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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 20 2015 Office: TEXAS 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 (AAO) in your case.

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an alien of extraordinary ability in the arts, as a sound engineer in the field of sound design and engineering, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), which makes visas available to aliens who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation. The director determined that the petitioner had not satisfied the initial evidence requirements set forth at 8 C.F.R § 204.5(h)(3), which requires documentation of the beneficiary's one-time achievement or evidence that the beneficiary meets at least three of the ten regulatory criteria.

On appeal, the petitioner asserts that the director erred because the beneficiary meets the criteria under the regulations at 8 C.F.R. § 204.5(h)(3)(iii), (v), (viii), and (ix). For the reasons discussed below, we agree with the director that the petitioner has not established the beneficiary's eligibility for the exclusive classification sought. Specifically, the petitioner has not submitted qualifying evidence of the beneficiary's one-time achievement pursuant to 8 C.F.R. § 204.5(h)(3), or evidence that the beneficiary satisfies at least three of the ten regulatory criteria set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x). As such, the petitioner has not demonstrated that the beneficiary is one of the small percentage who is at the very top in the field of endeavor, and that the beneficiary has sustained national or international acclaim. *See* 8 C.F.R. § 204.5(h)(2), (3). Accordingly, we will dismiss the petitioner's appeal.

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. 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate the alien's sustained acclaim and the recognition of the alien's achievements in the field through evidence of a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit this evidence, then a petitioner must submit sufficient qualifying evidence that meets at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The submission of evidence relating to a one-time achievement or at least three criteria, however, does not, in and of itself, establish eligibility for this classification. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination); s*ee also Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011) (affirming USCIS' proper application of *Kazarian*), *aff'd*, 683 F.3d. 1030 (9th Cir. 2012); *Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013) (finding that USCIS appropriately applied the two-step review); *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality" and that USCIS examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true").

II. ANALYSIS

A. Previous O-1 Visa Petition and Comparable Evidence

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. The regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability in the arts are dramatically different. 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts as simply "distinction," which is further defined as follows:

> Distinction means 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.

The regulation relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field 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." While the ten immigrant criteria set forth at 8 C.F.R. § 204.5(h)(3) appear in the nonimmigrant regulations, 8 C.F.R. § 214.2(o)(3)(iii), they refer only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. Separate criteria for nonimmigrant aliens of extraordinary ability in the arts are set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv). The distinction between these fields and the arts, which appears in 8 C.F.R. § 214(o), does not appear in 8 C.F.R. § 204.5(h). As such, the petitioner's approval for a nonimmigrant visa under the lesser standard of "distinction" is not evidence of her eligibility for the similarly titled immigrant visa.

On appeal, the petitioner asserts that the beneficiary's O-1 nonimmigrant visa petition approvals constitute comparable evidence under the regulation at 8 C.F.R. § 204.5(h)(4). As explained above, the standard for an O-1 nonimmigrant visa petition is different, and of a lower standard, than the standard for an immigrant visa petition under section 203(b)(1)(A) of the Act. As such, the petitioner has not shown that the previous nonimmigrant visa petition approvals under the distinction standard constitute comparable evidence of the beneficiary's eligibility under the instant immigrant visa petition, where the standard is status among that small percentage who have risen to the very top of the field. The petitioner has also not explained how an immigration adjudication is comparable to the types of objective evidence of achievements recognized in the field set forth in the criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The petitioner further asserts on appeal that the director erred in failing to take into account that the beneficiary obtained a diploma in Broadcast Audio Engineering and then graduated from the Institute of Audio Research "with a perfect 4.0 GPA." Finally, the petitioner asserts that the director erred by not considering the beneficiary's work at Columbia Records and 20 years of experience. A degree and at least 10 years of experience are two criteria for aliens of exceptional ability, a lesser classification. 8 C.F.R. § 204.5(k)(3)(ii)(A), (B). The petitioner has not explained how evidence that falls under two criteria for a lesser classification is comparable to the criteria for this higher classification. While the petitioner claims that the beneficiary has more experience than required under 8 C.F.R. § 204.5(k)(3)(ii)(B), nothing in any of the criteria at 8 C.F.R. § 204.5(h)(3) suggests that the length of experience alone can serve as evidence of extraordinary ability. Moreover, academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold for a lesser classification than the one the petitioner now seeks. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215, 219, n.6 (Assoc. Comm'r 1998). Finally, the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence of a leading or critical role for organizations or establishments with a distinguished reputation. The petitioner has not asserted that the beneficiary performed in a leading or critical role for Columbia Records or explained why a lesser affiliation with a distinguished organization is comparable evidence.

Moreover, the plain language of the regulation states that the petitioner may rely on comparable evidence when the criteria under 8 C.F.R. § 204.5(h)(3)(i)-(x) "do not readily apply to the

beneficiary's occupation" as a sound engineer. The petitioner has not made such an assertion, nor has the petitioner provided any legal support showing that the regulatory criteria do not readily apply to a sound engineer.

B. Evidentiary Criteria[1]

Under the regulation at 8 C.F.R. § 204.5(h)(3), the petitioner, as initial evidence, may present evidence of a one-time achievement that is a major, internationally recognized award. In this case, the petitioner has not asserted or shown through the evidence that the beneficiary is the recipient of a major, internationally recognized award at a level similar to that of the Nobel Prize. Indeed, the director concluded that the evidence did not establish the beneficiary's receipt of a major, internationally recognized award. On appeal, the petitioner has not specifically challenged the director's conclusion. As such, as initial evidence, the petitioner must present at least three of the ten types of evidence under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x).

> *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.* 8 C.F.R. § 204.5(h)(3)(iii).

On appeal, the petitioner asserts that the beneficiary meets this criterion because he was the sound engineer for a concern that the [redacted] reviewed, and because as a musician performing under the name [redacted] the beneficiary was "the focal point of numerous articles." The petitioner has not shown that the beneficiary meets this criterion.

First, published materials, including those in [redacted] that relate to the beneficiary's singing and songwriting career do not meet this criterion, because the materials do not relate to the beneficiary's "work in the field for which classification is sought," which is sound design and engineering. For example, the record includes a [redacted] review of the beneficiary's song [redacted] The petitioner has not shown that the two-sentence review relates to the beneficiary's work as a sound engineer. In addition, the record lacks sufficient information showing that the magazines that published the materials constitute professional or major trade publications or other major media.

Second, although the evidence includes a number of published materials about the petitioner and various artists who have performed at the petitioning venue, including articles in the [redacted] these materials do not specifically mention the beneficiary or provide specific information relating to the beneficiary's work as a sound engineer. These materials thus do not meet the plain language requirements under the criterion, because they are not "about the [beneficiary] . . . relating to [his] work in the field for which classification is sought."

[1] We have reviewed all of the evidence the petitioner has submitted and will address those criteria the petitioner claims the beneficiary meets or for which the petitioner has submitted relevant and probative evidence.

Finally, the petitioner has not shown that the article ' posted on audioprointernational.com meets this criterion. Specifically, the petitioner has not shown that the publisher audioprointernational.com is a professional or major trade publication or other major media. The petitioner has not provided any information relating to the nature or the reach of this website. Similarly, the petitioner has not shown that the December press release, which mentions the beneficiary's work as a sound engineer for the petitioner, constitutes published material in a professional or major trade publication or other major media. Rather, press releases, like the press release, are often disseminated by companies as promotional materials for their products.

Accordingly, the petitioner has not submitted published material about the beneficiary in professional or major trade publications or other major media, relating to his work in the field for which classification is sought, sound design and engineering. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(iii).

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.* 8 C.F.R. § 204.5(h)(3)(v).

On appeal, the petitioner asserts that the beneficiary meets this criterion based on reference letters in the record that show the beneficiary's work "has made original contributions of major significance to the music industry." The evidence in the record does not support this assertion.

The record includes a number of reference letters, some of them dated 2005, but none of them provide specific information relating to what the beneficiary has done in the field of sound design and engineering that is either original, such that he is the first person or one of the first people to have done it, or establish that what he has done constitutes contributions of major significance in the field, such that it significantly advanced or fundamentally impacted the field of sound design and engineering as a whole. Rather the evidence, including the reference letters, shows that the beneficiary's employer and individuals who have worked with the beneficiary praise the beneficiary's talent and skills as a sound engineer and his work for the petitioning venue. General praises and recognition of one's talent and skills are not sufficient to show that the beneficiary meets this criterion. Regardless of the field, the plain language of the phrase "contributions of major significance in the field" requires evidence of an impact beyond one's employer and clients or customers. *See Visinscaia*, 4 F. Supp. 3d at 134-35 (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole).

The beneficiary's employer, who is also the petitioner, has submitted two letters in support of the petition. According to a 2010 letter from the petitioner's owner, the beneficiary has been the petitioner's head sound engineer for the past four years. Mr. states that the beneficiary "is extremely conscientious and has a great work ethic." He further states that the beneficiary's "musical background allows him to communicate with the performers in their own

specific terminology and make the appropriate technical adjustments. He is very confident in his work and this confidence filters through to the musicians, allowing them to concentrate solely on giving their best possible performance." According to Mr. second letter, dated April 23, 2014, the beneficiary's "contributions are critical for the successful execution of [the musicians'] performances" and "allow [the petitioner] to maintain its high standard of musical excellence." Mr. states that the beneficiary's "original sound work has significantly contributed to the petitioner's growing success. It is because of his work, the acclaimed performing artists want to return to play at the petitioning venue where they can expect the highest standard of musical quality." Although Mr. letters discuss the beneficiary's contributions to his employer, the petitioner, they do not establish the beneficiary's contributions to the field of sound design and engineering. The letters do not state that the beneficiary's work has significantly impacted or advanced the field as a whole.

On appeal, the petitioner asserts that the evidence in the record shows that the beneficiary "has contributed in a way that is of significant importance to the outcome of the petitioner's activities." At issue here, however, is not the beneficiary's contributions to his employer, which is relevant to the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii), discussed below. Rather, as required under the plain language of the criterion, the petitioner must show the beneficiary's original contributions of major significance in the field of sound design and engineering as a whole, which are contributions beyond those made to the beneficiary's employer and clients. *See Visinscaia*, 4 F. Supp. 3d at 134-35.

The record includes a December press release that details the equipment the beneficiary used for the petitioner's sound system. Neither this press release nor any other evidence in the record, however, indicates that while working for the petitioner, the beneficiary has made any original contributions of major significance in the field of sound design and engineering as a whole.

The petitioner has submitted other reference letters, all giving high marks to the beneficiary's work. According to M.A., Master Teacher, the beneficiary's "original sound work has significantly contributed to [the petitioner's] growing success, and for this reason artists want to come back to play at [the petitioning venue], where the audience expects an elevated standard of musical quality." According to the beneficiary "is a rare and unique talent among the sound engineers with his distinctive ability to enhance the sound of a jazz musician during [a] live performance." Ms. states that "by adding his own original signature to that sound, [the beneficiary] significantly contributes to the performance." According to the beneficiary's "creative use of technology together with his musical talent and intuition causes him to produce an excellent ambiance for listener and performer alike at the famous club [the petitioning venue], which is essential for all parties involved." According to a the beneficiary "is an exceptional sound engineer, both in the quality of his work, and the professionalism with which he performs his job. He delivered great sound to the audiences who were very enthusiastic and appreciative, not only about the music that [Ms. presented, but also about the sound quality that was mixed by [the beneficiary] during

the shows." According to , Vice President and General Manager of , the beneficiary "is first-rate" and, in his work for the petitioner, "provides a unique understanding of how to best convey the acoustic dynamics and intimacy of a jazz club renowned for attracting the top jazz artists from around the world." According to President of the the beneficiary, while working for the petitioner, "has been extraordinarily helpful to all of [her] clients . . . who have performed at this major venue, and [that] they have all been very pleased with [the beneficiary's] work." According to a former Marketing Manager with the beneficiary has "consistently delivered" and he is "increasingly becoming both more proficient and confident as a musician, a producer and now also an engineer." According to a concert producer, the beneficiary "displays a unique combination of technical knowledge and musical understanding that assures [Mr. time and again that he is among the stand-out engineers in his field, consistently producing sound of the highest standard, regardless of the genre and their background." These letters do not specifically discuss the impact or influence of the beneficiary's work in the field of sound design or engineering as a whole. Evidence of the beneficiary's talents and ability to perform his duties, without evidence of his work's impact and influence in the field as a whole is insufficient to show that the beneficiary meets this criterion.

Some of the reference letters discuss the beneficiary's talent and achievements in areas other than sound design and engineering. For example, President of discusses the beneficiary's talent as a song writer and vocal arranger and producer. The petitioner has not shown how the beneficiary's talents in other areas of the music industry are indicative of the beneficiary's original contributions of major significance in the field of sound design and engineering, the field in which the petitioner claims extraordinary ability. Although Mr. letter does discuss the beneficiary's work as a sound engineer, it does not include specific information relating to his contributions that are either original or are of major significance in the field as a whole. Similarly, Director of discusses the beneficiary's work on vocal production and his work as a vocalist and songwriter. Regardless, he did not sign the letter; so it has no probative value. who also did not sign his letter, discusses the beneficiary's song writing and production skills. an independent producer/engineer and an instructor at the discusses the beneficiary's education at a recording studio workshop. Studio Manager of discusses the petitioner's work ethics, but the letter is unsigned. The petitioner has not shown that talent and skills in areas of song writing, vocal and production, and work ethics establish that the beneficiary has made original contributions of major significance in the field of sound design and engineering.

Some of the reference letters provide conclusory statements about the beneficiary's talent and skills as a sound engineer. They do not, however, provide specific information on any contributions that the beneficiary has made in the field as a whole. For example, according to President and Owner of the beneficiary "has extraordinary ability and he is one of that small percentage who have risen to the very top of his field. He is known to all of us in the performing arts and recording field as one of the finest engineers and a trustworthy individual. His skills are

unmatched at live venues all over the country and [Ms. [redacted] would recommend him highly to [her] colleagues and associates." According to [redacted] owner of [redacted] "[s]ound design is a delicate field that only a few people can work in and even fewer master. [The beneficiary] is that rare few." Neither of these letters provide any specific examples of the beneficiary's contributions in the field of sound design and engineering that are either original or of major significance. These letters contain bare assertions of acclaim without specifically identifying contributions and providing specific examples of how those contributions rise to a level consistent with major significance in the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *See 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. Apr. 18, 1997). Similarly, USCIS need not accept primarily conclusory assertions. *See 1756, Inc. v. United States Att'y Gen.*, 745 F. Supp. 9, 17 (D.C. Dist. 1990).

Vague, solicited letters from colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009), *aff'd in part*, 596 F.3d 1115 (9th Cir. 2010).[3] The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as this decision has done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see Visinscaia*, 4 F. Supp. 3d at 134-35 (upholding our decision to give minimal weight to vague, solicited letters from colleagues or associates that do not provide details on contributions of major significance in the field).

Accordingly, the petitioner has not presented evidence of the beneficiary's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(v).

[3] In 2010, the *Kazarian* court reiterated that our conclusion that "letters from physics professors attesting to [the petitioner's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii).

On appeal, the petitioner asserts that the beneficiary meets this criterion because the beneficiary performs a critical role for his employer, the petitioner. The petitioner asserts that the beneficiary has "played a critical role in numerous significant events" during his current employment. The evidence in the record does not establish that the beneficiary meets this criterion.

The evidence shows that the petitioner has a distinguished reputation. The record includes a article published on stating that the petitioner had "established itself as the one place that every jazz musician had to play," and that it had a "dominant status" in jazz music. The record also includes a selection of published materials relating to well-known and critically acclaimed artists and bands who have performed at the petitioning venue. As such, the petitioner has shown that it is an organization or establishment that has a distinguished reputation.

Moreover, the beneficiary has submitted letters from Mr. noting the critical role that the beneficiary performs for the petitioner. According to Mr. February 2010 letter, the "position of sound engineer is a highly specialist position and that makes [the beneficiary] an integral part of the team here at the petitioning venue." According to Mr. second letter, the beneficiary plays a critical role at the petitioning venue, as the petitioner's "top Head Sound Engineer who is in charge of all aspects of the sound management and acoustics during [the petitioner's] live shows." Mr. further states that the beneficiary "is responsible for making crucial artistic decisions along with the complex technical adjustments for [the petitioner]" and that "[the petitioner] has] come to depend on [the beneficiary's] talents and expertise while servicing a large and demanding clientele."

Similarly, the record includes other reference letters that establish the critical role the beneficiary performs at the petitioning venue. According to a producer and manager at the beneficiary "plays a critical part in the recording projects and live jazz performances at the famous [petitioning venue]." According to Mr. "[t]he importance of the role [the beneficiary] plays at [the petitioning venue] in replicating the highest possible sound quality performance after performance is evident whether one simply enjoys a show as an attendee, or views it as one's own production, elevating the experience to a commendable musical event." Mr. further states that "[t]here is no doubt that what [the beneficiary] does is absolutely critical to the success of the venue and approval of the audience, as well as the musical presentation which sits at the core of the enterprise." According to the beneficiary "plays a critical role for [the petitioner] as he is responsible for all aspects of the sound at the club's live shows, ranging from tuning and preparation to the maintenance of sound quality during the show."

Notwithstanding our finding that the beneficiary has performed a critical role for the petitioner, the evidence in the record does not establish that the beneficiary has met this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires evidence of the beneficiary performing in a leading or critical role for organizations or establishments, in the plural, that have a

distinguished reputation. This requirement is consistent with the statutory requirement for extensive documentation. *See* section 203(b)(1)(A)(i) of the Act. While the petitioner has shown that the beneficiary performs a critical role for the petitioner, the petitioner has not shown that the beneficiary performs either a leading or critical role for another organization or establishment that has a distinguished reputation.

Accordingly, the petitioner not has presented evidence that the beneficiary has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(viii).

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix).

On appeal, the petitioner asserts that the beneficiary meets this criterion because he earns $47.50 an hour, and earned $49,912.84 in 2013 and $48,069.91 in 2012. The evidence in the record does not support the petitioner's assertion.

First, the beneficiary's annual earnings for 2012 and 2013 do not establish that he commanded a high salary or other significantly high remuneration for services, in relation to others in the field of sound design or engineering. The beneficiary's Internal Revenue Service (IRS) Form W-2 Wage and Statements show that he earned $49,912.84 in 2013 and $48,069.91 in 2012. For comparison purposes, the petitioner submitted statistics for May 2013 that the Bureau of Labor Statistics published on its website. According to these statistics, sound engineers at the 50th percentile earned $46,480 annually, those at the 75th percentile earned $72,860 annually, and those at the 90th percentile earned $101,840. The hourly wages were $22.35 (50th percentile), $35.03 (75th percentile), and $48.96 (90th percentile). The evidence therefore shows that in 2012 and 2013, the beneficiary earned slightly above those at the 50th percentile. This data is not indicative of the beneficiary commanding a high salary or other significantly high remuneration in his field.

Second, after the petitioner submitted its petition, in response to the director's request for evidence (RFE), the petitioner also submitted an employment agreement executed on January 23, 2014, indicating that the petitioner agreed to pay the beneficiary $47.50 per hour and to employ him to work 20-25 hours per week. This document postdates the filing of the petition and does not establish that the beneficiary met this criterion in October 2013, at the time of filing. It is well established that the petitioner must demonstrate eligibility for the visa petition at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The petitioner cannot secure a priority date based on the anticipation of a future event. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977); *Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Assoc. Comm'r 1998) (adopting *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition.") Moreover, although the $47.50 hourly wage falls between the hourly wage of sound engineers earning at the 75th and 90th percentile, the beneficiary's maximum annual earning of approximate $61,000, which is $47.50 × 25 hours × 52 weeks, would only put his annual earning

between those sound engineers at the 50th and 75th percentile. The petitioner has not shown that earning an annual compensation in the 50th to 75th percentile range is indicative of the beneficiary meeting this criterion. Furthermore, the record includes paystubs showing that from February 2014 to March 2014, the beneficiary earned a gross salary of $950 a week. Assuming the beneficiary's weekly salary remains constant, the beneficiary would earn approximately $49,400 annually, which is $950 × 52 weeks. This amount is slightly higher than those sound engineers earning at the 50th percentile and does not establish the beneficiary meets this criterion.

Finally, the petitioner has submitted additional online printouts relating to wages and compensation that sound engineers receive within certain geographic areas, including New York State and New York – New Jersey Metropolitan Division. At issue is the beneficiary's salary and compensation as compared to others in his field, not as compared to only those within a certain limited geographic area. Also, the figures provided in these online printouts relate only to average earnings of sound engineers. Earning more than the average sound engineer is not sufficient to show that the beneficiary meets this criterion.

Accordingly, the petitioner has not submitted evidence showing that the beneficiary has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. The petitioner has not met this criterion. *See* 8 C.F.R. § 204.5(h)(3)(ix).

C. Summary

The record includes other evidence not specifically discussed above, including but not limiting to contracts that the beneficiary or his parents signed to further his singing career and evidence relating to the beneficiary's educational and employment background. We have considered all the evidence in the record and conclude that the evidence does not pertain to the antecedent regulatory requirement of presenting at least three types of evidence in the field of endeavor, sound design and engineering, as required under the regulation at 8 C.F.R. § 204.5(h)(3).

For the reasons discussed above, we agree with the director that the petitioner has not submitted the requisite initial evidence, in this case, evidence that satisfies three of the ten regulatory criteria.

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 his or her field of endeavor.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a 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 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. As the petitioner has not done so, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of presenting evidence that satisfied the initial evidence requirements set forth at 8 C.F.R § 204.5(h)(3) and (4). *Kazarian*, 596 F.3d at 1122. Nevertheless, although we need not provide the type of final merits determination referenced in *Kazarian*, a review of the evidence in the aggregate supports a finding that the petitioner has not demonstrated the level of expertise required for the classification sought.[4]

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. 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.

[4] We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, we maintain 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* INA §§ 103(a)(1), 204(b); 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).