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FILE: WAC 04 215 53667 Office: CALIFORNIA SERVICE CENTER Date: NOV 07 2005

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

§ Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office 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 in athletics. The director determined the petitioner had not established the sustained national or international acclaim as an equestrian show jumper necessary to qualify for classification as an alien of extraordinary ability. Specifically, the director concluded that the petitioner's training achievements were not sufficiently related to his claim of acclaim as a competitor and that his competitor achievements did not meet at least three of the regulatory criteria.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate "sustained national or international acclaim" and present "extensive documentation" of his or her achievements. *Id.* 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 criteria that call for the submission of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). Through the submission of required initial evidence, at least three of the ten regulatory criteria must be satisfied for an alien to establish the sustained national or international acclaim under the regulation.

Counsel's appellate brief and separate "memorandum" focus on the appropriate standard of proof and admissibility of expert testimony rather than the regulatory criteria, to which counsel devotes a single paragraph. However, the petition must be filed with the initial evidence required by regulation. 8 C.F.R. § 103.2(b)(1). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2). Determinations regarding the standard of proof arise only after the petitioner submits the required initial evidence. For this reason, the AAO will first address the regulatory criteria and the submitted evidence and then turn to the standard of proof.

For the reasons discussed below, we find that counsel's assertions relating to the petitioner's eligibility and the standard of proof are not persuasive. While we find that the petitioner's training accomplishments are more relevant to his potential future services in the United States than his competition accomplishments, we concur with the director's ultimate decision as we find that the petitioner meets only one of the regulatory criteria, three of which are required to establish eligibility.

Statutory and Regulatory Evidentiary Requirements

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 to the United States will substantially benefit prospectively the United States.

(Emphasis added.) As used in this section, the term "extraordinary ability" means 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 specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

In his appellate brief, counsel asserts that the evidence should be considered cumulatively. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The evidence submitted to meet a given criterion must be indicative of or at least uniquely consistent with sustained national or international acclaim if that standard is to have any meaning. The cases cited by counsel are not persuasive authority that a "cumulative" evaluation of the evidence can overcome a failure to submit the required initial evidence to meet at least three criteria. Again, the unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2). As conceded by counsel, the cases he cites relate to hardship waivers and, as such, are not persuasive authority for a benefit that requires an alien to meet three separate regulatory criteria. In addition, the cases cited by counsel relate to the submission of subjective evidence, rather than the objective evidence required by 8 C.F.R. § 204.5(h)(3).¹

Field of Expertise

This petition seeks to classify the petitioner as an alien with extraordinary ability as an equestrian show jumper, although the evidence that the petitioner continues competing, as opposed to training others, is minimal. The local California media coverage of the petitioner indicates that his primary focus in the United States has been to export horses and train riders. The regulation at 8 C.F.R. § 204.5(h) requires the beneficiary to "continue work in the area of expertise." While a rider and a coach certainly share knowledge of show jumping, the two rely on very different sets of basic skills. Thus, competitive athletics and coaching are not the same area of expertise. This interpretation has been upheld in federal court. In *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

¹ Adjudication of hardship waivers requires a balance of discretionary favorable and unfavorable factors. *Matter of Jose Mendez-Morales*, 21 I&N Dec. 296, 299-300 (BIA 1996). In the present matter, the relevant statute, regulations and precedent decisions relating to the benefit sought require no such balancing test and specifically require the submission of objective evidence.

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. Given the petitioner's stated intent to return to competing, which is somewhat questionable given his lack of documented achievements in this area since 1988, we will address the petitioner's accomplishments as a competitor. We note, however, that the petitioner appears to have switched from competing to training after 1988. As such, he has had ample time to develop a reputation as a trainer. The longer the time since the petitioner switched from competing to training, the less relevance we accord to the petitioner's accomplishments as a competitor. Thus, we will give more weight to evidence reflecting on the petitioner's reputation as a trainer.

Analysis of the Evidence under the Regulatory Criteria (8 C.F.R. § 204.5(h)(3)(i)-(x))

The petitioner has submitted evidence that, he claims, meets the regulatory criteria at 8 C.F.R. § 204.5(h)(3), discussed below. It is instructive, however, prior to discussing the individual criteria, to list all of the evidence submitted in its entirety. Counsel's initial brief discusses the petitioner's reputation in general terms, but only addressed two of the regulatory criteria, rather than the required minimum of three: awards, 8 C.F.R. § 204.5(h)(3)(i), and published materials about the petitioner, 8 C.F.R. § 204.5(h)(3)(iii). The petitioner initially submitted (1) three reference letters, (2) newspaper and magazine articles (none of which are supported with the evidence required by the relevant regulation and requested by the director), (3) an undated award certificate for the Samsung International, (4) an unofficial list of awards with no attestation as to the source of the information in the list and (5) photographs. In response to the director's request for additional evidence, counsel asserted that the petitioner meets four criteria, including: contributions of major significance, 8 C.F.R. § 204.5(h)(3)(v), and critical or leading role for an entity with a distinguished reputation, 8 C.F.R. § 204.5(h)(3)(viii). The petitioner submitted four more reference letters. On appeal, counsel continues to assert that the petitioner meets the four criteria claimed previously and the petitioner submits two more reference letters and a document entitled "International Group for Qualifications in Training Horse and Rider." Thus, at the outset, we note that the petitioner relied entirely on a self-serving list of awards, a single undated award certificate, reference letters and evidence of media coverage that does not conform to the regulatory requirements.

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

The director concluded that the evidence established only that the petitioner received a second place award at one competition and won \$600 at another competition. The director concluded that the petitioner had not established that these accomplishments constituted receipt of lesser nationally or internationally recognized prizes or awards.

As stated above, the petitioner submits an unsubstantiated list of awards. The list does not contain an official seal or any indication as to the source of the information on the list. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, we cannot consider this list as evidence.

As primary evidence of awards, the petitioner submits the undated certificate verifying his second place finish at the Samsung International Show Jumping Competition. As secondary evidence, the petitioner submits several newspaper articles. An undated article in *Horse and Pony* pictures the petitioner competing at the Sydney Royal Easter Show and identifies the petitioner as a "leading prospect for the Olympic showjumping squad." Thus, this article must predate the petitioner's membership on that team in 1988. Regardless, the article does not report the petitioner's results. A May 1988 article in *Hoofs and Horns* gives the petitioner's score at "the Royal" as "4-8" with little explanation. Another undated article in an unidentified publication discusses the petitioner's participation in the International Festival of the Horse but does not report how the petitioner finished. As the article identifies the petitioner as a member of New Zealand's Olympic team, the article would appear to have been published around 1988. A third undated article in an unidentified publication reports the petitioner's win at the Samsung International Class and the Volvo World Cup events. The article states:

[The petitioner's] weekend wins follow a successful run in which he has been made a member of the New Zealand showjumping team and also a member of the New Zealand development squad traveling to Australia at Easter.

Thus, it would appear that this article predates the petitioner's Olympic participation in 1988. A fourth undated article in an unidentified publication reports the petitioner's first prize win at the Bay of Plenty showjumping championships where he won \$600. An undated article in *Horse and Pony* pictures the petitioner as riding "for the winning NZ Olympians" at the Qantas International Teams Trophy event. The most recent date referenced in the article is 1988. A May 1988 article in the *NZHS Bulletin* pictures the petitioner as a member of the New Zealand Kiwi Lager Show Jumping Team touring Australia. Page sixteen of the bulletin lists the petitioner as ranked 10th in the top twenty 1987/1988 Grand Prix winners after 58 rounds. The November 1987 issue of the same publication lists the petitioner as ranked third in the Kiwi Lager World Cup after two rounds. The petitioner is pictured "shortly after his unique double in the 2nd Kiwi Lager World Cup Round." Finally, an undated article in an unidentified publication reports the petitioner's 12th place finish in the 1988 Olympics. While it reports his hope to compete again in 1992, the record lacks evidence that he did so. A July 2004 article in *Riding*, a California publication, provides a summary of the petitioner's career. The article lists no competitions after 1988, referencing instead the petitioner's 10 years "with the coaching committee" after that year.

In addition to the above primary and secondary evidence, the petitioner submits reference letters. [REDACTED] equestrian coach of the U.S. Olympic team in 1996 and 2000, asserts that the petitioner "has won major Grand Prix world cup qualifying classes." While we do not question Mr. [REDACTED] credentials and expertise in the field, he does not identify any of the Grand Prix wins or provide any dates. [REDACTED] a former board member of U.S.A. Equestrian, asserts that the petitioner "has won many Grand Prix events and countless other prizes." Ms. [REDACTED] does not identify a single Grand Prix or any of the "other prizes" and fails to indicate when the petitioner won these prizes. [REDACTED] Chairman of the [REDACTED], asserts that the petitioner has won more than 50 Grand Prix jumping events. He does not indicate when the petitioner won those awards or identify even a few of the specific events. [REDACTED] an equestrian sports writer, asserts that after the 1988 Olympics, the petitioner has "gone on to success after success, and has been known on the international equestrian scene as the 'one to watch.'" Mr. [REDACTED] further asserts that the petitioner's "international competition track record has produced medal after medal." Mr. [REDACTED] does not identify any

post-1988 competitions or any specific medals. The record does not contain any photographs of medals or copies of award certificates beyond the single undated certificate discussed above.

The above evidence fails to demonstrate any awards or prizes after 1988, sixteen years prior to the filing of the petition in 2004. As stated above, the statute requires evidence of "sustained" acclaim. We cannot conclude that the record demonstrates the petitioner's sustained acclaim as a show jumper in 2004, when the petition was filed.

That said, it remains to consider whether the petitioner had sustained acclaim as a trainer in 2004, something not advanced by counsel or considered by the director but which we will consider in light of the evidence of record. We accept that the awards criterion is not readily applicable to coaches and trainers. Thus, we will accept evidence of the awards won by the alien's students while actively being coached by the alien as comparable evidence to meet this criterion. 8 C.F.R. § 204.5(h)(4).

Mr. ██████ asserts that the petitioner "trains riders and horses at the international level." Ms. ██████ asserts that the petitioner "trains international level horses and coaches top jumper riders, including young up and coming riders as well as top international level Grand Prix riders." Neither expert identifies any rider trained by the petitioner or the awards that student has won and when.

Mr. ██████ asserts that the petitioner has trained "both horses and riders at the international Grand Prix level, including his wife Toni who placed 6th in the Olympic qualifying event for the 2000 Sydney Olympic games." The *Riding* article references ██████ participation in the New Zealand Olympic qualifiers, but does not identify any awards she has won. An article in an unidentified publication notes that Mrs. ██████ "is recently back from a successful six-month campaign on the United States showjumping circuit." The article lists no specific prizes and does not specify that the petitioner was her trainer during the circuit or even that he accompanied her. A 2000 article in *NZ Horse and Pony*, written by Mrs. ██████ reports her grand prix win at a show for which she and the petitioner served as show directors. She does not identify the petitioner as her trainer at that time or previously.

Mr. ██████ asserts that the petitioner's New Zealand barn is "renowned for the horses and riders he trained." Mr. ██████ does not identify a single horse or rider or the awards or prizes they have won. On appeal, the petitioner submits a new letter from Mr. ██████ asserting that the petitioner is the only New Zealand trainer certified as "level four" by the "International Group for Qualifications." Mr. ██████ explains that level four trainers are certified to coach at the Olympic level. Mr. ██████ further asserts that the petitioner "trained Olympic level riders," but does not specifically state that the petitioner was a coach of an Olympian at the time the rider competed at that level or that the rider won any awards or prizes. We note that counsel concedes that the United States is not a member of this international organization, although the United States participates in the Olympics.

While we accord weight to Mr. ██████ assertions, the lack of primary evidence about the "International Group for Qualifications," such as recognition by the International Olympic Committee, prevents us from according significant weight to this evidence. Moreover, we note that the final page of the document from the International Group for Qualifications contains the preprinted phrase "Level 3" crossed out with the handwritten notations "International expert" and "Grade IV," rather than the claimed "Level 4." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence

pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Regardless, the record does not establish that any of the petitioner's students won lesser nationally or internationally recognized prizes or awards while under the petitioner's tutelage.

In light of the above, the evidence relating to this criterion does not establish the petitioner's sustained acclaim as a competitor or as a trainer.

(ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

While not asserted by counsel or considered by the director, we acknowledge that the petitioner was a member of New Zealand's 1988 Olympic team. While playing for a major league team, in and of itself, is insufficient to meet this criterion, 56 Fed. Reg. 60899 (November 29, 1991), we have accorded more weight to national teams, such as an Olympic team. Nevertheless, for the same reasons discussed above, we cannot consider a 1988 membership to be evidence of sustained acclaim 16 years later. While Mr. [REDACTED] discusses the petitioner's assistance with the selection of later New Zealand Olympic teams, Mr. [REDACTED] does not assert that the petitioner served as an official coach, manager or trainer for a subsequent Olympic team and the record does not contain evidence of the petitioner's Olympic coaching credentials.²

In light of the above, the evidence relating to this criterion does not establish the petitioner's sustained acclaim as a competitor or as a trainer.

(iii) Published materials 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.

As discussed above, much of the published material appears in unidentified publications and is undated. As quoted above, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires evidence of the "title, date, and author of the material." In his request for additional evidence, the director specifically requested the name of the publications. Moreover, despite the clear and unambiguous request by the director for evidence of the circulation of the publications that covered the petitioner, the petitioner failed to submit such evidence for any publication.³ The regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires evidence of published material "in professional or major trade publications or other major media." Thus, the petitioner was on notice that evidence of the significance of the publication is required. Moreover, as stated above, the director specifically requested such evidence. By itself, this failure to fully respond to the director's request for evidence is fatal to the petitioner's claims. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Even if the petitioner had submitted such evidence on appeal, which he did not, we would be unable to consider it. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

² Certification qualifying an individual to coach at the Olympic level is not evidence that the individual actually did so.

³ Failing to comply with the regulation and the director's specific request does not meet the preponderance of the evidence standard of proof.

First, we concur with the director that articles that merely mention the petitioner or report competition results are not primarily about the petitioner. That said, we acknowledge that some of the articles do focus on the petitioner. Nevertheless, most of those articles are undated and appear in unidentified publications. Of the dated material, nearly all of it dates from 1988. The two dated articles that postdate 1988 appear in *Riding* and *NZ Horse and Pony*. The cover of *Riding* indicates that it is a local California publication. Without evidence of a national circulation, we cannot conclude that the article constitutes published material in a professional or major trade publication or other major media. Moreover, the petitioner's wife is the author of the 2000 article in *NZ Horse and Pony*. As such, it carries less weight than independent journalistic coverage, not because of bias but because recognition from one's spouse is not evidence of national or international acclaim. Such acclaim necessarily implies recognition beyond one's family. Regardless, while the article mentions the petitioner as one of the show directors, the article is not "about" him, but about the show he directed. While the petitioner submitted a letter from an equestrian journalist, Mr. [REDACTED] does not assert that he has ever written an article about the petitioner in a publication with a national circulation.

In light of the above, the petitioner has not established that he meets this criterion as a competitor or as a trainer.

(iv) 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 letters discussed above attest to the petitioner's work as a trainer, although none of the authors identify any horses or riders other than the petitioner's wife. The published material confirms Mrs. [REDACTED]'s competitor status. As stated above, on appeal, the petitioner submits a new letter from Mr. [REDACTED] asserting that the petitioner is the only New Zealand trainer certified at "level four" by the International Group for Qualifications and, thus, certified to coach at the Olympic level. Mr. [REDACTED] further asserts that the petitioner "trained Olympic level riders," but does not specifically state that the petitioner was a coach of an Olympian at the time the rider competed at that level or that the rider won any awards or prizes. The record does not contain the petitioner's Olympic coaching credentials or other evidence that he was an official coach of an Olympic team.

Regardless, evaluating the work of one's students is inherent to the occupation of teacher, instructor, coach or trainer. Duties that are inherent to one's occupation are not indicative of or consistent with national or international acclaim.

In his initial letter, dated April 13, 2005, Mr. [REDACTED] asserts:

I have asked [the petitioner] to evaluate New Zealand equestrian riding in the U.S. Our 2004 Olympian team includes [REDACTED] and as an alternate, [REDACTED] both New Zealand citizens.

[The petitioner's] assessment of New Zealand citizen equestrians competing in the U.S. will be invaluable for deciding who will represent New Zealand at the 2008 Olympic games in China. There are at least four competitors whom he will judge, [REDACTED] and Shaun Wordley.

The director concluded that there was no evidence that the petitioner had already performed the scouting duties discussed by Mr. [REDACTED]. Counsel does not address this concern on appeal. We concur with the director that

any judging duties after the date of filing are not relevant to the petitioner's eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Moreover, Mr. ██████ fails to indicate how many such scouts are serving in such a role for New Zealand. Regardless, far more persuasive than an unofficial role as a consultant or scout for selecting competitors three years prior to the games themselves would be serving as a judge for a national or international competition. The record contains no evidence that the petitioner has judged a national or international-level competition.

In light of the above, the evidence relating to this criterion is not indicative of national or international acclaim.

(v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

The director concluded that merely competing at national and international events does not constitute a contribution of major significance to the field. The director failed to consider the petitioner's post 1988 activities other than to discount it as irrelevant.

Mr. ██████ asserts that the petitioner runs New Zealand's "leading horseshows." Ms. ██████ provides similar information, stating that the petitioner "has managed New Zealand's leading jumping competitions." On appeal, Mr. ██████ elaborates as follows:

[The petitioner] also organized and managed New Zealand's leading horse show "The Kawerau Christmas Festival." This event features competitors showing at international level events as well as others. It has World Cup and Olympic qualifying classes. Presenting such an event requires expertise in multiple areas. The show must be approved by the Federation Equestrian International (FEI) for World Cup qualification and by Equestrian Sport New Zealand to assure that the standards set by the International Olympic committee for the Olympic qualifying classes are met. The proper judges and course designers must be hired, sponsors arranged, and ground footing provided. This show became the richest jumper event in New Zealand and Australia, a position it maintained for several years.

The 2000 article in *NZ Horse and Pony* by the petitioner's wife reports on the event, naming the petitioner and his wife as show directors for the event run by the Whakatane Showjumping discipline. While serving as show director demonstrates the petitioner's managerial and organizational skills, we are not persuaded that it serves as evidence of a contribution of major significance to the field as a whole. The record lacks evidence that this particular show has influenced show jumping competitions nationwide.

More significantly, Mr. ██████ states that the petitioner "was instrumental in creating guidance for the New Zealand Coaching and Accreditation committee for choosing and accrediting up to the Olympic level." On appeal, Mr. ██████ discusses the petitioner's additional achievements as follows:

[The petitioner] conceived, developed, and coauthored the educational curriculum for our polytechnic college courses which prepare professional equestrians. This curriculum is used today by all equestrian colleges in New Zealand for training and assessing coaches for credits toward degrees recognized by the New Zealand qualification authority.

While we do not question Mr. [REDACTED] credibility or expertise and his letter would place any primary evidence of this achievement in context, the record once again lacks primary evidence of the beneficiary's achievements with respect to the guidance he created for use by the New Zealand Coaching and Accreditation Committee, or the curriculum that he developed for use in New Zealand's equestrian colleges. Specifically, the petitioner does not claim to have authored scholarly articles in the field. The record contains no reports, official guidance on accreditation, or articles authored by the petitioner or crediting him in any way. The record lacks course curricula from a variety of New Zealand schools listing materials authored by the petitioner.⁴

In light of the above, the record lacks evidence that the petitioner has made a contribution of major significance, which we interpret to mean one that has impacted or influenced the field as a whole, as a competitor or as a trainer.

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

Counsel does not contest the director's conclusion that the record lacks evidence relating to this criterion and we concur with the director that it does not.

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The director concluded that this criterion does not apply to athletes. On appeal, counsel asserts that this criterion is a "related criterion." Counsel does not elaborate on that assertion or provide any authority for considering evidence under "related criteria." We concur with the director. It is evident from the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) that this criterion applies to the visual arts. Moreover, it is inherent to the field of competitive show jumping to compete at shows. The record does not reflect that the petitioner performed at a noncompetitive exhibition designed to showcase the top jumpers in the field. Moreover, the record lacks evidence that the petitioner has competed since 1988. As such, even if we accepted horse showcasing as comparable evidence pursuant to 8 C.F.R. § 204.5(h)(4), which allows comparable evidence where a criterion is not readily applicable to the alien's field, the evidence relating to this criterion is not indicative of or consistent with sustained national or international acclaim in 2004. Thus, the petitioner has not established that he meets this criterion.

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

In response to the request for additional evidence, counsel asserted that the petitioner meets this criterion through "running his own stable and running the largest horse show in New Zealand." On appeal, counsel further asserts that the petitioner meets this criterion by "advising the New Zealand Olympic Committee." The director concluded that the petitioner's show jumping activities could not serve to meet this criterion and that his

⁴ The significance of influencing training within New Zealand is also questionable. While Mr. [REDACTED] asserts that New Zealand is "known as a place where many of the best international riders are developed," Mr. [REDACTED] asserts on appeal that the petitioner, in 1988, was the last New Zealand Olympian equestrian based within New Zealand, suggesting that the training of New Zealand's top equestrians is occurring outside of New Zealand.

training and event organization responsibilities were related to his "own business ventures" and not related to his ability as a jumper.

As stated above, the record is more persuasive that the petitioner intends to continue his work as a trainer than that he intends to return to show jumping. As such, we withdraw the director's finding that the petitioner's training responsibilities are not relevant to the petition. We do not contest that the petitioner plays a leading or critical role for his stable in the United States. The media coverage of the petitioner's stable, however, is local. The record lacks sufficient evidence that it enjoys a nationally or internationally distinguished reputation as a training facility, as opposed to horse exporting.

More significantly, Mr. ██████'s assertion that the petitioner organized a Christmas horse festival is supported by the 2000 report on that festival by the petitioner's wife in *NZ Horse and Pony*. We accept that show director is a leading or critical role for an individual show. We also accept Mr. ██████'s testimony as to the significance of this festival. While the petitioner's claim would have been bolstered by evidence of the number of such competitions in New Zealand and an official ranking of the competitions, we find that the petitioner has minimally established that he meets this single criterion.

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

Counsel does not contest the director's conclusion that the petitioner has not established that his remuneration is significantly high in relation to others in the field and we concur with the director.

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

Counsel does not contest the director's conclusion that this criterion is not relevant to the petitioner's field and we concur with the director.

Upon review, the AAO finds that the petitioner meets only one of the regulatory criteria, three of which are required to establish eligibility. 8 C.F.R. § 204.5(h)(3). In addition, the AAO finds that the petitioner failed to fully respond to the director's request for material evidence, precluding a material line of inquiry, which constitutes an additional ground for denying the petition. 8 C.F.R. § 103.2(b)(14).

Standard of Proof and Evidentiary Matters

I. Standard of Proof

On appeal, counsel asserts that the director applied the wrong standard of proof. Counsel asserts that the correct standard is "preponderance of the evidence," which requires only that eligibility be "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). Counsel relies on several court cases, both administrative and federal, for the proposition that the director erred in finding that the witness letters submitted did not establish the petitioner's eligibility. As will be explained below, counsel confuses standard of proof issues with the statutory and regulatory evidence requirements. Counsel's second legal analysis involves the admissibility of expert testimony. As will be discussed below, the issue is not whether the expert testimony in

this matter is admissible, but whether it carries sufficient weight, given the limited nature of the remaining evidence, to establish that the petitioner meets three criteria.

Section 291 of the Act provides:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act, and, if an alien, that he is entitled to the nonimmigrant; immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be.

The law goes on to assert that the evidence must establish eligibility "to the satisfaction" of the adjudicating officer. This burden is confirmed in *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965) and *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). We acknowledge that the director's decision states that the evidence must "clearly demonstrate" the petitioner's eligibility. While the director used the phrase "clearly demonstrate" instead of "preponderance of the evidence," the director appears to be using the common usage of the word "clearly" as opposed to articulating a higher standard of proof, such as "clear and convincing." The AAO finds that the director's use of the word "clearly demonstrate" was innocent of any intent to hold the petitioner to a higher standard of proof and constitutes harmless error, at worst. Regardless, for the reasons discussed below, we do not find that the petitioner has established his eligibility by a preponderance of the evidence. As will be elaborated below, the petitioner has failed to comply with the statutory and regulatory evidentiary requirements. Thus, whatever weight we accord to the reference letters, the petitioner has not submitted the required documentation for the classification sought.

The cases cited by counsel regarding the proper standard of proof do not address the evidentiary requirements for the classification sought. For example, *Matter of E-M-*, 20 I&N at 77, involves an application for temporary resident status under Section 245A of the Act. While the standard of proof for such cases is also preponderance of the evidence, we note that the decision focused on the evidentiary requirements for the benefit sought. The decision specifically notes that affidavits are an accepted form of documentation for the benefit sought, provided they meet the regulatory requirements for an affidavit. *Matter of E-M-*, 22 I&N Dec. at 80-81 (citing 8 C.F.R. § 245a.2(d)(3)). As noted in the decision, letters that do not meet regulatory requirements for an "affidavit" do not need to be afforded as much evidentiary weight, but should be considered a "relevant document" pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). *Id.* at 81. The decision also notes that the alien in that case presented a passport, evidence of entry into the United States prior to the required date and relevant official records reflected no absences. *Id.* at 83. Thus, the petitioner in that case had presented persuasive evidence in addition to the affidavits.

Similarly, *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), another case cited by counsel, involved the withholding of removal based on a subjective determination that the alien has a "credible fear of persecution." In that case, the regulatory requirements specifically accept the credibility of personal testimony, even if not corroborated. The *Matter of J-E-* decision states:

The question before us is whether the respondent has established his eligibility for protection under Article 3 of the Convention. The respondent bears the burden of proving that it is more likely than not that he will be tortured if returned to Haiti. *The respondent's testimony, if*

credible, may be sufficient to sustain the burden of proof without corroboration. See 8 C.F.R. § 208.16(c)(2).

Id. (Emphasis added.) Similarly, the court in *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985) noted that if one's own testimony of a personal threat is insufficient, no one could establish eligibility as a political refugee.

Unlike the above cited cases, the benefit sought in the present matter is not the type for which documentation is typically unavailable and the statute specifically requires "extensive documentation" to establish eligibility. See section 203(b)(1)(A)(i) of the Act. The regulations governing the present immigrant visa determination have no requirement mandating that CIS specifically accept the credibility of personal testimony, even if not corroborated. The regulations provide that eligibility may be established through a one-time achievement or through documentation meeting at least three of ten criteria. The commentary for the proposed regulations implementing this statute provide that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (1991). The criteria require specific documentation beyond mere testimony, such as awards, published material about the alien, and box office receipts. As an example of the specific nature of the documentation required, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires the "title, date and author" of the published material about the alien. The only criterion for which letters are specifically relevant is the criterion relating to the alien's leading or critical role for an entity with a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii). The first issue is the role the alien was hired to fill. According to 8 C.F.R. § 204.5(g) letters from employers are acceptable evidence of experience.⁵ In fact, as discussed below, we find that the petitioner has satisfied this criterion. While letters may place the evidence for other criteria in context, they cannot serve as primary evidence of the achievement required by the criterion. Further, while the regulation at 8 C.F.R. § 204.5(h)(4) permits "comparable evidence" where the ten criteria do not "readily apply" to the alien's occupation, the regulation neither states nor implies that general affidavits attesting to the alien's standing in the field are "comparable" to the strict documentation requirements in the regulations setting forth the ten criteria.

We further note that 8 C.F.R. § 103.2(b)(2) provides:

Submitting secondary evidence and affidavits. (i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

⁵ We note, however, that an alien would also need to submit objective evidence of the reputation of the employer to satisfy the specific requirement of 8 C.F.R. § 204.5(h)(3)(viii).

We find that where the regulations require specific, objective evidence of achievements, such as awards, the primary evidence of such awards would be copies of the awards themselves. Secondary evidence might be newspaper reports of the competition results. Affidavits attesting to awards, therefore, would need to “overcome the unavailability of both primary and secondary evidence.” The petitioner has not demonstrated that the required evidence is unavailable or cannot be obtained, and therefore the petitioner is presumed ineligible pursuant to 8 C.F.R. § 103.2(b)(2).

II. Expert Testimony

The second category of cases cited by counsel relate to the admissibility of expert testimony. Counsel asserts that expert testimony should be sufficient to establish the petitioner's eligibility as an alien of extraordinary ability under the preponderance of the evidence standard of proof, and that “the regulations do not require that visa petitions be supported by independent corroborative evidence.”

As acknowledged by counsel, even if expert testimony is admitted, a second issue arises as to how much weight to afford reference letters. Counsel's supplemental Memorandum at page 9. Counsel cites *Hong Kong T.V. Video Program, Inc. v. Ilchert*, 685 F. Supp. 712 (N.D. Calif. 1988), where the court overturned a finding by legacy Immigration and Naturalization Service (legacy INS) that an expert's opinion (as to whether the alien had the equivalent of an MBA) was insufficiently explained.

In addition, counsel cites to *Kival & Vagil v. Gonzales*, 418 F. 3d 798 (7th Cir. 2005), where the court remanded an asylum case for consideration of expert testimony from a Mormon expert, previously excluded by the immigration judge in favor of U.S. State Department reports. The court found that the expert, while not having traveled to the Ukraine for 12 years, had sufficient contacts in the Ukraine to qualify him as an expert. *Id.* The facts in *Furstenberg v. U.S.*, 595 F. 2d 603 (U.S. Ct. Cl. 1979), involved the admission of testimony regarding the fair market value of a painting in a proceeding to recover income taxes.

All of the cases cited by counsel involve expert testimony. We note that “expert testimony,” also known as “expert evidence,” is evidence “about a scientific technical, or professional issue given by a person qualified to testify because of familiarity with the subject or special training in the field.” Black's Law Dictionary 577-578 (7th ed. 1999). For example, as in the above cases cited by counsel, expert testimony can help the fact finder reach an opinion as to the fair market value of a painting or the equivalence of an alien's experience and education. Whether the painting exists or whether the alien has the experience or education claimed to be equivalent to a specific degree is established by primary evidence, not the expert testimony.

Had the petitioner in this matter submitted primary evidence relating to the regulatory criteria, such as copies of his grand prix awards, we would give substantial weight to the references who attest to the significance of the competitions. Similarly, if the petitioner had provided the dates and publications for all of the published material submitted, we would give substantial weight to media experts testifying as to whether such publications constitute “major media.” Finally, had the petitioner provided evidence of his income, we would give substantial weight to experts testifying as to whether the income constitutes comparable income with those at the top of the field.⁶ As will be discussed in more detail below, however, we cannot give the expert letters as

⁶ We acknowledge that the petitioner does not claim to meet the remuneration criterion set forth at 8 C.F.R. § 204.5(h)(3)(ix), but merely provide this example to show how expert testimony can assist in the adjudication of a petition seeking eligibility under this exclusive classification.

much weight as counsel requests because the record lacks the necessary primary evidence required by the regulations. We note that in *Matter of Price*, 20 I&N Dec. 953 (Assoc. Comm. 1994), the petition was not only supported by impressive reference letters, but an "Official Statistics Profile" and "numerous articles" in national publications.

Finally, counsel's concern that Citizenship and Immigration Services views all reference letters from an alien's immediate circle of colleagues as biased is not persuasive. We do not presume that an alien's close colleagues are biased or insincere. Rather, the relationship of the letter's author to the petitioner has bearing on the weight that CIS accords the expert opinion. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony in visa proceedings. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

In the present matter, the statutory requirement that an alien have "sustained national or international acclaim" necessitates evidence of recognition beyond the alien's immediate circle of colleagues. While such evidence need not be in the form of letters from independent experts (the regulation at 8 C.F.R. § 204.5(h)(3) provides ten types of evidence), the opinions of close colleagues alone cannot form the cornerstone of a successful claim of national or international acclaim. Regardless, we acknowledge that several of the witnesses are independent of the petitioner. The content of their statements and how they became aware of the petitioner's reputation, however, are also important considerations. For example, vague statements attesting to an alien's standing and skill are less persuasive than specific examples of achievements. Similarly, experts who were previously aware of the alien's accomplishments through his reputation are more persuasive than experts who were previously unaware of the alien and are providing an opinion based on a review of the alien's credentials as provided by the alien.

As previously discussed, the AAO finds that claims made in the submitted expert opinions are unsupported by the initial evidence that is specifically required by the regulations, despite the director's request for evidence. 8 C.F.R. § 204.5(h)(3). Where the regulations require specific, objective evidence in support of a petition, the petitioner's burden of proof is not satisfied by submitting unsupported expert testimony. 8 C.F.R. § 103.2(b)(1). Accordingly, the AAO gives the submitted letters less weight and finds them unpersuasive on the whole. *Matter of Caron International*, 19 I&N Dec. at 791.

Conclusion

The documentation submitted in support of a claim of extraordinary ability must demonstrate by a preponderance of the evidence 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.

Review of the record, however, does not establish that the petitioner has distinguished himself as a show jumper (in the last sixteen years preceding the filing of this petition) or trainer to such an extent that he may be said to have achieved *sustained* national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner gained some acclaim as a jumper up until 1988, sixteen years before filing the petition, and that he shows talent as a trainer, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

Finally, the AAO notes that the petitioner is currently in the United States as a P-1 nonimmigrant, a visa classification that requires the alien to perform as an athlete, either individually or as part of a team, at an internationally recognized level of performance, and that the alien seek to enter the United States "temporarily and solely for the purpose of performing as such an athlete." See section 214(c)(4)(A) of the Act, 8 U.S.C. § 1184(c)(4)(A). The current record is devoid of any evidence to indicate that the petitioner is performing as an athlete at an internationally recognized level or that he is in the United States "temporarily and solely" for the purpose of performing as such an athlete.

While CIS approved at least one P-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude CIS from denying an immigrant visa petition based on a different, if similarly phrased standard. It must be noted that many I-140 immigrant petitions are denied after CIS 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 CIS 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, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

Moreover, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. Due to the lack of required initial evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant visa petition.

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. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. 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 had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

The director is instructed to review the previous nonimmigrant approval for possible revocation, pursuant to 8 C.F.R. § 214.2(p)(10)(iii).

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.