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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
LIN 03 268 50150

Office: NEBRASKA SERVICE CENTER

Date: APR 30 2007

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
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 and questioned the petitioner's job opportunities.

On appeal, counsel submits a brief and additional evidence. Counsel has not overcome the director's valid bases for denial. Ultimately, the extremely small number of professional gladiators and the lack of amateur gladiators somewhat diminishes the significance of the petitioner's apparent rank among that group. We are not persuaded that the very fact that the petitioner qualifies for employment in her field creates a presumption of national or international acclaim. Regardless, while counsel asserts that the witness letter in the record is submitted to explain the evidence rather than in lieu of evidence, we concur with the director that the record lacks the primary initial required evidence for petitions filed pursuant to section 203(b) of the Act as set forth in the regulation at 8 C.F.R. § 204.5(h)(3).

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.

Citizenship and Immigration Services (CIS) 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 56 Fed. Reg. 60897, 60898-9 (November 29, 1991). 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 she has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a “gladiator/coach.” The regulation at 8 C.F.R. § 204.5(h) requires the petitioner to “continue work in the area of expertise.” The petitioner intends to work as a gladiator and coach in the United States. Most of the documentation submitted relates to the petitioner’s role as a gladiator on the South African television game show, “MSN Gladiators.” While that show grew out of the popularity of American Gladiators, the petitioner has not established that American Gladiators continues to produce new episodes for broadcast. While a letter submitted on appeal references American Gladiator fitness challenges and sporting events, the record lacks evidence that these events mimic the television show’s format. Without evidence that employment opportunities exist in the United States for performing gladiators, we cannot conclude that the petitioner intends to seek employment in the United States as a performing gladiator.

The petitioner also expresses her interest in training gladiators and hosting American Gladiator events. While an athlete/performer and a trainer certainly share knowledge of fitness, the two rely on very different sets of basic skills. Thus, competitive athletics and training 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:

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. Thus, the petitioner must establish that she enjoys national or international acclaim as a trainer. For the reasons discussed below, the petitioner has not demonstrated sustained national or international acclaim as either a gladiator or a trainer as defined in the pertinent regulations.

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.

At the outset, we note that the petitioner relies heavily on a letter from a fellow gladiator, ██████████. Ms. ██████████ reviews the regulatory criteria and, with little discussion, concludes that the petitioner meets six of them. The director concluded that the letter could not support the petitioner's eligibility. On appeal, counsel asserts that Ms. ██████████ "established her expertise in her affidavit and testified that she considered the following evidence to meet the criteria." Counsel further asserts that as an expert, Ms. ██████████ has the knowledge to judge the significance of the petitioner's accomplishments.

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, 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 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, while we do not question Ms. ██████████ knowledge of the gladiator industry or her sincerity, it remains that she was the petitioner's fellow cast member and her opinion is highly subjective. 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 only unsolicited materials submitted in this matter relate to a single criterion, published materials about the petitioner, and are not persuasive for the reasons discussed below.

The petitioner has submitted evidence that, she claims, meets 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.

Ms. ██████████ asserts that in 2000, the petitioner won Best Achieving Female Gladiator of the year in South Africa. Ms. ██████████ further asserts that the beneficiary won 91 percent of her competitions and was the second highest ranked female member on the team.

As noted by the director, the record does not contain the actual award issued to the petitioner in 2000 and none of the publicity materials discuss such an award. On appeal, counsel asserts that Ms. ██████████ letter was submitted to assist the director in understanding the evidence submitted, not in lieu of it. Counsel acknowledges the director's conclusion that the 2000 award was not submitted but fails to rebut this conclusion or submit the award itself.

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

The regulation at 8 C.F.R. § 103.2(b)(2) provides that the non-existence or unavailability of primary evidence creates a presumption of ineligibility and that affidavits are only acceptable where the petitioner establishes that both primary and secondary evidence are unavailable. In this matter, the petitioner has not demonstrated that the 2000 award itself or media coverage of the award is unavailable. Thus, we cannot accept Ms. [REDACTED]'s affidavit as evidence that the petitioner actually won this award. Ms. [REDACTED]'s testimony as to the significance of the award is immaterial without the award itself.

Further, it is not clear the significance of the beneficiary's win percentage or ranking. The record of proceeding includes the rules for the gladiator television events, which suggest that the program was a type of game show where contestants or "contenders" compete for points with the "gladiators" serving mostly as obstacles. The television events described do not suggest that gladiators typically compete against other gladiators as part of the regular series, although the record contains evidence of at least one publicity event where gladiators from the South African show competed against the cast of the British show. The record contains no evidence that, as with other sports, gladiators regularly compete against other gladiators for recognized prizes. To illustrate the difference between the petitioner's field and other professional sports, soccer teams play in regular seasons against other teams in tournaments of ever increasing prestige, with the World Cup as the ultimate prize. The ultimate purpose of a gladiator, however, is to thwart the efforts of "contenders" to win points as part of a physical game show. Any competition between the casts of different gladiator shows is secondary.

In response to the director's request for additional evidence, [REDACTED]s, founder of [REDACTED], asserts that the petitioner meets this criterion because she completed the company's obstacle course faster than any other woman. The record lacks evidence that [REDACTED] obstacle course is nationally recognized such that completing it in the fastest time is significant. As the course was designed by the company to evaluate potential trainers, it is not clear that anyone other than trainers or possibly clients have even run it. Regardless, it does not appear that the petitioner was honored with a nationally recognized award or prize for this "record."

In light of the above, the petitioner has not established that she 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 has consistently asserted that the petitioner meets this criterion through being cast on South Africa's MTN Gladiators television show. Ms. [REDACTED] asserts that 400 athletes compete for two to three open slots annually, that there are only approximately 100 gladiators in the world, averaging about 20 per nation. Finally, Ms. [REDACTED] asserts that the petitioner remained in the cast for three and a half years while only 25 percent of the gladiators in South Africa "make it for consecutive or numerous years."

The director concluded that the cast of MTN Gladiators was not an association that required outstanding achievements of its members. On appeal, counsel asserts that this office has previously concluded that national and Olympic team membership can serve as comparable evidence to meet this criterion.

We are not persuaded that being cast in MTN Gladiators is comparable to national or Olympic team membership. National and Olympic teams are fielded from the thousands of athletes competing in the same sport who have proven themselves in that sport through competition in college, in national competitions or for regional teams. When competing for national or Olympic teams, they must reach specified benchmarks in the trials. Most national and Olympic team members have been training *in their specific sport* since early childhood. In contrast, the petitioner has not established that thousands of gladiators compete in lesser gladiator leagues with the top gladiators in these lesser leagues earning the right to compete for the television show. As stated above, Ms. [REDACTED] indicates that there are only 100 gladiators worldwide, all of whom have been cast in a version of the television show. In fact, the record does not even establish that those who try out for the cast must have experience in the gladiator events that are part of the television show.

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

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.

The director concluded that the published material was generally not "about" the petitioner, providing three examples. The director further concluded that the petitioner had not established that any of the publications submitted have a national or international circulation. Finally, the director concluded that an article in *MTN Gladiators Magazine* was promotional rather than independent.

On appeal, counsel asserts that the director dismissed "the numerous articles submitted in newspapers, programs and magazines with reference to two." Counsel asserts that the director's conclusion regarding *MTN Gladiators Magazine* was "beyond the scope of analysis." Finally, counsel notes that Ms. [REDACTED], "an expert in the field, determined that the articles in Gladiator Magazine and others met the criteria."

While Ms. [REDACTED] may be a former gladiator and have knowledge of the television series, CIS is the ultimate authority on immigration law. We are not bound by Ms. [REDACTED] opinion regarding an interpretation of our own regulations. Moreover, Ms. [REDACTED] is not the publisher of any of the publications and, as such, her personal opinion that the petitioner meets this criterion is not primary evidence that the publications enjoy a national circulation, an issue she does not even expressly address. Primary evidence of the circulation of these publications would include official circulation data or an official letter from the circulation department of the publication, evidence that has not been submitted in this matter.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the materials published, be “about” the alien and that they appear in major trade publications or other major media. It was not “beyond the scope of analysis” for the director to inquire as to the circulation of the publications submitted to meet this criterion. Rather, it is the petitioner’s burden to establish every element of a given regulatory criterion, including that the materials appeared in a major trade publication or other major media.

A program, while printed, is not “published material” or a “major trade publication or other major media.” Thus, the program for the promotional competition between the South African cast and the British cast and another program for a regular show cannot be considered under this criterion. Similarly, trading cards and promotional paid advertisements cannot serve to meet the plain language of this criterion.

The director’s use of examples in analyzing whether the remaining articles were “about” the petitioner was not in error and in no way indicates that the director failed to review each article. Although we are not persuaded by counsel’s assertion on appeal that the director erred in this regard, we will discuss each article and photograph caption.

The July 1999 article in the “Special Launch Issue” of *Gladiators* provides a history of the television show. It is not “about” the petitioner and does not even mention her by name. “Another One Bites the Dust,” in *You* relates the journalist’s experience competing unofficially as a contender and does not even mention the petitioner by name. A similar article, “Muscling in on the Act,” appeared in the *Sunday Times*. In this article, the petitioner is pictured, named in the caption, included as an example of a gladiator name and finally named as the gladiator against whom the journalist competed in the “Travelator” event. This article is clearly not “about” the petitioner. Finally, the petitioner is mentioned in an article about the upcoming season of “Gladiators,” but is not the focus of a story in the *Mail and Guardian*.

Other materials are more persuasively “about” the petitioner. Specifically, the July 2001 issue of *Gladiators* contains a lengthy interview with the petitioner. A one-paragraph photograph caption in the *Southern Courier* reports the petitioner’s promotional local appearance. Similarly, a one-paragraph article in the *Randburg Sun* reports the petitioner’s local appearance and future advertising spots due to sponsorship by a local business. While these materials may be about the petitioner, we concur with the director that the petitioner must establish that these materials appeared in a major trade journal or other major media.

The petitioner does not submit the circulation data for *Gladiators*, the *Southern Courier* or the *Randburg Sun* on appeal. As such, the petitioner has not overcome the director’s valid concern that the record lacks evidence of the circulation of the publications submitted. While “MSN Gladiators” has been documented as a popular show, it does not necessarily follow that the magazine promoting the show enjoyed wide national circulation. Moreover, independent journalistic coverage is far more

persuasive than coverage in a magazine created exclusively to promote the petitioner's own television show. It is the petitioner's burden to provide primary evidence establishing every element of a given criterion, including that the published material appeared in major media. Finally, the remaining two publications appear from their names to be local or regional in nature.

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

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

In response to the director's request for additional evidence, Ms. [REDACTED] asserts that as a part-time trainer for [REDACTED], the petitioner judged the progress of the company's clientele. The director did not address this claim and counsel does not raise this issue on appeal. We simply note that judging one's students or clients is an inherent duty of a trainer and is not indicative of or consistent with national or international acclaim. The record lacks evidence that the petitioner has judged major gladiator competitions or similar events where judging would be indicative of or consistent with national or international acclaim.

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

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

Counsel and Ms. [REDACTED] assert that the petitioner meets this criterion based on her 91 percent "win record" and by ranking as the second female within the South African MSN Gladiator cast. The director concluded that these were not original athletic contributions recognized as having major significance in the sport nationally or internationally. On appeal, counsel asserts that Ms. [REDACTED] testimony is evidence that the petitioner's contributions are recognized in the sport.

Counsel is not persuasive. The Gladiator television show concept began in the United States and spread to several other countries before being picked up in South Africa, according to the materials submitted by the petitioner. The petitioner has not demonstrated that her success in competing against "contenders" who lack her training is original. The show is designed to provide powerful obstacles that limit the ability of the "contenders" to succeed. Performing as trained is not an original contribution to the concept of the gladiator games. Even if the win percentage refers to the few times the petitioner has competed against other gladiators, simply competing successfully is not an original contribution as every gladiator competition results in someone winning. Similarly ranking second among a very small pool of cast members is not an original contribution such that it is a unique concept within the show.

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 in athletics, the athlete must change the field, such as by setting the goal to which the most accomplished athletes aspire as in a world record. As acknowledged by Ms. [REDACTED] the number of gladiators nationally and even worldwide is extremely small. The record does not establish that the beneficiary's success rate against minimally trained contenders or her rank within a small group of gladiators is of *major* significance in the field of gladiator athletes. The record lacks evidence that the gladiator show was significantly influenced and changed by the petitioner's win record or ranking. In fact, the petitioner has not demonstrated that any country continues to broadcast new episodes of the show.

As stated above, in response to the director's request for additional evidence, Ms. [REDACTED] asserts that the petitioner set a "record" for completing the company's "purpose built" obstacle course. The record lacks evidence that this is a goal to which the most renowned athletes aspire, such as a world or national record in a nationally renowned event.

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

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

Ms. [REDACTED] asserts that the petitioner meets this criterion based on her alleged award as Female Gladiator of the Year and her membership on the South African gladiator team that competed against the British cast "with 89% win record."

On appeal, counsel reiterates the petitioner's claim to meet this criterion but does not directly rebut the director's conclusion that the petitioner's individual role and her employer's reputation were not sufficiently documented.

At issue for this criterion are the nature of the position the petitioner was hired to fill and the national reputation of the entity that hired her. MSN Gladiators, while popular during its broadcast years, appears to be an ensemble show. While the petitioner's win rate may relate to her ability to fulfill her job duties, it does not reflect a selection by her employer for a leading or critical role that set her apart from the remaining ensemble of gladiators. Moreover, a distinguished reputation implies a reputation that has stood the test of time. The petitioner has not established that the MSN Gladiators television show continues to be aired and enjoy popularity.

In response to the director's request for additional evidence, the petitioner submitted evidence that she served as a founding part-time trainer and spokesperson for [REDACTED]. The company now has five locations, 12 permanent staff and 20 part-time instructors. It is not clear how many part-time instructors or spokespersons the company employed while the petitioner worked there. Moreover, while the founder of the company asserts that Boot Camp SA is now "the undisputed leader in military themed events specializing in corporate team building, kids parties and activities as well as health and strength training," he does not indicate that the company enjoyed that reputation while the petitioner

worked there. In addition, 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)). The record lacks press coverage of the company or other independent evidence documenting its distinguished reputation.

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

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

Initially, Ms. ██████ asserted that the petitioner earned \$6,000 per week in wages and a \$400 per hour appearance fee as a MSN Gladiator. Ms. ██████ however, implies that these wages and fees are consistent with the other cast members. As the field of professional gladiators appears limited to the cast members of the show, the only meaningful comparison is with other cast members. A letter purportedly from ██████, Director of IT Productions, which promoted the gladiators, asserts that the petitioner was, with two other gladiators, the most popular at promotions. As this letter is unsigned, however, it has no evidentiary value.

In response to the director's request for additional evidence, Ms. ██████ asserts that the petitioner earned \$800 per week part-time and, had she worked full-time, would have been the highest compensated trainer. Ms. ██████ reaches this conclusion, however, by doubling the petitioner's part-time salary even though the petitioner worked three days per week, which is more than half of full-time employment.

The director concluded that the petitioner had not documented her actual remuneration as an MSN Gladiator and had not established that her remuneration compared with the top tier in the entertainment or professional sports industries. On appeal, the petitioner submits several contracts for appearances in 2000 and 2001.

The record still lacks data of comparative wages of television entertainer/athletes and trainers in South Africa. Without such data, we cannot determine whether the petitioner's remuneration was comparable to the remuneration of the most renowned members of these fields.

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 herself as a gladiator trainer to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence indicates that the petitioner shows talent as a gladiator and fitness trainer, but is not persuasive that the

petitioner's achievements set her significantly above almost all others in her 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 regulation at 8 C.F.R. § 204.5(h)(5) provides:

No offer of employment required. Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

Initially, the petitioner asserted that she was licensed to "train, compete and host American Gladiator events from Action, Inc., the owner of the American Gladiator name." The director requested the actual license. The petitioner's response did not include the license. Thus, the director questioned the petitioner's reasonable intent to continue working in her area of expertise. On appeal, the petitioner submits her license "to train participants for exclusive American Gladiators fitness challenges and sporting events." [REDACTED]s, CEO of [REDACTED], indicates that the petitioner will also be able to participate in celebrity events and host Gladiator contests.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, she should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

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.

[REDACTED] 4/18/2007