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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: SEP 22 2006
SRC 05 059 52224

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.

Robert P. Wiemann, 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 on appeal. The appeal will be dismissed.

The petitioner seeks classification as an “alien of extraordinary ability” in athletics, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel asserts that the director’s decision is inconsistent with the approval of a nonimmigrant petition filed in behalf of the beneficiary under a similar category. Counsel further asserts that approval of the petition would not displace any U.S. workers because there are no U.S. workers seeking employment in the beneficiary’s area of expertise. Thus, counsel concludes, the labor certification process is unnecessary. Finally, counsel addresses the specific bases of denial.

We will address counsel’s assertions regarding the beneficiary’s nonimmigrant status in detail at the end of this decision. In brief, we do not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each case must be decided on a case-by-case basis on the evidence of record.

Counsel’s assertions regarding the absence of U.S. workers seeking employment in the beneficiary’s area of expertise are irrelevant. First, while the classification sought does not require the petitioner to go through the labor certification process, the applicability of that process is not an issue under the law or regulations. Regardless of whether U.S. workers are seeking employment in the alien’s field, the alien must meet the statutory standard of national or international acclaim. In fact, the issue of available U.S. workers is never an issue before Citizenship and Immigration Services (CIS). Rather, the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dep’t of Transp.* 22 I&N Dec. 215, 221 (Comm. 1998). In fact, the assertion that the beneficiary would not displace any U.S. workers is an argument for utilizing the labor certification process. *Id.* at 220-221. We will consider counsel’s specific assertions regarding the beneficiary’s eligibility under the pertinent regulatory criteria below.

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.

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 the beneficiary has sustained national or international acclaim at the very top level.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as a "horse trainer and competitor." The petitioner relies almost exclusively on reference letters, a membership card in a non-exclusive professional association, an article authored by the beneficiary and photographs. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim of sustained national or international acclaim. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS 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; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated. *Id.* at 795; *See also 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)).

We note at the outset that vague letters containing general praise are less persuasive than letters that specifically explain the significance of the primary evidence submitted as it relates to the regulatory criteria. Ultimately, evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce unsolicited materials reflecting that acclaim.

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 petitioner has submitted evidence that is claimed to meet the following criteria.¹

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

Initially, the petitioner submitted several reference letters, four of which assert generally that the beneficiary had won many championships at the national and international level. While one reference names locations and another discusses "Colombian awards," none of them identify a single specific competition where the horse the beneficiary rode won. Other similarly worded letters assert only that the beneficiary is "one of the few trainers capable of training and riding horses in the Champion and Champion of Champion events." These letters do not reference any awards or prizes won by the beneficiary or his horse at such events. The petitioner also submitted photographs that appear to be of the beneficiary riding horses with attached ribbons. Photographs are not primary evidence of awards or their significance.

In response to the director's request for additional evidence, the petitioner submitted a letter from [REDACTED] Treasurer and Acting President of the American Trote y Trocha Association, asserting that in April 2004 the beneficiary rode [REDACTED] to a first place win in his class at a Grand Championship "among 18 other participants." The entire competition drew 53 participants from the United States, Dominican Republic and Colombia. The petitioner also submitted a letter from [REDACTED] President of Asdepasso, asserting that the beneficiary, riding [REDACTED], won first place in his class and the Grand Championship at [REDACTED] 2005 in July of that year. Eighty-five horses competed in the event. Internet materials provided by the petitioner indicate that Agroexpo "is the greatest business generator in [the] Latin America agricultural sector." We note that the petition was filed on December 27, 2004. Thus, only the American Trote y Trocha Association event occurred prior to the filing of the petition. Moreover, while much of the evidence discusses [REDACTED] won in the trot and gallop class.

The director concluded that the beneficiary meets this criterion. We cannot agree. While we concur with counsel that awards won by horses ridden by the beneficiary can serve as comparable evidence to meet this criterion, the record contains no primary or secondary evidence of such awards. Specifically, primary evidence would be copies of the awards themselves while secondary evidence might include contemporaneous news coverage of the awards. The nonexistence or unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2). Only where the petitioner has demonstrated that primary evidence is unavailable or does not exist can the petitioner rely on secondary evidence and only when secondary evidence is similarly unavailable or does not exist may the petitioner rely on affidavits. Thus, the petitioner has not demonstrated that the beneficiary or a horse he presented has ever won at any event.

¹ The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

Even if we accepted the more specific letters submitted in response to the director's request for additional evidence, the petitioner must demonstrate the beneficiary's eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). As stated above, one of the beneficiary's two awards referenced in response to the request for additional evidence occurred after the date of filing. While Ms. [REDACTED] asserts that horses from more than one country competed at the American Trote y Trocha Association event, it is insufficient that the competitors were from more than one country. The regulation requires that the award or prize be nationally or internationally *recognized*. The record lacks evidence that the trade journals covering [REDACTED] horses or other major media report on the results of the American Trote y Trocha Association event or comparable evidence of the event's national or international recognition. We note that the Confederation of [REDACTED] oversees the major competitions for these horses, including the Mundial, or World Cup. The record lacks evidence that CONFEPASO oversees the American Trote y Trocha Association event.

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

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.

Counsel does not challenge the director's conclusion that the petitioner had not established that the Paso Fino Horse Association requires outstanding achievements of its members and we concur with the director.

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

The director concluded that the petitioner had not demonstrated the impact of an article authored by the beneficiary. On appeal, counsel references two letters written in support of the petition.

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. To be considered a contribution of major significance, the contribution must be one that has impacted or influenced the field as a whole. Significantly, the regulations include a separate criterion for awards and prizes, 8 C.F.R. § 204.5(h)(3)(i). To conclude that awards and prizes are also contributions of major significance would render meaningless the statutory requirement for extensive evidence and the regulatory requirement that an alien meet at least three criteria.

We concur with the director that, regardless of the circulation of the magazine that published the beneficiary's article, the petitioner has not demonstrated that the article has had sufficient impact in the field to be considered a contribution of major significance. In addition to the article, the petitioner

initially submitted reference letters praising the beneficiary's abilities as a horse trainer and competitor, his character and his professionalism. A former employer asserts that the beneficiary performed his job duties in a "satisfactory manner" and made "great progress" with the horses he trained. These vague and general letters cannot establish that the beneficiary has made specific original contributions of major significance to the field.

In response to the director's request for additional evidence, the petitioner submitted new letters. [REDACTED] owner of El Paso Ranch, asserts that when the beneficiary began training horses at Los Amigos Ranch, the horses at that ranch began to win important competitions for the first time in the ranch's lengthy history. [REDACTED] an experienced trainer, asserts that the beneficiary acquired [REDACTED] cheaply for the petitioner because the horse was not viewed as having potential, but the beneficiary transformed the horse into a champion. Mr. [REDACTED] further asserts that [REDACTED] has returned to Colombia and won nine grand champions, three short of the number required for "Out of Contest" status.

The record does not corroborate the assertions of Mr. [REDACTED] or Mr. [REDACTED]. Specifically, the record does not contain awards or prizes issued to horses owned by [REDACTED] or confirmation from the owners of that ranch that they previously had not produced champion horses. The record also lacks evidence of [REDACTED] championships. Moreover, [REDACTED] does not appear to have approached "Out of Contest" status prior to the date of filing the petition.

Finally [REDACTED] asserts that based on the beneficiary's advice, he purchased a mare for a low price and transformed her into a champion in 2003. We note that, according to the record, Mr. [REDACTED] has been exhibiting championship horses since at least 1999. As such, it is not clear that the beneficiary has played a significant role in Mr. [REDACTED] success.

Assuming the above assertions to be true, the beneficiary is a successful trainer. Simply succeeding in training horses capable of competing successfully, the job the petitioner was hired to do, is not necessarily an *original* contribution of *major significance*. The letters in the record, without additional corroborating materials, cannot establish the beneficiary's impact in the field. Thus, the petitioner has not established that the beneficiary meets this criterion.

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

In response to the director's request for additional evidence, the petitioner submitted an "Opinion" letter by the beneficiary published in *Fedequinas*. The letter, entitled "The Trocha is Something Else," differentiates between "the trocha" and a trot. The beneficiary concludes by refuting the idea that other horses with a diagonal gate can pass over to the lateral gate of [REDACTED]. This observation appears aimed at horse fans, as opposed to horse trainers who presumably are aware of the differences in gates. The petitioner asserted that the magazine has an international circulation. The director concluded that the record did not support the assertion that the magazine has an international circulation.

On appeal, the petitioner submits evidence that *Fedequinas* is circulated in Colombia, Puerto Rico and elsewhere in the United States, the Dominican Republic and Venezuela. The circulation in Colombia is 5,000. Counsel acknowledges on appeal that the article is not “scholarly” but asserts that scholarly articles do not exist in the beneficiary’s field. Counsel requests that the article be considered as comparable evidence as it is a professional article addressed to other trainers or breeders.

The regulation at 8 C.F.R. § 204.5(h)(4) permits the submission of “comparable evidence” where a criterion is not readily applicable to the alien’s field. It is not self-evident that scholarly articles on athletics and even horse breeding or training do not exist such that we will accept counsel’s assertion on this matter without additional corroboration. Moreover, we are not persuaded that the article is comparable to a scholarly article. As stated above, the article is listed as an “opinion” and appears to discuss very basic elements of diagonal verses lateral gaits.

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

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

The director concluded that no evidence was submitted to meet this criterion. On appeal, counsel references the assertions about [REDACTED] and concludes that they establish the beneficiary’s leading and critical role for the petitioner. Counsel then asserts that the petitioner now enjoys a distinguished reputation based on the beneficiary’s training of [REDACTED] for the petitioner.

At issue are the role the beneficiary was hired to fill and the reputation of the entity that hired him. The petitioner’s business is the breeding and exhibition in competition of [REDACTED] and Trot and Gallop horses. [REDACTED] competes as a trot and gallop horse. The record lacks evidence regarding the number of trainers the petitioner employs or an organizational chart. Thus, we cannot determine whether the beneficiary’s position as a trainer and competitor sets him apart from other employees working for the petitioner. Even if we were to consider the beneficiary’s accomplishments for the petitioner, the record lacks evidence that [REDACTED] is the petitioner’s most successful horse. As stated above, the petitioner breeds and shows both Paso Finos and Trot and Gallop horses. Regarding the petitioner’s reputation, the record lacks evidence that the petitioner has been featured in trade journals or otherwise recognized nationally for breeding and showing horses.

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

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

Review of the record, however, does not establish that the petitioner has distinguished himself as a horse trainer and competitor 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 shows talent as a horse trainer and competitor, 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.

As stated above, counsel asserts that the director's decision is inconsistent with a prior approval by the same Service Center of a nonimmigrant visa petition in behalf of the beneficiary. While CIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, 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 beneficiary'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(o)(8).

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.