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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] OFFICE: TEXAS SERVICE CENTER Date: OCT 10 2008

SRC 07 015 50385

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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 employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) 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.[1] 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. The director also found the petitioner had not established that she is one of that small percentage who have risen to the very top of her field of endeavor.

On appeal, counsel argues that the petitioner qualifies for classification as an alien of extraordinary ability and that she "demonstrated her unique skills and achievements in the athletic field."

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, 60898-99 (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).

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[1] The petitioner was initially represented by attorney [redacted]. In this decision, the term "previous counsel" shall refer to [redacted].

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, filed on October 23, 2006, seeks to classify the petitioner as an alien with extraordinary ability in acrobatics. The petitioner submitted evidence showing her competitive achievements as a Ukrainian acrobat from 2000-2002. According to her Form G-325A, Biographic Information, the petitioner has been attending ASA College in Brooklyn, New York since October 2005. Part 6 the Form I-140, "Basic information about the proposed employment," was left blank. Regarding the petitioner's plans for employment in the United States, previous counsel's September 12, 2006 letter states: "[The petitioner] will continue her work as a sports acrobat, thereby substantially benefiting U.S." Previous counsel's letter further states that the petitioner "has taught as a guest coach at one of the prestigious Acrobatic Schools in Brooklyn, New York," but the record does not include evidence to support this claim. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence showing that the petitioner has worked, coached, or competed in acrobatics subsequent to her arrival in the United States in July 2005. In response to the director's request for evidence, the petitioner submitted a January 16, 2007 from previous counsel stating that the petitioner intends to work as an "acrobatics coach" in the United States. The petitioner's response included a January 13, 2007 letter from [redacted] Owner and Head Coach, Paramount Tumbling and AcroGymnastics, Sunnyvale, California, stating: "We would like to offer [the petitioner] a position as a trainer/coach in our gym."

In the four years preceding the petition's filing date, there is no evidence indicating that the petitioner has competed as an acrobat. Further, according to the documentation submitted in response to the director's request for evidence, the petitioner (age 21 at the time of filing) is seeking work in the United States as an acrobatics coach rather than as an acrobat. The statute and regulations require the petitioner's national or international acclaim to be *sustained* and that she seeks to continue work in her area of expertise in the United States. *See* sections 203(b)(1)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1153(b)(1)(A)(i) and (ii), and 8 C.F.R. §§ 204.5(h)(3) and (5). While an acrobatics competitor and a coach certainly share knowledge of the sport, the two rely on very different sets of basic skills. Thus, competitive acrobatics 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:

> 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. In the present matter, there is no evidence showing that the petitioner has sustained national or international acclaim through competitive acrobatic achievements in the four years preceding the petition's filing date. Further, the documentation submitted in response to the director's request for evidence indicates that the petitioner intends to work as an acrobatics coach in the United States rather than to compete. While the petitioner's competitive accomplishments as an

acrobat are not completely irrelevant and will be given some consideration, ultimately she must satisfy the regulation at 8 C.F.R. § 204.5(h)(3) through her achievements as a coach.

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, internationally 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. A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The petitioner argues that she meets the following criteria.

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

The petitioner submitted the following:

1. Diploma for "1st place at of Ukrainian Youths for sports acrobatic . . . pair exercise" (April 2002).
2. Diploma for "1st place at [redacted] – 2002' for sports acrobatic" (February 2002).
3. Diploma from "Vinnitsa's Special Child-Youths School of Olympic Reserve" for the petitioner's "accomplishment at the World and European Championship in 2001 for sports acrobatic."
4. Gratefulness Award from the "National Board for Youths' Politics, Sports and Tourism of Ukraine" for the petitioner's "accomplishment at the World Championship between youth in 2001" (April 2002).
5. Certificate from the "National Board for Youths' Politics, Sports and Tourism of Ukraine" declaring the petitioner "a Master of Ukrainian Sport of International Qualification at Sport Acrobatic" (December 18, 2001).

The record does not include supporting evidence demonstrating the significance of the preceding honors and competitive achievements. The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is her burden to establish every element of this criterion. With regard to the awards won by the petitioner at the "junior" or "youth" level, we do not find that such awards indicate that she "is one of that small percentage who have risen to the very top of the field of endeavor." *See* 8 C.F.R. § 204.5(h)(2). CIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg.

at 60899.[2] Likewise, it does not follow that an acrobat who has had success in national or international competition limited to juveniles should necessarily qualify for an extraordinary ability employment-based immigrant visa. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor." Finally, there is no evidence showing the petitioner's receipt of nationally or internationally recognized acrobatics awards since 2002. Thus, the petitioner has not demonstrated that her national or international acclaim as a competitive acrobat has been sustained. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

As discussed previously, even if the petitioner were to establish that she earned national or international recognition as a competitor at the very top level of her sport, ultimately she must satisfy the regulation at 8 C.F.R. § 204.5(h)(3)(i) through her achievements as a coach. As such, the petitioner's national and international awards demonstrating her past success as a competitive acrobat in the early 2000s cannot serve to meet this regulatory criterion. Nationally or internationally recognized prizes or awards won by competitive athletes coached primarily by the petitioner can be considered for this criterion. The record, however, does not include such evidence.

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

> *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.*

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.[3]

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[2] While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

> [T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court's reasoning indicates that CIS's interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

[3] Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

The petitioner submitted a captioned photograph of her and her partner in *Zorepad Nad Bugom*. The petitioner also submitted competitive results mentioning them in a publication previous counsel identifies as *First Acrobatic Sports Games for Ukrainian Schoolchildren*. None of the preceding materials were primarily about the petitioner. The plain language of this regulatory criterion, however, requires that the published material be "about the alien." Further, there is no evidence (such as circulation statistics) showing that the preceding publications were professional or major trade publications or some other form of major media.

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.*

The regulation at 8 C.F.R. § 204.5(h)(3) provides that "a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." Evidence of the petitioner's participation as a judge must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criterion at 8 C.F.R. § 204.5(h)(3)(iv), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). For example, judging a national competition for top acrobats is of far greater probative value than judging an age-group competition at the local level.

In her September 12, 2006 letter, previous counsel asserts that the petitioner "has served as a judge at a youth acrobatic competition held in Brooklyn, New York." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. As stated previously, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 533, 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 1, 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503, 506. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The record does not include evidence demonstrating the petitioner's participation as a judge and the significance of the acrobatic competition. Without evidence showing that the petitioner has judged other acrobats in a manner consistent with sustained national or international acclaim at the very top level of her sport, we cannot conclude that she meets this criterion.

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

In her January 16, 2007 letter responding to the director's request for evidence, previous counsel argues that the petitioner's awards satisfy this regulatory criterion. The petitioner's awards have already been addressed under the awards criterion at 8 C.F.R. § 204.5(h)(3)(i). Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for awards and original contributions of major significance, CIS clearly does not view the two as being interchangeable. If evidence

sufficient to meet one criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three criteria would be meaningless.

In this case, there is no evidence showing that the petitioner has made original athletic contributions of major significance in the field. For example, there is no evidence showing the extent of the petitioner's influence on other acrobats or that her sport has somehow changed as a result of her accomplishments. The mere fact that the petitioner has performed admirably at the junior level does not demonstrate that her achievements are nationally or internationally acclaimed as original athletic contributions of major significance in her sport. Without extensive documentation showing that the petitioner's accomplishments have been unusually influential, highly acclaimed throughout her sport, or have otherwise risen to the level of original contributions of major significance, we cannot conclude 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.*

In response to the director's request for evidence, the petitioner submitted a January 16, 2007 letter from [redacted], Headmaster of the Vinnitsa Regional Sports Club, stating:

> [The petitioner] is one of the few athletes I have come across that has risen to the very top of her field of endeavor, acrobatics. The technique and precision of [the petitioner's] performance is significantly above that of her peers at the Vinnitsa Regional Sports Club. This was not an easy task for [the petitioner] to accomplish since Vinnitsa boasts of producing the best athletes in Ukraine and is world renown [sic]. To date 40 gold, 43 silver and 49 bronze medals have been won by Vinnitsa's champions in the World and European Championships since 1985. However, [the petitioner] has managed to distinguish herself greatly from others who have had the same training and same background as her. Through her hard work and dedication, [the petitioner] gradually became a well known participant in the World and European Championships. She began participating in World and European championships. Finally, she was honored and recognized as an individual of extraordinary ability in 2001 for her exemplary performance at the World Championship competition of the Youth by the National Board for Youth's [sic] Politics, Sports and Tourism of Ukraine. In 2002, [the petitioner] herself became a trainer with the Vinnitsa Regional Sports Club. Once again she demonstrated her abilities by coaching and training others.

There is no supporting evidence showing that the Vinnitsa Regional Sports Club has a distinguished reputation. Further, without objective evidence showing that the petitioner's competitive achievements differentiated her from those of her team members (such as a tally of medals earned by each team member), we cannot conclude that her role for the team was leading or critical. The record also lacks information regarding the specific nature of her role as a trainer and coach. For example, there is no evidence showing how her role differentiated her from the other members of the club's coaching staff. With regard to the petitioner's roles as trainer and acrobatics competitor, there is no evidence showing that she was responsible for the Vinnitsa Regional Sports Club's success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim. As such, the petitioner has not established that she meets this criterion.

In this case, the petitioner has failed to demonstrate her receipt of a major, internationally recognized award, or that she meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3). The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). Further, there is no evidence showing that the petitioner's national or international acclaim in acrobatics has been sustained. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). Specifically, the record includes no evidence of her national or international achievements and recognition in acrobatics subsequent to 2002.

In her September 12, 2006 letter, previous counsel argues that the petitioner's certificate declaring her "a Master of Ukrainian Sport of International Qualification" and her participation in acrobatics championships are comparable evidence of her extraordinary ability pursuant to C.F.R. § 204.5(h)(4). This evidence has already been addressed under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i). Further, there is no supporting evidence showing that the documentation the petitioner requests re-evaluation of as comparable evidence constitutes achievements and recognition consistent with sustained national or international acclaim at the very top level of her sport. Nevertheless, the regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten criteria "do not readily apply to the beneficiary's occupation." The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3).[4] Where an alien is simply unable to meet three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

Review of the record does not establish that the petitioner has distinguished herself 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 is not persuasive that the petitioner's achievements set her significantly above almost all others in her field at a national or international level. 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.

[4] In fact, previous counsel has argued that the petitioner meets five of the ten criteria at 8 C.F.R. § 204.5(h)(3).