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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE:

JAN 09 2013

Office: NEBRASKA SERVICE CENTER

FILE:

[Redacted]

IN RE:

Petitioner:

[Redacted]

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

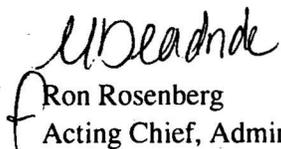
[Redacted]

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 with the field office or service center that originally decided your case by filing a 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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability as a violinist. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of her sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserts that the petitioner meets the categories of evidence at 8 C.F.R. § 204.5(h)(3)(iv), (vii), and (viii). For the reasons discussed below, the AAO will uphold the director's decision.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. See H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term “extraordinary ability” refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien’s sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 580 F.3d 1030 (9th Cir. 2009) *aff’d in part* 596 F.3d 1115 (9th Cir. 2010). 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.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two 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 considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

¹ Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

II. ANALYSIS

A. Evidentiary Criteria²

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The director discussed the evidence submitted for this regulatory criterion and found that the petitioner failed to establish her eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *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). Accordingly, the petitioner has not established that she meets this regulatory criterion.

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The director discussed the evidence submitted for this regulatory criterion and found that the petitioner failed to establish her eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885, at *9. Accordingly, the petitioner has not established that she meets this regulatory criterion.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The petitioner initially submitted multiple "PRIVATE LESSON STUDENT/PARENT CONTRACT(S)" reflecting agreements for her to teach music lessons at students' respective schools at a cost of \$16 - \$32 per lesson. The petitioner also submitted multiple [REDACTED] PRIVATE LESSON STUDENT/PARENT CONTRACT(S)" reflecting agreements in which students and parents requested the petitioner as a music lesson teacher at a cost of \$17 per lesson. In addition, the petitioner submitted various contracts she executed with the [REDACTED] to perform services as an "Orchestra/violin clinician" and "Workshop Clinician." The petitioner's initial evidence also included her performance contracts with the [REDACTED] and [REDACTED] the [REDACTED]; the [REDACTED]

² On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

[REDACTED] and the [REDACTED] The petitioner also submitted an e-mail from the [REDACTED] informing the petitioner that she was approved to teach private music lessons, an e-mail from the [REDACTED] informing the petitioner that her volunteer application was approved, and various e-mails requesting the petitioner's services as a violin teacher. None of the language in the preceding contracts and e-mails indicates that the petitioner has participated, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification.

The evidence initially submitted by the petitioner also included a December 9, 2010 letter from [REDACTED] Orchestra Director, [REDACTED] stating:

[The petitioner] is knowledgeable, dependable and relates well to our students. We are certainly grateful to have someone of her expertise and knowledge teaching our students. No student can be successful without continuity. [The petitioner] has been dedicated to many students, and has helped them achieve great success in their violin/viola playing, through numerous contests and auditions. For example, all of her students received Exemplary, Superior, or Excellent Ratings at the Solo Contest held last February in [REDACTED]. In addition, I have noticed that [the petitioner] prepares her students well for any of the playing exams and musical events during the year.

In addition, the petitioner submitted a December 18, 2010 letter from [REDACTED] and [REDACTED] Texas, stating:

From the first time I met [the petitioner] at the [REDACTED] [REDACTED] I was immediately impressed. She facilitated the learning of the music in the class setting and maintained amazing rapport with the students. All of the students came away empowered by their new understanding of the music and how to practice it for successful performances. Throughout the past year, I have had numerous occasions to observe [the petitioner] teaching string students in one-on-one a group settings and I can state without hesitation that her talents in this regard are second to none. She is a wonderful teacher, who commands the highest respect from all of those around her, students and peers alike. In addition to her music abilities which allows [sic] her to demonstrate for her students in each setting, she is dependable, always on time, organized, communicates regularly with parents and students, and passionate about ensuring the success of her students.

Neither of the preceding letters from [REDACTED] states that the petitioner has participated, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification.

The director issued a request for evidence (RFE) notice indicating that the petitioner had failed to establish eligibility for this regulatory criterion. The director's RFE noted that "students are not considered in the same or an allied field" with that of the petitioner. In response, the petitioner submitted a February 18, 2012 letter from [REDACTED] stating:

It is my understanding that USCIS wants clarification about the importance of master classes and clarification on how it is an allied field of a professional musician. In my professional opinion, the duties of a professional musician are many and varied. They include: performance as a symphony member, performance as a chamber musician, performance as a soloist, instructor/conductor of symphony orchestras, instructor/conductor of chamber ensembles, instructor/conductor of soloists, adjudicators of symphony orchestras, adjudicators of chamber music ensembles, and adjudicators of soloists. . . . A professional musician is expected to do more than just perform at the highest level, but also to prepare those who hope to attain musical mastery and musical proficiency.

* * *

I have engaged [the petitioner] for a series of sessions to work with/coach/teach/demonstrate/perform with/my students in [redacted]. These sessions are master classes and as such are an important component of my curriculum. The duties of a MASTER TEACHER are to work with select students in front of a larger body of students on select occasions. A master teacher is chosen as the instructor for these instrument specific special classes because they "are a master in their field." [The petitioner] is one such Master teacher as well as a violin virtuoso, and pedagogue. Only a master teacher can make pertinent, incisive and construct remarks as well as demonstrations from which the all performers and the audience will benefit. She addresses specific violin and chamber music performance topics with these young artists: elements of style, articulation, vibrato, and various bowing and interpretation techniques. She encourages, she gives helpful tips and the pacing and sequence of her comments is invaluable to the students as they prepare advanced musical literature.

This spring, she conducted a series of violin clinics and master classes in preparation for the rigorous [redacted] and [redacted] competitions. . . . Again, I have hired [the petitioner] to work on my campuses with students in previous years and this year because of her mastery of the her instrument, her commitment to excellence, her caring attitude, her professional demeanor and her ability to connect with my students. [The petitioner] is able to help students of all levels set and achieve goals; master complex musical forms and teach them advanced repertoire for college admissions.

The petitioner's response also included a February 5, 2012 letter from [redacted] a pianist and teacher residing in [redacted] stating:

It is my understanding that USCIS needs further proof that judging master classes, or helping students improve their performance level is "in the same or allied field" as [the petitioner's] specialization as a violinist. I am writing this letter as a colleague who is simultaneously a performer and a teacher. I wish to confirm that the endeavors are one in

the same. Teaching and judging classes are but a small part of a violinist's duties and responsibilities.

As a piano instructor, performer and accompanist, I have often participated in master classes offered by world class artists, such as William Preucil, Concertmaster of the Cleveland Orchestra, Gil Shaham, international violin virtuoso, Elly Ameling famous singer and recording artist, the Emerson Quartet, one of the foremost groups of its kind, etc. They are outstanding artists, who travel all over the world, wherever their career engagements take them. Yet, they all teach on the side, as well as judge master classes. A lot of students learn and are guided by the example of their teachers. Who better than a performer can teach a promising, upcoming student how to perform on an instrument, be that violin, piano, voice, or any other? It is mostly through their performance experience that artists enhance their knowledge, perfect their skills, learn how to promote their work, etc., which in turn they pass on to their students.

It is quite common in our field for young students to share the stage with their master teachers, as professionals. To illustrate, one of the greatest 20th century violinists, Yehudi Menuhin, took up the violin at age four, learned his first classical concerto at seven, was admitted at ten into the studio of the great George Enescu, who was then at the height of his fame as violinist, composer, teacher, and conductor, and at fifteen, his level of performance was so remarkable that even if still a student, he performed in Paris the Bach Double Concerto, alongside Enescu, causing such excitement, that the work was soon recorded. That was 1931. Since then, the recording has been remastered, and it remains a bestseller.

* * *

[The petitioner] judges ensemble clinics and individual sessions for violin students. These clinics aim at polishing students' performance, in order to make them competitive for major showcases and competitions. In particular, [the petitioner] addresses topics with these young artists especially related to her field, Violin Performance.

I would like to add that even if some of [the petitioner's] students have yet to earn a college degree, they are nevertheless very advanced violinists, able to perform technically and musically challenging repertoire, composed by and for masters of the instrument. Her students have consistently won highest scores in various competitions, and hold leading positions in their respective orchestras.

states that "[i]t is quite common in our field for young students to share the stage with their master teachers, as professionals," but he does not specifically identify any of the petitioner's students who have performed on stage as "professionals." Regardless, the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires evidence that the petitioner has served as "a judge of the work of others in the same or an allied field of specification." The AAO cannot conclude that being contracted to provide services as a private lessons teacher or a master class instructor equates to participation as "a judge" of the work of others in the field. The phrase "a judge"

implies a formal designation in a judging capacity, either on a panel or individually as specified at 8 C.F.R. § 204.5(h)(3)(iv). The regulation cannot be read to include informal instances of student music instruction, interaction, and evaluation in a middle or high school educational setting. On appeal, counsel points to the example of “serving as a member of a Ph.D. dissertation committee that makes the final judgment as to whether an individual candidate’s body of work satisfies the requirements for a doctoral degree” as meeting the plain language requirements of 8 C.F.R. § 204.5(h)(3)(iv), but counsel fails to provide specific examples of any equivalent committees on which the petitioner has formally participated in judging the work of others in the field. While the documentation submitted for this criterion indicates that the petitioner is a capable violin teacher for middle and high school students in the [REDACTED] and [REDACTED] school districts in [REDACTED] there is no documentary evidence demonstrating her participation as “a judge” of the work of others in the same or an allied field of specification. Accordingly, the petitioner has not established that she meets this regulatory criterion.

Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases.

The AAO withdraws the director’s finding that the petitioner meets this regulatory criterion. The petitioner submitted documentary evidence of her various music performances as evidence for this criterion. Neither the petitioner nor counsel has explained how music performances equate to visual art exhibits. For instance, the petitioner’s work as one of multiple violinists that perform for an orchestra is enjoyed for its sound, not its visual aspects. Such performances do not satisfy the regulatory requirements under 8 C.F.R. § 204.5(h)(3)(vii). The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires “[e]vidence of the display of the alien’s work in the field at artistic exhibitions or showcases.” The petitioner is a violinist. When she is playing with an orchestra in concert, she is not displaying her music in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing her work as part of a large instrumental ensemble, she is not displaying her work. In addition, to the extent that the petitioner is a performing artist, it is inherent to her occupation to perform. The AAO notes that the ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Accordingly, the petitioner has not established that she meets this regulatory criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment. The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. The petitioner submitted documentary evidence of her solo performances in a university setting. For instance, the petitioner performed violin solos at the [REDACTED] the [REDACTED] the [REDACTED] the [REDACTED] and the [REDACTED]. In addition to her solo performances in an academic setting, the petitioner submitted event programs indicating that she was a violinist with the [REDACTED] the [REDACTED]

[REDACTED] that performed in local theatrical productions such as [REDACTED] the [REDACTED] the [REDACTED]. The petitioner also submitted an event program indicating that she was a principal second violinist with the [REDACTED]

While the petitioner has performed violin solos at the [REDACTED], there is no documentary evidence demonstrating that her specific role for those institutions was leading or critical. Further, there is no evidence showing that the petitioner's roles as a violinist with the [REDACTED] and as a principal second violinist for the [REDACTED] were leading or critical to those orchestras. Moreover, there is no documentary evidence demonstrating that the preceding orchestras have a distinguished reputation relative to other successful orchestras.³ It is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or a similar reputation. The AAO acknowledges that the petitioner submitted general information about the [REDACTED]

[REDACTED] from their internet websites, but the self-serving nature of the online material is not sufficient to demonstrate that the orchestras have earned a distinguished reputation. USCIS need not rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO, *aff'd* 317 Fed. Appx. 680 (C.A.9) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media).

The petitioner's initial evidence also included a December 9, 2010 letter from [REDACTED] stating:

³ For comparison, some examples of orchestras with distinguished reputations include the Berlin Philharmonic, the London Symphony Orchestra, the Vienna Philharmonic, the Chicago Symphony Orchestra, the Cleveland Orchestra, the Los Angeles Philharmonic, the Boston Symphony Orchestra, and the New York Philharmonic. *See* article entitled "Chicago Symphony Tops U.S. Orchestras" at <http://www.npr.org/templates/story/story.php?%20storyId=97291390>, accessed on November 28, 2012, copy incorporated into the record of proceeding.

(b)(6)

I would first like to emphasize [the petitioner's] numerous leading roles for organizations of distinguished reputation. [The petitioner] has participated as a soloist or principal for scores of performances over the last decade. She is currently involved with several symphonies including the [redacted] Symphonies and the [redacted]

[redacted] asserts that the petitioner has performed in "numerous leading roles for organizations of distinguished reputation," but 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*, No. 95 civ 10729, 1997 WL 188942 at *1, *5 (S.D.N.Y.). Moreover, [redacted] does not explain his affiliation with any of the symphonies mentioned in his letter. The regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence of experience "shall" consist of letters from employers. Therefore, the AAO will not consider letters written by anyone other than the petitioner's current and former employers with regard to this criterion. Further, despite [redacted] assertion that the petitioner "has participated as a soloist or principal for scores of performances over the last decade," none of the event programs submitted by the petitioner from the [redacted]

[redacted] specifically identify the petitioner as a "soloist or principal" violinist.

The petitioner also submitted an unsigned December 16, 2010 letter from [redacted] Music Director, [redacted] stating:

I am the Founder of Symphony [redacted].
I have served as Music Director of the [redacted]
[redacted]
currently serve as Music Director of the [redacted]
[redacted]

* * *

It is a pleasure for me to recommend violinist [the petitioner], who has been a member of the [redacted] for two and a half years. As Music Director of the [redacted] and a guest conductor of orchestras in some fifteen countries, I can state with confidence that [the petitioner] is a player of exceptional virtuosity and rare musicianship. Her solid technical skills make her one of the most capable violinists with whom it has been my good fortune to work. She is an experienced ensemble player with a thorough knowledge of the many musical styles and periods that a symphonic musician must master, from Baroque to contemporary.

As Music Director of the [redacted] [redacted] I audition and select for engagement all the musicians needed for concert services. [The petitioner], who has demonstrated a unique

(b)(6)

and extraordinary ability in the field of music, is one of the finest musicians that I have hired.

* * *

Her ability to combine music and her technique make her uniquely qualified to keep sharing her craft with audiences around the world, especially in the United States. Particularly valuable are [the petitioner's] European training and international performing credentials, which enable her to serve as mentor and coach for many young Americans in the orchestra. Her contribution in the [redacted] is unique and irreplaceable.

In his initial letter dated December 16, 2010, [redacted] identifies the petitioner as "a member of the [redacted] also refers the petitioner as "an experienced ensemble player." [redacted] notes that the petitioner's European training and international performing credentials have enabled her to serve as mentor and coach for younger members in the orchestra, but there is no documentary evidence demonstrating that her role was leading or critical to the orchestra as a whole. The initial letter from [redacted] fails to specify how the petitioner's role was leading or critical relative to that of the [redacted] other violinists, let alone the orchestra's principal musicians, concert master, and conductor.

In response to the director's RFE, the petitioner submitted a February 23, 2012 letter from [redacted] stating:

[The petitioner] is Assistant Concertmaster of the [redacted] of which I am Music Director and Conductor.

* * *

The [redacted] is a professional ensemble of 93 classical musicians. It is, by both budget size and number of performances, one of the top one hundred orchestras in the United States.

The position of the Assistant Concertmaster is a key leadership post in any symphony orchestra. The Assistant Concertmaster sits on the first of the fifteen stands of the violins, directly on the conductor's left. While the conductor signals the overall tempo and style of the music being played, it is the first desk of the violins – i.e., the Concertmaster and Assistant Concertmaster – who communicate to the other 28 violinists just how the conductor's wishes are to be executed. They make such crucial decisions as which notes are to be played upbow and which downbow, whether the bow stroke is long or short, whether a note is played at the tip of the bow or at the frog, whether the bow is placed near the bridge or on the fingerboard, and soon. All of these choices profoundly affect the sound of the entire string section, the shape of the phrase, and the flow of the music. Were the orchestra a corporation, the conductor would be the CEO, the Concertmaster the COO, and the Assistant Concertmaster the Executive Vice President.

The Assistant Concertmaster must have a masterful technical command of the violin. [The petitioner] is an outstanding virtuoso; her playing commands the respect not only of the violin section, but of the entire orchestra. This enables her to excel in this leadership role by quickly offering alternatives and recommendations needed to solve musical problems in rehearsal. [The petitioner's] technical prowess is augmented by an outstanding musical sensitivity. Musicians are an independent lot, and it requires a powerful artistic personality to mold two and a half dozen cantankerous fiddlers into a unified whole. This amalgam of talent, skill, and leadership has taken [the petitioner] in a few short seasons from the back stands of the orchestra to center stage. Her unique contribution is vitally necessary to maintain the [redacted] level of excellence.

In his second letter dated February 23, 2012, [redacted] indicates that the petitioner is now an "Assistant Concertmaster" of the [redacted]. [redacted] does not specify the date that the petitioner was appointed to the new position. The AAO notes that the petitioner's "INDIVIDUAL CONTRACT" for the 2010-2011 season with [redacted] Orchestras states that she "shall play Section Violin" and does not mention the "Assistant Concertmaster" position or its duties. There is no evidence showing that the petitioner had been appointed to the position of the Assistant Concertmaster at the time of filing the petition on February 13, 2011. 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. [redacted] the founder and music director of the [redacted] also comments that his orchestra is "one of the top one hundred orchestras in the United States," but the record does not include documentary evidence to support his self-serving assertion. As previously discussed, USCIS need not rely on self-promotional material. *See Braga v. Poulos*, at 680. Further, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

The petitioner also submitted a February 20, 2012 letter from [redacted] Associate Professor of [redacted] and [redacted] of the [redacted] [redacted] stating:

[The petitioner] currently holds the position of Assistant Concertmaster with the [redacted] [redacted] the largest arts group in [redacted]. She holds this same position with the [redacted] [redacted] which are amidst the top five cultural attractions in both [redacted]. She has also appeared as concertmaster of the [redacted] Orchestra, a group which gained immediate international acclaim, subsequently touring all of Europe. Additionally, she was a featured concertmaster and soloist with the [redacted].

Orchestra, Solo Violin with the [REDACTED] and Asst.-concertmaster with the newly-founded [REDACTED]

A concertmaster is the leader of an entire orchestra, subordinate only to the conductor. The assistant concertmaster supports the concertmaster, or leads the ensemble in his/her absence. The choice of these two leaders is the most important an orchestra's music director can make, as the position requires not only superb playing ability and musicianship, but also grace and optimism under pressure, and the finesse of a diplomat. The violin leader sets the tone in more ways than one for an orchestra. The very sound that the concertmaster creates, be that rich, pensive or lyrical, is representative of the orchestra at large. The leaders can have a profound and complex effect on the orchestra. The concertmaster represents the orchestra – the conductor, the musicians and the management – in the community. Then, within the organization, he/she mediates between the board of directors and the management or the players. Oftentimes the concertmaster helps the conductor lead the orchestra by providing clarity through exaggerated shoulder movements and bowings.

As previously discussed, there is no evidence showing that the petitioner had been appointed to the position of Assistant Concertmaster with the [REDACTED] and the “newly-founded [REDACTED]” at the time of filing the petition on February 13, 2011. 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. at 49. Further, as previously noted, the self-serving information submitted by the petitioner from the internet websites of the [REDACTED]

[REDACTED] is not sufficient to demonstrate that the orchestras have a distinguished reputation relative to other U.S. orchestras. USCIS need not rely on self-promotional material. *See Braga v. Poulos*, at 680. Dr. Osadchy states that the petitioner “appeared as concertmaster of the *Young Virtuosi of Tirana Orchestra*,” “was a featured concertmaster and soloist with the [REDACTED] played “Solo Violin with the [REDACTED]” and served as “Asst.-concertmaster with the newly-founded [REDACTED]” There is no documentary evidence showing that the preceding ensembles have earned a distinguished reputation when compared to similar music groups. Further, the record lacks documentary evidence (such a contractual agreements or letters of employment) to support [REDACTED] assertions that the petitioner was appointed to the roles of concertmaster with the [REDACTED] Orchestra and assistant concertmaster with the [REDACTED] 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)). The documentation submitted by the petitioner does not establish that she performed in a leading role or that she was responsible for the preceding ensembles' success or standing to a degree consistent with the meaning of “critical role.”

In light of the above, the petitioner has not established that she meets this regulatory criterion.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The director discussed the evidence submitted for this regulatory criterion and found that the petitioner failed to establish her eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885, at *9. Accordingly, the petitioner has not established that she meets this regulatory criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence.

C. Prior O-1 Nonimmigrant Visa Status

The record reflects that the petitioner is the beneficiary of an approved O-1 nonimmigrant visa petition for an alien of extraordinary ability in the arts. Although the words "extraordinary ability" are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, "The term 'extraordinary ability' means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction." The O-1 regulation reiterates that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the petitioner's receipt of O-1 nonimmigrant classification is not evidence of her eligibility for immigrant classification as an alien with extraordinary ability. Further, the AAO does not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each petition must be decided on a case-by-case basis upon review of the evidence of record.

It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556 (5th Cir. 2004) (finding that prior approvals do

not preclude USCIS from denying an extension of the original visa based on a reassessment of the alien's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Eng'g Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of the alien, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, *1, *3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.⁴ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

⁴ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.