED] in the [REDACTED] none of the evidence indicates that she performed as a lead or starring participant or that the performances had a distinguished reputation. The letter from [REDACTED] states that the beneficiary was a member of his ensemble when she was his student at the [REDACTED]. In the interview with the beneficiary at [REDACTED] the beneficiary stated that she performed with Mr. [REDACTED] as "a sideman." While the record contains evidence suggesting Mr. [REDACTED] is a [REDACTED] nominee and winner, that evidence does not establish that every event at the school where he teaches is a distinguished event. Regarding the beneficiary's appearance as a special guest drummer for the [REDACTED] concert at [REDACTED] at the [REDACTED] without additional evidence regarding the role of the beneficiary, it cannot be established whether she was a lead or starring participant. Regardless, there is no evidence to establish the event had a distinguished reputation.

Regarding the promotional poster for the beneficiary's appearance with the [REDACTED] at [REDACTED] she is one of seven featured individuals. The promotional poster does not single her out and there are no reviews or other evidence demonstrating that the event was distinguished. Regarding the program for the [REDACTED] the beneficiary is listed as one of thirty faculty members. The program does not indicate whether or not the beneficiary performed at the festival or otherwise participated in a lead or starring capacity. Regarding the [REDACTED] concert at the [REDACTED] the program and poster list the beneficiary as one of the big band members but does not single her out as a lead or starring participant. While the petitioner submitted the [REDACTED] own promotional materials about the venue, the petitioner did not document the reputation of the event at which she performed. Regarding the partially translated article ' [REDACTED] the article mentions the band [REDACTED], of which the beneficiary is a member, but not the beneficiary. The article does not demonstrate that the beneficiary's participation at the event was leading or starring. None of the submitted evidence regarding these events establishes that the beneficiary performed as a lead or starring participant or that any of the events had a distinguished reputation.

The record also contains a poster for a concert at [REDACTED] in Korea, the largest underground shopping center in Asia according to an excerpt that supposedly appeared on the mall's website. The petitioner did not submit a translation of the poster, rather the poster contains a handwritten notation that one of the names in Korean is the beneficiary's. As the petitioner did not submit a certified translation pursuant to 8 C.F.R. § 103.2(b)(3), the poster has no probative value. Regardless, while the venue may be at a large shopping center, the petitioner has not established that the particular event at which the beneficiary performed had a distinguished reputation.

The petitioner also submitted letters and contracts for the beneficiary's future appearances at [REDACTED]. Although the [REDACTED] has voted [REDACTED] one of the "venues of the year" in New York City and the letters affirm that a number of established jazz musicians have played at both locations, the record does not establish that the

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<sup>2</sup> [REDACTED] is misspelled as [REDACTED] on the poster the petitioner submitted.

beneficiary's performances at these venues will be events with a distinguished reputation. For example, the record reflects that [REDACTED] sponsors open jam sessions and young pianist showcases in addition to their featured artists. The petitioner has not demonstrated that every event at this venue, including week night performances, is an event with a distinguished reputation.

With respect to the television sound track on which the petitioner asserts the beneficiary performed, the petitioner did not submit certified translations documenting this performance. Moreover, the petitioner has not established that performing as one musician on a sound track is lead or starring participation for the event, the television show.

As the petitioner has not established that the beneficiary has performed as a lead or starring participant in productions or events which have a distinguished reputation, the petitioner has not established the beneficiary's eligibility under the plain language of 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.*

In support of the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2), the petitioner originally submitted a two-paragraph "Special Thanks" segment from [REDACTED] magazine, an interview which appears on the [REDACTED] website at [REDACTED] and single page excerpts from the Calendar of Events listings of [REDACTED] magazines. In response to the director's request for evidence, the petitioner submitted a blog post dated February [REDACTED] and another Calendar of Events listing from January [REDACTED]. The filing date of the original petition was November 1, 2013. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Thus, the new evidence submitted in response to the director's request for evidence cannot be considered here.

Regarding the material from [REDACTED] magazine, the beneficiary's name appears in the [REDACTED] section of the magazine. The unnamed author thanks the beneficiary for a lesson. The Calendar of Events listings indicate that the beneficiary performed at [REDACTED] once in May 2009, once in February 2011 and once in March 2011. Further the Calendar of Events listings submitted only include a copy of the magazine cover and the page on which the beneficiary's group appears and includes more than 100 performances, of which the beneficiary is only one of the listed acts. According to the cover of [REDACTED]

According to the cover of [REDACTED] it is a [REDACTED]. As such, these listings are indicative only of her ability to work in her field rather than the receipt of national or international recognition for achievements. The petitioner has not demonstrated that an interview with the beneficiary for an online magazine with undocumented viewership, a mention in a [REDACTED] section of a fashion magazine or being included in Calendar of Event listings is evidence of national or international recognition for achievements as required by the plain language of the regulation. In addition, contrary to the petitioner's assertion on appeal that "all of the material is

published in major magazines in her field of jazz music,” the petitioner did not submit independent, objective evidence to establish that any of these publications other than [REDACTED] magazine qualify as major newspapers, trade journals, magazines, or other publications.

For the reasons above, the petitioner has not established the beneficiary’s eligibility under the plain language of 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 as evidenced by articles in newspapers, trade journals, publications, or testimonials.*

The petitioner asserts that the beneficiary satisfies this criterion for the first time on appeal. A petitioner may not raise a previously unclaimed eligibility criterion on appeal. *See generally Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). *Cf. Matter of Jimenez*, 21 I&N Dec. 567, 570 n.2 (BIA 1996) (finding that claims of eligibility for a waiver presented for the first time on appeal are not properly before the Board of Immigration Appeals and that the Board will not issue a determination on the matter). Regardless, the petitioner discusses this claim in the same section as the discussion of the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) where the petitioner discusses the beneficiary’s participation with various events without discussing her roles for organizations or establishments. A passing reference without substantive arguments is insufficient to raise that ground on appeal. *Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. 433, 435 (11<sup>th</sup> Cir. 2009) *citing Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir.1979). We have discussed why the petitioner has not established that the beneficiary’s participation at various events is qualifying. Similarly, the record does not establish that beneficiary has performed a leading, starring or critical role for an organization or establishment with a distinguished reputation.

*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 director determined that the petitioner established the beneficiary’s eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) requires “[e]vidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field.” A review of the record of proceeding, however, does not reflect that the petitioner submitted sufficient documentary evidence establishing that the beneficiary meets the plain language of the regulation for the reasons outlined below.

The petitioner asserts that the beneficiary satisfies this criterion based upon an award from [REDACTED] a \$4,000 scholarship from [REDACTED] selection as a “featured faculty” member at the [REDACTED] and a number of reference letters, including a consultation letter from the President of the [REDACTED]

Regarding the beneficiary’s position at the [REDACTED] the petitioner submitted the cover page and page 27 of a brochure which includes photographs and information for three individuals. The submitted translation does not contain a certification from the translator and, thus, does not comply with the regulation at 8 C.F.R. § 103.2(b)(3). Regardless, the provided translation

does not distinguish the beneficiary from the other individuals listed and does not indicate that the beneficiary is a “featured faculty” member, as the petitioner claims. Furthermore, the information provided only lists a few “performance experiences,” none of which are indicative of significant recognition for achievements, as required by the plain language of the regulation.

Regarding the scholarship, the petitioner submitted evidence of receipt of \$4,000 for a [REDACTED] and a letter from [REDACTED] Director of Administration for [REDACTED] which confirms that it was a merit-based award. The letter, however, does not provide any additional information, such as the criteria for selection or total number of scholarships awarded, to establish that the scholarship qualifies as significant recognition for achievements rather than financial support for a promising musician’s continued education.

Regarding the [REDACTED] in the category of Composition at [REDACTED] the petitioner provided general information about [REDACTED] but did not provide any information regarding the award to establish that the award constitutes significant recognition for achievements.

Regarding the consultation letter, [REDACTED] Jr, President, states that “it is our advisory opinion that the evidence presented clearly establishes that [the beneficiary] is a musician/composer of extraordinary ability, which has been demonstrated by sustained international acclaim,” but does not provide any information regarding the beneficiary’s achievements. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Regarding the reference letters, all of which the beneficiary’s teachers or performance collaborators authored, 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.

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. Upon review of the letters, 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 praise the beneficiary’s artistic talents, their testimony fails to describe with any specificity the beneficiary’s recognition and achievements in factual terms. USCIS need not accept primarily conclusory assertions. *1756, Inc. v. United States Att’y Gen.*, 745 F. Supp. 9 (D.C. Dist. 1990).

For the reasons above, the petitioner has not established the beneficiary's eligibility under the plain language of 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.*

On appeal, the petitioner did not contest the findings of the acting director for this criterion or offer additional arguments. The petitioner, therefore, has abandoned this issue. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

### C. Comparable Evidence

On appeal, the petitioner asserts that the beneficiary meets four of the six regulatory criteria but also asserts: "When it comes to the beneficiary's occupation as a jazz drummer, the petitioner provided comparable convincing evidence in order to establish the beneficiary's eligibility per under [sic] 8 C.F.R. § 214.2(o)(3)(iv)(C)." This regulation permits the petitioner to submit comparable evidence if the criteria "do not readily apply to the beneficiary's occupation." While the petitioner identifies the beneficiary's occupation in its discussion of comparable evidence, it does not explain why the criteria it claims the beneficiary meets (or the remaining criteria) do not readily apply to the beneficiary's occupation. Further, it does not identify which evidence the petitioner has submitted is comparable to the regulatory criteria. We have considered all of the evidence above. The petitioner has not explained how evidence that does not meet the regulatory criteria is comparable to evidence that does.

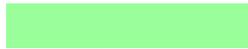
### D. Summary

The submitted evidence demonstrates that the beneficiary is a talented musician, but fails to distinguish her from other working musicians. The evidence does not establish that the beneficiary has a high level of achievement in the field of arts, as evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that she is renowned, leading, or well-known in her field of arts, as required by section 101(a)(46) of the Act and 8 C.F.R. § 214.2(o)(3)(ii).

### III. Conclusion

The petitioner failed to establish the beneficiary's eligibility pursuant to the regulatory criteria under 8 C.F.R. § 214.2(o)(3)(iv)(B). Therefore, the petitioner has not established the beneficiary's eligibility pursuant to section 101(a)(15)(O)(i) of the Act and the petition may not be approved.

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 remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.