**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

B2

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 04 2009
SRC 07 109 60254

IN RE: Petitioner:
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petition 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 the arts and athletics. 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. More specifically, the director found that the petitioner had failed to demonstrate receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

On appeal, counsel for the petitioner argues that the petitioner meets the statutory requirements and at least three of the regulatory criteria 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.

U.S. Citizenship and Immigration Services (USCIS) and the 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 has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated,

however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition, filed on February 23, 2007 seeks to classify the petitioner as an alien with extraordinary ability as a bodybuilder. 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.

Counsel alleges on appeal:

> It seems to us that the Service wants MORE than just satisfaction of the criteria established by the Regulations, i.e. at lest three out of ten characteristics, listed in Section 204.5(h)(3)(i-x). We refer the AAO to its *Decision in the case WAC 03 118 54147*, page 3: The Language [of the Regulations] does not support the director's assertion that meeting three criteria is insufficient evidence of extraordinary ability. . . Once there criteria are met under this standard, the Regulations do not suggest any further inquiry into acclaim is warranted[.]" [Emphasis in the original.]

We note first that in her brief, counsel refers to many unpublished decisions by the AAO. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Furthermore, as the AAO has consistently held, a petitioner cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three of the criteria outlined in 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 has submitted evidence that, he claims, meets the following criteria under 8 C.F.R. § 204.5(h)(3).[1]

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

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

The petitioner claims to meet this criterion based on his receipt of several awards during competitions in 1995, 1996, 1997 and 1998. The petitioner submitted copies of documents indicating that he won 2nd place in the over 80 kg weight category among juniors in the Krasnodar Territory Championship "Samson" in 1995, 1st place in the over 80 kg weight category in the October 1996 Krasnodar Territory Championship, 1st place in the juniors over 80 kg category in the May 10, 1997 Krasnodar Territory Cup "Samson-X," 2nd place in the men over 90 kg weight category in the May 10, 1997 Krasnodar Territory Cup "Samson-X," 6th place in the May 10-11, 1997 Krasnodar Territory Cup "Samson-X," an October 1996 diploma recognizing his participation in the Krasnodar Territory Championship "Samson-9," a letter indicating that he participated in the "Samson-6" Krasnodar Territory Cup in June 1995 and placed second, and documentation indicating that he placed 2nd in the Junior Division of the September 1998 National Amateur Bodybuilders Association (NABBA) USA National Bodybuilding Championships.

In a request for evidence (RFE) dated July 19, 2007, the director advised the petitioner that his awards as a junior and in an amateur status were not indicative of being at the very top of his profession and that he had submitted no documentation relative to this criterion of his sustained acclaim. In response, counsel challenged the director's contention that "awards received at the amateur level cannot be considered as having reached the top of the field," citing the Olympics as an example. The petitioner submitted a letter from the Krasnodar State Federation of Bodybuilding and Fitness (KKFKF) "SAMSON" which, according to counsel, would establish the significance of the petitioner's awards. However, the letter, signed by Igor V. Samokhin, the organization's president, stated:

> KKFKF "SAMSON" was established in 1998y., uniting athletes (bodybuilders) [throughout] the Southern Federal Circuit territory (South Russia), including Krasnodar and Stavropol States, Republic of Adigeya, Sochi, Vladikovkaz, & etc. KKFKF "SAMSON" is included in the Federation of Bodybuilding and Fitness of Russia, it is the biggest territorial organization in Russia, counting more than 20,000 members of the Federation. KKFKF "SAMSON" is a representative of IFBB (International Federation of Bodybuilding) in the South of Russia.

The letter clearly states that the "SAMSON" competitions are regional in nature as opposed to the international nature of the Olympics.

In denying the petition, the director again stated, "The service cannot consider the self-petitioner's accomplishments at the amateur level as having reached the very top of the bodybuilding field." On appeal, counsel cites to an unpublished AAO decision that she alleges "is very helpful in supporting our position that receiving awards on non-professional level counts." Counsel then states:

> In the cited decision the athlete has not "*actively competed in the sport since the late **1980s***". The petitioner in the current case was receiving his presented awards until the 1990s. In the cited decision there was "*documentation from numerous authoritative sources of national and international awards as a competitive athlete*". In the current case the petitioner also submitted evidence of numerous awards on the national level. [Emphasis in original.]

Counsel's argument is without merit. First, as noted previously, unpublished decisions by the AAO are not binding precedent. Further, counsel has provided no evidence that the facts of the instant petition are analogous to those in the unpublished decision. For example, the petitioner has not provided "documentation for numerous authoritative sources of national and international awards as a competitive athlete." The petitioner submitted no documentation to establish that awards presented by KKFKF "SAMSON" are nationally or internationally recognized as awards of excellence in his field. In fact, the documentation provided by the petitioner indicates that the KKFKF "SAMSON" competitions are "territorial," encompassing specific areas in Russia, and thus regional.

With regard to awards won by the petitioner in amateur or "junior" competitions which involve only a small number of competitors in his category, we do not find that such awards indicate that he "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). There is no indication that the petitioner faced significant competition from throughout his field, rather than mostly limited to a few individuals in age-based or amateur competition. USCIS 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 a bodybuilder who has had success in age-group or amateur competition involving only a small number of participants 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."

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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 USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

Further, 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 the petitioner's burden to establish every element of this criterion. In this case, there is no evidence showing that petitioner's awards commanded a significant level of recognition beyond the context of the events where they were presented. For example, there is no evidence showing that the petitioner's awards were announced in major media or in some other manner consistent with national or international acclaim. Accordingly, the petitioner has not established that the categories in which he successfully competed resulted in his receipt of nationally or internationally recognized prizes or awards in bodybuilding.

The director further determined that the petitioner had not submitted evidence relevant to this criterion subsequent to 1998 and thus had not established that he had achieved sustained acclaim in his field. On appeal, counsel argues that "the Regulations do not make any requirement regarding the time when the awards were given" and that "[c]ase study only shows that the award should have been received by the time of filing."

Counsel's argument is again without merit. Section 203(b)(1)(A)(i) of the Act provides that this classification is reserved for those of extraordinary ability which has been demonstrated by sustained national or international acclaim. Additionally, as discussed previously, 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. The petitioner's failure to provide evidence of his receipt of any awards under this criterion subsequent to 1998 is not consistent with the requirement for sustained acclaim of this highly restrictive visa classification.

The petitioner has failed to establish that he 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 petitioner alleges that since his entry into the United States, he as participated as a judge "in many competitions," and that in 2005 and 2006, he participated on a panel of judges seven times. The petitioner submitted an October 19, 2006 letter from [redacted] of the NABBA USA, in which he stated:

> [The petitioner] has been an invaluable help to NABBA USA as a National Judge since 1999 where and [sic] has also qualified as a NABBA International Judge. He has since judged 7 of our national Championships and 5 of our Regional Championships. He has also been appointed as Chairman for Russian Speaking athletes.

The petitioner submitted documentation indicating that he was appointed a judge with the NABBA USA and a list of seven competitions that he stated he judged in 2005 and 2006. He also provided a copy of a score sheet that he stated he completed during the 2005 Junior National competitions. The petitioner submitted no other documentation verifying his participation as a judge in other events. In response to the RFE, the petitioner provided a September 14, 2007 letter from [redacted] who stated that:

> The criteria used to appoint a NABBA USA National Judge is the candidate must have demonstrated a previous involvement in bodybuilding either as a certified judge for one of the recognized federations in the USA or the world, be involved in bodybuilding or the health sciences as a trainer, physical therapist, competitor or educator. The candidate must pass a total of two written tests demonstrating he knows the rules of the organization and must test judge three competitions. The results of the test judgements are then compared to those judges who are currently certified. If his/her scores are within 10% in agreement, the he/she is considered to have past [sic] the criteria to become a national Judge.
>
> [The petitioner] took the written tests in 2004 and the practical tests that same year. He passed with high scores. He was appointed as a NABBA National Judge in November, 2004.

The director determined that:

> [T]he passing of tests in order to become a judge for the NABBA is not indicative of the petitioner's excellence in the field. It must be demonstrated that his sustained national or international acclaim resulted in his selection to serve as a judge of the work of others in the field.

Counsel states on appeal that not only did the petitioner pass tests, he also served as a judge. Counsel further states:

> Even though the Regulations do not specifically require that "participation as a judge of the work of others" should be only for events at the highest level, the case study shows that they should be "beyond the typical peer review inherent to the field" . . . Being a head judge of NABBA competitions is clearly beyond "the typical peer review". The file contains evidence that the Petitioner was a judge . . . all over the United States in major (not regional) competitions.

The evidence of record does not corroborate counsel's assertion that the petitioner judged major competitions or that he has served as a "head judge." In his January 23, 2008 letter submitted on appeal, [redacted] stated that the petitioner was "qualified" as a head judge but did not indicate that the petitioner had ever served in that capacity.

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 involving top professionals is of far greater probative value than judging a local competition involving students or amateurs. The petitioner has failed to demonstrate that his selection as a judge of the NABBA indicates that it was based on his reputation or standing in the field, or was otherwise indicative of expertise at the very top of his field.

The petitioner has failed to establish that he meets this criterion.

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

The plain language of this regulatory criterion indicates that it applies to visual artists (such as sculptors and painters) rather than to bodybuilders such as the petitioner. The petitioner asserts that bodybuilding is an art, stating:

> A painter presents his paintings, the result of his hard work at artistic exhibitions, a bodybuilder presents his body, also the result of his hard work, at artistic exhibitions, that because of its recent recognition as sport are also called competitions. The mere fact that the result of this hard work has been selected for such participation at high level exhibitions should satisfy [this criterion.]

In response to the RFE, counsel stated, "The Service wants us to provide information that bodybuilding is considered an Art. A very persuasive explanation is given in context of the Arnold Schwarzenegger DVD, "Pumping Iron,'" in which Mr. Schwarzenegger stated that he visualized himself as a piece of sculpture. However, that Mr. Schwarzenegger considered himself a work of art is not conclusive evidence that bodybuilding is one of the arts as contemplated by the statute and regulation. Counsel also stated that the DVD indicated that a bodybuilding show, *Articulate Muscle, the Body of Art; a Live Exhibition by Arnold Schwarzenegger, Frank Zane and Ed Corney*, was put on with the Whitney Museum of American Art in 1976. The petitioner submitted no documentation of any comparable exhibition in any other artistic forum.

In denying the petition, the director stated that, assuming that USCIS accepts the petitioner's claim that bodybuilding is an art, he has failed to establish that the competitions in which he appeared were showcases or exhibitions of his work. On appeal, counsel acknowledges that there

is no legal support that bodybuilding is or is not an art and that the petitioner's position "is not a typical one." Counsel further asserts:

> Extraordinary abilities in any field are always a result of natural abilities and hard work in developing them. However talented by nature a person is if these talents are not developed such person will never rise to the top of his/her field of endeavor. It goes equally to scientists, athletes, artists, etc. At the same time if a person does not have natural abilities, there is nothing to develop.

Counsel's argument is speculative and not supported by any underlying documentation to support her conclusions. To state that only naturally talented persons can rise to the top of their field of endeavor is not persuasive as it rules out education and experience. Counsel also asserts:

> The Petitioner had abilities given to him by nature and he worked very hard to develop them for later presentation at artistic showcases. The Petitioner was not only "asked to present his "art" at an exhibit; he was chosen from many others to do that. It is similar to paintings: there are a lot of artists, but only a chosen few have their paintings in respected and attended galleries.

Counsel appears to thus argue that the sole purpose of the petitioner's development as a bodybuilder was to present himself as an art exhibit and therefore he is an artist. This is a circular argument that presents no logical evidence of bodybuilding as an art. Counsel then argues:

> The Service contends that a person who is competing cannot display his work at a showcase. We disagree. There are competitions among ballet dancers, jewelers, artists, otherwise how would they been [sic] able to show their awards, if not as the result of competitions. Competitions and showcases are not mutually exclusive.

The director did not state that a competitor could not also display his work; merely that not every competition is a showcase. The petitioner presented no evidence that the competitions in which he appeared constituted a display of his work similar to that of Arnold Schwarzenegger, Frank Zane or Ed Corney at the Whitney Museum. Counsel asserts that the petitioner's appearance as "a guest poser" at NABBA competitions is "a display at a showcase."

While the petitioner's appearance as a guest poser is more akin to a display of his work, the petitioner has not shown that the competition in which he appeared are artistic showcases. Further, not all artists are visual artists for which this criterion would be applicable. Without evidence that performances by a performing artist, for example, were comparable to the exclusive artistic showcases that might serve to meet this criterion for a visual artist we could not conclude that a bodybuilder meets this criterion.

The petitioner's participation and performance as a bodybuilding competitor has been addressed under the criterion at 8 C.F.R. 204.5(h)(3)(i). The ten criteria in the regulations are designed to

cover different areas and not every criterion will apply to every occupation. Virtually every athlete "displays" his or her work in the sense of competing in front of an audience. Accordingly, the petitioner has not established that he meets this criterion.

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

To meet this criterion, the petitioner must show that he performed a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

The petitioner stated that he meets this criterion based on his position as the creator and president of the Russian Athletes Association within the NABBA. The petitioner stated that the winner of the 2000 and 2005 NABBA Universe Championship was from Russia and that he "hope[s] that his success may be partially attributed to my efforts to attract new members of NABBA through the Russian Athletes' Association."

The petitioner submitted letters from several individuals who attest to his leadership role in the Russian Athletes' Association. On appeal, counsel asserts that USCIS "does not dismiss Russian Athletes Association as not having a distinguished reputation." While the director did not expressly address the issue, the petitioner submitted no documentation to establish that the NABBA or the Russian Athletes' Association is an organization with a distinguished reputation. Further, as noted by the director, the petitioner provided no documentation of the significance of the Russian Athletes' Association to the NABBA and therefore failed to establish that the petitioner's role as president or chairman of the association was in a critical or leading role for the NABBA.

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 his field of endeavor. Review of the record, however, does not establish that the petitioner has distinguished himself 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.

In addition, beyond the decision of the director, we find the petitioner has failed to establish that he seeks to continue work in his area of expertise in the United States. See section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). 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 intends to continue his work in the United States. The petitioner has failed to submit any detailed plan or statement regarding what he will do or how he intends to continue his work in the United States.

Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A)(i) and (ii) 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.