



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: **JUL 18 2013** Office: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 (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
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) rejected and, in the alternative, dismissed a subsequent appeal. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed pursuant to 8 C.F.R. § 103.5(a)(1)(iii)(C), 103.5(a)(2), 103.5(a)(3), and 103.5(a)(4).

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 professional violinist.¹ The director determined that the petitioner had not met the requisite criteria for classification as an alien of extraordinary ability. On appeal, the AAO found that because the underlying petition was not properly filed with the petitioner's signature as required by the regulation at 8 C.F.R. § 103.2(a)(2), further action on the petition could not be pursued, and the appeal was rejected. In the alternative, the AAO dismissed the petitioner's appeal finding that the petitioner had failed to establish that she meets at least three of the regulatory categories of evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). In addition, the AAO determined that the petitioner had failed to submit "clear evidence" demonstrating that she will continue to work in her area of expertise as claimed on the I-140 petition as required by the regulation at 8 C.F.R. § 204.5(h)(5).

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a de novo legal determination reached in its decision that may not have been addressed by the party. Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must

¹ According to her Form I-94, Arrival/Departure Record, the petitioner was last admitted to the United States on January 9, 2010 as an F-1 nonimmigrant student.

show how a change in law materially affects the prior decision. See *Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

In the April 30, 2013 decision dismissing the petitioner's appeal, the AAO stated:

Form I-140, Immigrant Petition for Alien Worker, was electronically submitted to U.S. Citizenship and Immigration Services on September 22, 2011. Part 1 of the Form I-140 identifies [REDACTED] as the petitioner. In Part 8 of Form I-140, under "Petitioner's Signature," counsel signed and certified the petition electronically. Form I-140 was not signed by the petitioner, as required by regulation, but instead by the petitioner's attorney. The only signatures on the form are those of counsel. The AAO notes that the regulations do not permit an individual who is not the petitioner to sign Form I-140.

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

Filing. (1) Preparation and submission. Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. . . .

(2) Signature. An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on a benefit request that is being filed with the USCIS is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

Form I-140 Instructions state:

If the petitioner is an individual, then that individual, or that individual's legal guardian if he or she is incompetent or under 14 years of age, must personally sign the petition. If the petitioner is a corporation or other legal entity, only an individual who is an officer or employee of the entity who has knowledge of the facts alleged in the petition, and who has authority to sign documents on behalf of the entity, may sign the petition.

There is no regulatory provision that waives the signature requirement for a petitioner to designate an attorney or accredited representative to sign the petition on behalf of the petitioner.

On motion, counsel states:

The appeal should not have been rejected due to counsel's signature in the Petitioner's box on the e-filed I-140. [The petitioner] signed the paper copy of the I-140 two days in advance

of the on-line application. The paper copy, with the original signatures of counsel and Petitioner is enclosed with this submission. Counsel would have provided this evidence with the re-submitted petition, had [U.S. Citizenship and Immigration Services] rejected the petition when it was file [sic] originally in 2011. We submit that providing this signed and dated petition, even at this date, cures the signing defect the AAO alleges warranted rejection in the alternative.

In this instance, the petition was not properly filed on September 22, 2011 because the petitioner had not signed the petition. Instead, counsel signed and certified the petition electronically on September 22, 2011. Form I-140 was not signed by the petitioner, as required by regulation, but instead by the petitioner's attorney. Pursuant to the regulation at 8 C.F.R. § 103.2(a)(7)(i), a benefit request which is not signed must be rejected. In addition, a benefit request which is rejected will not retain a filing date. 8 C.F.R. § 103.2(a)(7)(iii). While the service center did not reject the initial filing as required by the regulation at 8 C.F.R. § 103.2(a)(7)(i), the AAO is not 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). The regulation at 8 C.F.R. § 103.2(a)(7)(i) is binding on U.S. Citizenship and Immigration Services (USCIS) employees in their administration of the Act, and USCIS employees do not have the authority to ignore it. An agency is not entitled to deference if it fails to follow its own regulations. *See, e.g. Morton v. Ruiz*, 415 U.S. 199 (1974) (Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures); *U.S. v. Heffner*, 420 F.2d 809, (CA 4 1969) (Government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down); *Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C.,1979) (An agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (An agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

In support of the motion, the petitioner submits a "signed and dated" I-140 petition that counsel alleges is "the paper copy of the I-140" that the petitioner purportedly signed "two days in advance of the on-line application." The signed Form I-140 (Rev. 04/08/11) now submitted to the AAO on motion, however, differs significantly from the electronically-filed (e-filed) Form I-140 (Rev. 04/16/04) submitted to USCIS on September 22, 2011. For instance, the e-filed Form I-140 has a revision date of April 16, 2004, while "the paper copy" signed by the petitioner and submitted on motion has a revision date of April 8, 2011. In addition, the e-filed Form I-140 (Rev. 04/16/04) is three pages in length and "the paper copy" of Form I-140 (Rev. 04/08/11) signed by the petitioner is five pages in length. The following additional differences in the e-filed Form I-140 (Rev. 04/16/04) and the signed Form I-140 (Rev. 04/08/11) are noted:

1. In Part 3, the signed Form I-140 (Rev. 04/08/11) lists "Federal District" as "State/Province of Birth," while the e-filed Form I-140 (Rev. 04/16/04) was left blank;
2. In Part 3, the signed Form I-140 (Rev. 04/08/11) lists "D/S" as "Date Status Expires," while the e-filed Form I-140 (Rev. 04/16/04) was left blank;

3. In Part 4, the signed Form I-140 (Rev. 04/08/11) lists "Venezuela" as "Alien's country of current residence or, if now in the United States, last permanent residence abroad," while the e-filed Form I-140 (Rev. 04/16/04) lists "United States";
4. In Part 5, the signed Form I-140 (Rev. 04/08/11) lists "Professional Violinist/Violin Teacher" as "Occupation," while the e-filed Form I-140 (Rev. 04/16/04) lists "Professional Violinist";
5. In Part 6, the signed Form I-140 (Rev. 04/08/11) lists "Professional Violinist/Violin Teacher" as "Job Title," while the e-filed Form I-140 (Rev. 04/16/04) lists "125 – Musician, Singer, Composer"; and
6. In Part 6, the signed Form I-140 (Rev. 04/08/11) lists "Violinist: Performs in professional orchestra as soloist or in section, teaches violin, accompanies major music artists on tour" as "Nontechnical Description of Job," while the e-filed Form I-140 (Rev. 04/16/04) lists "Professional violinist."

As the signed Form I-140 (Rev. 04/08/11) now submitted on motion differs significantly from the e-filed Form I-140 (Rev. 04/16/04) submitted on September 22, 2011, the petitioner has not established that the latest submission is "the paper copy of the I-140" as claimed by counsel. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Regardless, the submission of a signed Form I-140 (Rev. 04/08/11) at this stage of the proceedings does not overcome the signature deficiency in the original e-filed Form I-140 petition submitted at the time of filing. 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). Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *Id.* at 176. 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.* Because the underlying petition was not submitted with the petitioner's signature at the time of filing and should have been rejected by the director without retaining a filing date, further action on the petition could not be pursued. Therefore, the AAO was correct in rejecting the appeal based on the evidence of record at the time of the appellate decision.

In addition, the AAO affirms its alternate finding that the petitioner has failed to establish that she meets at least three of the regulatory categories of evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). 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). 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.* and 8 C.F.R. § 204.5(h)(2). 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.

The AAO specifically and thoroughly discussed the petitioner's evidence and determined that she failed to establish eligibility for the nationally or internationally recognized prizes or awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the membership in associations which require outstanding achievements criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), the original contributions of major significance criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the display of work at artistic exhibitions or showcases criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The AAO therefore concluded that the petitioner had failed to satisfy the antecedent regulatory requirement of three categories of evidence.

On motion, counsel states:

[The petitioner] submitted several letters from colleagues who consider her to be a violinist of extraordinary ability. The additional expert letter we submit with this Motion, analyzes her past experience, as it existed at the time of the original application. The writer, Mr. [REDACTED] for the renowned [REDACTED] feels strongly that [the petitioner] is well-qualified for the EB-1 visa category. He has authored several expert opinion letters in the past and is familiar with the USCIS standards.

The April 30, 2013 appellate decision specifically addressed the letters from the petitioner's colleagues submitted in support of her petition for classification as an alien extraordinary ability. Counsel fails to provide any persuasive legal argument, precedent decisions, or other comparable evidence to establish that the AAO's analysis of the reference letters or findings pertaining to the regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3) were based on an incorrect application of law or USCIS policy. Moreover, with regard to Mr. [REDACTED] letter, counsel does not indicate the specific category of evidence at 8 C.F.R. § 204.5(h)(3) to which his letter applies.

The petitioner submits a May 22, 2013 letter from [REDACTED] [REDACTED] Minnesota Orchestra, stating:

In reviewing [the petitioner's] application, I was immediately impressed to see that she appears to have been actively pursued as a prospective student by some of America's most prestigious institutions of higher education. In particular, the [REDACTED] at [REDACTED] is on every musician's short list of the very top schools for musical performance. . . . [The petitioner] . . . was enthusiastically accepted and offered a full scholarship to pursue her master's degree at [REDACTED]. I cannot overstate how competitive the admissions process at America's top music schools can be – some music schools accept as few as 10% of their applicants. [The petitioner's] musical abilities must be extremely high if she was able to clear that admissions bar and be offered a tuition-free education at such a

prestigious school. In the classical music world, many top-tier performers choose to continue their education even as their professional career as a performer has already begun. Any student accepted to [REDACTED]'s graduate school should already rank among the top tier of musicians in the world.

The petitioner, however, has failed to establish that her admission to music schools, academic awards, scholarships, and success in student competitions are indicative of or consistent with sustained national acclaim or a level of expertise indicating that she is one of that small percentage who have risen to the very top of her field. See 8 C.F.R. § 204.5(h)(2). USCIS has long held that even athletes performing at the major league level do not automatically meet the statutory standards for immigrant classification as an alien of "extraordinary ability." Cf. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994); 56 Fed. Reg. at 60899. Likewise, it does not follow that demonstrating success as a student in a university setting should necessarily qualify for approval of an extraordinary ability employment-based immigrant visa petition. In *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

The court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor."

Mr. [REDACTED] further states:

It is also notable that [the petitioner] has already been offered employment with the [REDACTED]. The audition process for America's professional symphony orchestras is intensely competitive – it is not unusual for more than a hundred candidates to audition for a single open position. That [the petitioner] has achieved success in such a competitive field at such a young age is a further indication of her skills.

The AAO acknowledges the petitioner's submission on appeal of the December 4, 2012 letter from [REDACTED] Orchestra Personnel Manager, [REDACTED] discussing the petitioner's occasional work since September 2012 "as a substitute musician" for the [REDACTED] "when the Symphony needs additional violinists," but this evidence post-dates the September 22, 2011 filing of the petition and cannot be considered in this proceeding. As previously discussed, 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.

Mr. [REDACTED] continues:

I would also make special note of [the petitioner's] musical background in her home country of Venezuela. This is of particular interest in establishing her continuing value to America's musical profession, because Venezuela has been internationally celebrated in recent years for producing countless world-class musicians through its state-funded [redacted] music education program. As an alumna of the [redacted] program, [the petitioner] grew up on the cutting edge of global initiative in music education, and she had the opportunity to work directly with [redacted]'s most celebrated alumnus, [redacted] who today is making history as the youngest-ever music director of the mighty [redacted]. As a direct result of *El Sistema's* success in training and educating young musicians, alumni of the program are being highly sought after across America to help recreate Venezuela's successes in American cities. [The petitioner], I am confident, will be in a strong position to help revitalize and reinvent our country's sadly flagging music education infrastructure if she is granted the continued legal residence she seeks.

Mr. [redacted] comments on the petitioner's musical background as a foreign-born musician and her [redacted] music education program training, but assuming the petitioner's music skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment labor certification process. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 (Comm'r 1998).

Mr. [redacted] further states:

It is clear to me from [the petitioner's] documentation that she possesses extraordinary and sustained proficiency in music, and it is further clear from her extensive performing and teaching experience that her continued residence in the U.S. would substantially benefit our country's musical profession, which is always in need of a fresh supply of new and energetic talent.

Mr. [redacted] asserts that the petitioner "possesses extraordinary and sustained proficiency in music" and that "her extensive performing and teaching experience . . . would substantially benefit" the United States, but merely repeating the language of the statute 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); *Ayvr Associates, Inc. v. Meissner*, No. 95 civ 10729, 1997 WL 188942 at *1, *5 (S.D.N.Y.). While Mr. [redacted] speaks favorably of the petitioner, his opinions fail to demonstrate that the petitioner satisfies any of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). 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). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of reference letters 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"). Accordingly, the

AAO affirms its appellate finding that the petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence.

As previously discussed, a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of “new,” a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.² The petitioner has failed to explain why Mr. [REDACTED]’s letter was previously unavailable and could not have been submitted earlier. The petitioner has been afforded three different opportunities to submit evidence demonstrating her eligibility: at the time of the original filing of the petition, in response to the director’s request for additional evidence, and at the time of the filing of the appeal. A review of the evidence that the petitioner submits on motion reveals no fact that could be considered “new” under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen.

Furthermore, the AAO affirms its alternate finding that the petitioner failed to submit “clear evidence” demonstrating that she will continue to work in her area of expertise as required by the regulation at 8 C.F.R. § 204.5(h)(5). In the April 30, 2013 decision dismissing the petitioner’s appeal, the AAO stated:

Beyond the decision of the director, the statute and regulations require that the petitioner seeks to continue work in her area of expertise in the United States. *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the petitioner detailing plans on how she intends to continue her work in the United States. *Id.* On the Form I-140, in Part 5, the petitioner listed her “Occupation” as “Professional Violinist.” In addition, under Part 6, “Basic information about the proposed employment,” the petitioner listed the “Nontechnical Description of Job” as “Professional Violinist.” Moreover, the documentary evidence submitted by the petitioner focused primarily on her achievements and expertise as a violin player.³

As evidence that she intends to continue work in her area of expertise, the petitioner initially submitted the following:

1. An April 4, 2011 letter from Ms. [REDACTED] Piano Instructor, [REDACTED], stating that the petitioner is employed by the [REDACTED] “as a [REDACTED]” and

² The word “new” is defined as “1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . .” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

³ There is no documentary evidence showing, for example, that the petitioner meets any of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) based solely on her achievements as a music teacher, or that any of the young students under her direct tutelage have performed at a level demonstrating the petitioner’s sustained national or international acclaim as a music educator at the very top of her field.

that the petitioner “teaches Suzuki Violin for grades Pre-kindergarten through second” at [REDACTED]

2. An April 16, 2011 letter from [REDACTED] Principal, [REDACTED] stating that the petitioner “has been employed at [REDACTED] as a Music Teacher with a specialty in Suzuki Violin”;
3. Photos of the petitioner with her elementary school students;
4. A “Texas Educator Certificate” with an effective date of August 19, 2010 stating that the petitioner “has fulfilled all the requirements of the State of Texas and is authorized to practice as a certified educator”; and
5. [REDACTED] employee contract signed and dated by the petitioner on October 22, 2010.

On appeal, the petitioner submits a November 13, 2012 “offer of employment as a CLASSROOM TEACHER-SECONDARY . . . at [REDACTED]

[REDACTED] The petitioner also submits her November 13, 2012 “Contract of Employment” with the Board of Education of the [REDACTED] The AAO is not persuaded, however, that a “Professional Violinist” and an elementary or junior high school music teacher are the same area of expertise.⁴ In *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

It is reasonable to interpret continuing to work in one’s “area of extraordinary ability” as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee’s extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

Id. at 918. The court noted a consistent history in this area. Likewise, it does not follow that a primary or secondary public school music teacher and a professional violinist are the same area of expertise. The AAO acknowledges the petitioner’s submission of the December 4, 2012 letter from Ms. [REDACTED] discussing the petitioner’s occasional work since September 2012 “as a substitute musician” for the [REDACTED] “when the Symphony needs additional

⁴ According to the U.S. Department of Labor’s O*NET program, Instrumental Musicians (including violinists) are not the same occupation as Elementary School Teacher or Secondary School Teacher. These occupations have entirely different Standard Occupational Classification codes and tasks. See Summary Reports for “Musicians, Instrumental,” “Elementary School Teachers,” and “Secondary School Teachers” at <http://www.onetonline.org/link/summary/27-2042.02>, <http://www.onetonline.org/link/summary/25-2021.00>, and <http://www.onetonline.org/link/summary/25-2031.00>, accessed on April 23, 2013, copies incorporated into the record of proceeding. The O*NET program is the nation’s primary source of occupational information developed under the sponsorship of the U.S. Department of Labor/Employment and Training Administration. See <http://www.onetcenter.org/overview.html>, accessed on April 23, 2013, copy incorporated into the record of proceeding. The 2010 Standard Occupational Classification system is used by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. See <http://www.bls.gov/soc/>, accessed on April 23, 2013, copy incorporated into the record of proceeding.

violinists,” but this evidence post-dates the September 22, 2011 filing of the petition and cannot be considered in this proceeding. As previously discussed, 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. Regardless, as the petitioner has submitted extensive evidence of her pursuit of a teaching career and full-time employment as an elementary or junior high school music teacher, the petitioner has failed to submit “clear evidence” demonstrating that she will continue to work in her area of expertise as claimed on the I-140 petition as required by the regulation at 8 C.F.R. § 204.5(h)(5).

On motion, counsel states:

[The petitioner] submitted a job offer to teach music to inner-city children. This is the same position she held in [REDACTED]. We submitted this as evidence of her intent to pursue work in her field of expertise. The AAO disagreed that teaching music is with the field of expertise of a professional violinist. Even so, at the time the petition was filed, [the petitioner] supplied evidence that she also worked as a professional violinist in orchestras, concerts, recording, and on tour. She did provide ample evidence that she plans to continue work in her field of expertise, including teaching American children.

While the AAO concurs with counsel that the petitioner “supplied evidence that she . . . worked as a professional violinist in orchestras, concerts, recording, and on tour” in the months and years preceding the petition’s filing date, that evidence did not specifically address how the petitioner sought to continue work in her area of expertise in the United States after the Form I-140 petition was filed. In that regard, rather than submitting “clear evidence” demonstrating that she intended to continue work as a professional violinist, the petitioner submitted extensive evidence of her pursuit of a teaching career and full-time employment as an elementary or junior high school music teacher. As noted in the appellate decision, the plain language of the regulation at 8 C.F.R. § 204.5(h)(5) requires “clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.” In this matter, the petitioner failed to submit letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement detailing plans on how she intended to continue working in the United States as a “professional violinist” (as indicated in Parts 5 and 6 of the original Form I-140 petition e-filed on September 22, 2011). Once again, the AAO acknowledges the petitioner’s submission of the December 4, 2012 letter from Ms. [REDACTED] discussing the petitioner’s occasional work since September 2012 “as a substitute musician” for the MSO “when the Symphony needs additional violinists,” but this evidence post-dates the September 22, 2011 filing of the petition and cannot be considered in this proceeding. As previously discussed, 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. Counsel fails to provide any persuasive legal argument, precedent decisions, or other comparable evidence to establish that the AAO’s analysis of the evidence submitted for the regulation at 8 C.F.R. § 204.5(h)(5) was based on an incorrect application of law or USCIS policy.

Counsel further states:

[The petitioner] continues to assert that the standard of review applied to her petition originally, her response to the RFE, and her appeal, are inconsistent with Congress' intent and the spirit of the legislation. She argues that the standard applied to her petition is much higher and interpreted more narrowly than other similarly situated applications.

Counsel, however, fails to specifically identify the parts the appellate decision where the AAO applied an incorrect standard of review. The AAO concurs with counsel that the standard of proof in this proceeding is preponderance of the evidence, as noted by counsel on appeal. The "preponderance of the evidence" standard, however, does not relieve the petitioner from satisfying the basic evidentiary requirements required by the statute and regulations. Therefore, if the statute and regulations require specific evidence, the petitioner is required to submit that evidence. See section 203(b)(1)(A)(i) and (ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i) and (ii), and 8 C.F.R. §§ 204.5(h)(2), (3), and (5). The documentation submitted by the petitioner fails to demonstrate by a preponderance of the evidence that she meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3), that she has achieved sustained national or international acclaim, that she is one of the small percentage who has risen to the very top of the field of endeavor, and that she submitted evidence demonstrating that she will continue to work in her area of expertise as claimed on the original e-filed I-140 petition as required by the regulation at 8 C.F.R. § 204.5(h)(5). In most administrative immigration proceedings, the petitioner must prove by a preponderance of the evidence that he or she is eligible for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). The truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* at 376.

In this matter, the petitioner has failed to support her motion with any persuasive legal argument, precedent decisions, or other comparable evidence to establish that the AAO's April 30, 2013 decision was based on an incorrect application of law or USCIS policy. In addition, the petitioner has not established that the appellate decision was incorrect based on the evidence of record at the time of the decision. Furthermore, the petitioner's motion fails to identify any new facts and is unsupported by documentary evidence to overcome the grounds underlying the AAO's decision. The petitioner bears the burden of establishing that the AAO's rejection and, in the alternative, dismissal of her appeal were in error. If the petitioner can demonstrate that the AAO erred by rejecting and dismissing the appeal, then there would be grounds to reopen the proceeding. The petitioner has not done so in this proceeding. Moreover, the instant motion does not contain the statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding as required by the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C). For this additional reason, the motion must be dismissed.

The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen and reconsider is dismissed, the decision of the AAO dated April 30, 2013 is affirmed, and the petition remains denied.