

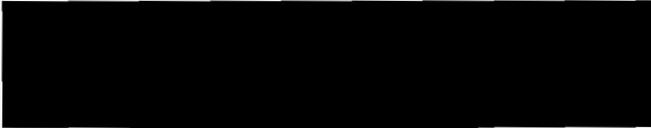
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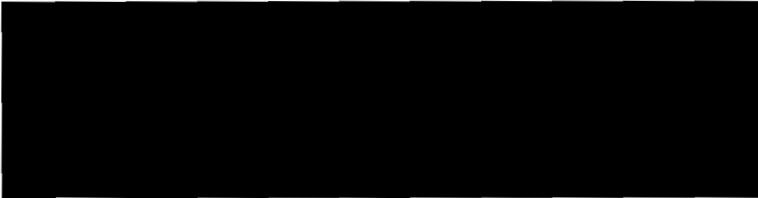
FILE: [REDACTED]
SRC 06 162 52097

Office: TEXAS SERVICE CENTER Date: **MAY 12 2008**

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.

2 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 (AAO) 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 submitted a brief and resubmitted the entire record of proceeding, which was already before this office. Subsequently, the petitioner submits a letter from His Excellency [REDACTED] the Ambassador from Grenada to the United States. The letter requests that the petition be approved so that the petitioner has “legal status” to travel to Beijing for the 2008 Olympics. We note that the petitioner’s legal status in the United States is not relevant to her ability to travel *to* Beijing. Her opportunity to compete on behalf of Grenada at the 2008 Olympics and her desire to return to the United States afterwards do not reflect on her eligibility for the classification sought as of the date of filing in this matter, the date as of which the petitioner must establish eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The classification sought is an exclusive classification for those who have already demonstrated sustained national or international acclaim, not a general means of securing an ability to return to the United States after participating in an Olympiad. For the reasons discussed below, we uphold the director’s finding that the petitioner has not established her eligibility for the classification sought.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien’s entry into the United States will substantially benefit prospectively the United States.

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 (Nov. 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 track and field athlete. 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. Counsel has never explained which three criteria the petitioner is alleged to meet. Rather, on appeal, counsel asserts that the director “rigidly applied the ten regulatory standards without providing a rational explanation for doing so.” Counsel then relies on *Vergara-Molina v. INS*, 956 F.2d 682, 685 (7th Cir. 1992), for the proposition that by applying the regulatory criteria, the director “failed to properly weigh other important factors and evidence” in the petition.

Vergara-Molina involved a decision by the Board of Immigration Appeals (BIA) on discretionary relief from deportation, a decision that expressly requires a balancing test between the grounds of deportability and other favorable factors. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). There is no similar requirement for CIS to “weigh” factors for classification as an alien of extraordinary ability. Unlike considerations for relief from deportation where grounds for deportation must be overcome, we have nothing to weigh the evidence against. Rather, the issue is whether the petitioner submitted extensive evidence¹ that meets the regulatory requirements at 8 C.F.R. § 204.5(h)(3).

The regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim “shall” include evidence of a one-time achievement or evidence of three of the following ten criteria. We acknowledge that the regulation at 8 C.F.R. § 204.5(h)(4) provides: “If the above standards do not readily apply to the beneficiary’s occupation, the petitioner may submit comparable evidence to establish the beneficiary’s eligibility.” It is clear from the use of the word “shall” in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner’s burden to explain why the regulatory criteria are not readily applicable to the petitioner’s occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x). Counsel raises the issue of “comparable evidence” for the first time on appeal. Thus, the director cannot be considered to have erred by following the regulatory criteria set forth at 8 C.F.R. § 204.5(h)(3).

¹ Section 203(b)(1)(A)(i) of the Act.

We note that it is unlikely that all ten criteria are applicable to any one occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts and the criterion at 8 C.F.R. § 204.5(h)(3)(x)² expressly applies to the performing arts. We are not persuaded that the inclusion of some occupation-specific criteria suggests that the director must consider “comparable evidence” without a specific request to do so, an explanation of what evidence is being submitted as “comparable” and an explanation as to how that evidence is comparable to the objective evidence required under the ten regulatory criteria.

On appeal, counsel asserts that the fourth through tenth criteria do not apply to the petitioner’s occupation, with a possible exception being the contributions of major significance criterion set forth at 8 C.F.R. § 204.5(h)(3)(v). Counsel does not elaborate on this assertion and, most notably, counsel does not explain why the significantly high remuneration criterion, set forth at 8 C.F.R. § 204.5(h)(3)(ix), does not apply. Specifically, the record contains no evidence that remuneration in comparison with others in the occupation of track and field athletes cannot be an indicator of an athlete’s ability. As noted by counsel on appeal, a petitioner need not meet any specific criterion as long as she meets three. An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner’s occupation.

Even assuming that, because some of the regulatory criteria are not directly applicable to the petitioner’s occupation, we should consider “comparable evidence,” counsel does not identify the “comparable evidence” submitted in this matter that was not considered. We will now consider all of the evidence submitted under the criteria to which they relate. The regulatory criteria follow.

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

On appeal, counsel asserts that the director failed to consider the petitioner’s rankings and awards. This assertion is based on what appears to be a typographical error in the director’s decision. The first paragraph on page 3 discusses the petitioner’s award certificates. The first sentence of the very next paragraph states: “The evidence above shows clearly that the [petitioner] has ‘nationally or internationally recognized.’” Counsel concludes that this sentence demonstrates that the director concluded that the petitioner had demonstrated national or international acclaim. Given that this sentence immediately follows a discussion of the petitioner’s awards and the inclusion of the phrase “nationally or internationally recognized prizes or awards” at 8 C.F.R. § 204.5(h)(3)(i), it appears that the director inadvertently omitted the words “prizes or awards.” Thus, it is evident to us from reading the decision in context that the director concluded that the petitioner meets this criterion. We concur with the director that the petitioner’s awards and ranking in the 800-meter track event serve to meet this

² This criterion requires evidence of “commercial success in the performing arts.” Thus, contrary to counsel’s assertion on appeal, the regulatory criteria do reference “commercial success,” although a petitioner is not required to demonstrate such success as long as she demonstrates she meets at least three other criteria.

criterion. Counsel has never asserted that any of the petitioner's prizes or awards constitutes a one-time achievement.³ Thus, the petitioner must demonstrate that she meets an additional two criteria.

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.

In her request for additional evidence, the director requested evidence to meet this criterion, suggesting a conclusion that the record at that time did not contain evidence to meet this criterion. In her final decision, the director noted the submission of evidence in response to that notice which does not relate to this criterion. Counsel has never expressly asserted that the petitioner meets this criterion and the record contains no evidence relating to it.

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

On appeal, counsel asserts that the director failed to provide sufficient reason for rejecting the evidence relating to this criterion and cites *Muni v. INS*, 891 F. Supp. 440, 445 (N.D. Ill. E. D. 1995). In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Regardless, the court in *Muni* noted that the published materials in that case met the plain language of the regulation. That is not the case in this matter.

The regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires both that the evidence be "about the alien" and that it appear "in professional or major trade publications or other major media." First, much of the material submitted in this case cannot credibly be considered "about" the petitioner. For example, the Internet articles that were posted on www.carribeannetnews.com and what appears to be a CBS

³ Congress' example of a one-time achievement is a Nobel Prize. H.R. Rep. No. 101-723, 59 (September 19, 1990). The regulation is consistent with this legislative history, stating that a one-time achievement must be a *major, internationally recognized* award. 8 C.F.R. § 204.5(h)(3). Significantly, even a lesser internationally recognized award could serve to meet only one of the ten regulatory criteria, of which an alien must meet at least three. 8 C.F.R. § 204.5(h)(3)(i). The selection of Nobel Laureates, the example provided by Congress, is global, is reported in the top media internationally regardless of the nationality of the awardees, is a familiar name to the public at large and includes a large cash prize. While an internationally recognized award could conceivably constitute a one-time achievement without meeting all of those elements, it is clear from the example provided by Congress that the award must be global and internationally recognized in the alien's field as one of the top awards in that field. An example of a one-time achievement in track and field would be an Olympic medal. The petitioner's prizes and awards are not at the Olympic level.

affiliated news site focus on the competition between Jamaican Asafa Powell and American Justin Gatlin and provide other results. Both articles include only a single sentence that mentions the petitioner. Similarly, the article “Carter sizzles in setting 200-meter mark” is a full-page article that mentions the petitioner in two sentences towards the end of the article. The remaining print articles also mention the petitioner only briefly as part of a larger story on her school’s team or the competition as a whole.

The record does contain two articles that are more focused on the petitioner. One article, posted at www.grenadasports.org, includes no byline and it is not clear if the story is complete, or, if it is, an example of independent journalistic coverage. The petitioner also submitted an article posted on the *Grenadian Connection*’s website with her name in the headline reporting on her second place finish at the [REDACTED] in Knoxville, Tennessee where the petitioner set a national record for Grenada. Only the first half of the first page of the article, however, is devoted to the petitioner.

The next issue is whether any of the materials were published in professional or major trade publications or other major media. The U.S. news articles all appeared in *The Advocate*, a Baton Rouge newspaper. The director concluded that the newspaper was local. On appeal, counsel asserts that because the articles were available in LexisNexis databases, whose distribution spans the world, the materials appeared in major media. As noted by counsel, LexisNexis boasts information from 32,000 (40,000 as of March 27, 2008)⁴ legal, news and business sources.

In today’s world, many newspapers, regardless of size and distribution, post at least some of their stories on the Internet and make their stories available to large electronic databases like LexisNexis. To ignore this reality would be to render the “major media” requirement meaningless. We are not persuaded that international accessibility by itself is a realistic indicator of whether a given publication is “major media.” The petitioner has not demonstrated that the print distribution of a publication fails to reflect the overall interest in the publication even if also accessible in a large database or on the Internet. We will not presume that the mere inclusion in LexisNexis of articles from a local newspaper will notably increase the readership of that paper if it is otherwise unknown or distributed nationally. It remains that coverage of the petitioner by a local newspaper can only demonstrate that local journalists have covered her.

Finally, the record contains no evidence regarding the distribution of *Grenadian Connection*, the only newspaper to focus on the petitioner’s accomplishments.

In light of the above, the petitioner has not submitted published materials that comply with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) and, thus, we cannot conclude that she meets this criterion.

⁴ In his appellate brief, counsel refers us to www.lexisnexis.com/about. That website, accessed March 27, 2008, now reflects that the database holds information from 40,000 sources.

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 record contains no evidence relating to this criterion.

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

On appeal, counsel asserts that the petitioner's contributions "have been substantially documented by her top-placings and rankings in women's track and field, both nationally and internationally." We have already considered the petitioner's awards and rankings above under the criterion to which they relate, 8 C.F.R. § 204.5(h)(3)(i). We will not presume that evidence directly relating to one criterion also must serve to meet a second criterion. To hold otherwise would render the statutory requirement for extensive evidence and the regulatory requirement that an alien meet at least three criteria meaningless.

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 word "original" and the phrase "major significance" is not superfluous and, thus, that it has some meaning. First, the petitioner has not demonstrated that her awards are "original." We acknowledge that the petitioner held the national record in Grenada for the 800-meter event. The petitioner, however, set this record in a race in the United States where she finished second. Even if we considered this record original, we are not persuaded that it is of major significance such that it has had a demonstrable impact on track and field as a whole.

In light of the above, while we do not contest that a track and field athlete able to demonstrate sustained national or international acclaim would substantially benefit the United States pursuant to section 203(b)(1)(A) of the Act (with which counsel confuses this regulatory criterion), we are not persuaded that the petitioner has submitted sufficient evidence to meet this regulatory criterion.

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

Counsel asserts that this criterion does not apply to the petitioner's occupation and the record contains no evidence relating to it.

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

Counsel asserts that this criterion does not apply to the petitioner's occupation and the record contains no evidence relating to it.

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

While counsel asserts on appeal that this criterion does not apply to the petitioner's occupation, the director actually concluded that the petitioner meets this criterion. As the director's conclusion is wholly unsupported by the record, we must withdraw that conclusion.

Specifically, the director stated that the petitioner performed a leading or critical role for the Commonwealth Games. At issue for this criterion are the position the petitioner was selected to fill and the reputation of the entity that selected her. In other words, the position must be of such significance that the alien's selection to fill the position, in and of itself, is indicative of or consistent with national or international acclaim. The record reflects that the petitioner competed as an athlete at the Commonwealth Games in Australia in 2006. We cannot conclude that every athlete plays a leading or critical role for the games where she competes. While we could conceive of a team captain demonstrating a leading role for a particular team, the record contains no such evidence. Moreover, the petitioner would then need to demonstrate that the team itself enjoys a distinguished reputation nationally.

In light of the above, we find that the petitioner has not submitted sufficient evidence to meet 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.

Counsel asserts that this criterion does not apply to the petitioner's occupation. While it is not self-evident to us that this criterion does not apply, the record contains no evidence that would allow us to compare the petitioner's remuneration as a track and field athlete with the most renowned and accomplished track and field athletes in the United States.

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

Counsel asserts on appeal that the regulations do not list commercial success as potential evidence and questions what that phrase might mean. Counsel next asserts, however, that the petitioner has demonstrated commercial success through her corporate sponsorships. The regulation at 8 C.F.R. § 204.5(h)(3)(x) does include commercial success in the performing arts as a criterion and explicitly lists the type of evidence that might demonstrate such success, thereby illuminating the meaning of that phrase.

Given the very specific language at 8 C.F.R. § 204.5(h)(3)(x), we are not persuaded that this criterion can apply to any field other than the performing arts. Moreover, given the very specific types of evidence required to meet this criterion, we are not persuaded that the regulation leaves open the

possibility that other evidence might be comparable pursuant to 8 C.F.R. § 204.5(h)(4). Regardless, the evidence submitted in this case cannot be considered comparable to evidence of personal commercial success enjoyed by an acclaimed performing artist.

In response to the director's request for additional evidence, the petitioner submitted a letter from QB Management asserting that the petitioner has secured shoe sponsorships and appearance fees resulting in an annual salary of "about \$48,000." We are not persuaded that a single letter from the petitioner's managing agent is comparable to the box office receipts or media sales data that is required by regulation to meet this criterion. The petitioner did not submit the actual contracts with her sponsors or her contracts for appearances. Thus, it is difficult to gauge whether the petitioner has truly achieved sponsorship comparable to the personal commercial success enjoyed by an acclaimed performing artist.

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 track and field athlete 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 track and field athlete, 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.

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.