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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B2

DATE: MAY 0 2 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, on December 16, 2010. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily 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 as a makeup artist. Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate "sustained national or international acclaim" and present "extensive documentation" of his or her achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific evidence. 8 C.F.R. §§ 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

In the director's decision, the director discussed the documentary evidence submitted by the petitioner and determined that the petitioner established eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i) but did not establish eligibility for the membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii) and the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v). The petitioner did not claim eligibility for any of the other categories of evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i)-(x). Moreover, the director conducted a final merits determination in accordance with *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) and determined that the petitioner failed to demonstrate a (1) "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2); and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." *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).

On Form I-290B, Notice of Appeal or Motion, counsel indicated in Part 2 that she was filing an appeal and her "brief and/or additional evidence will be submitted to the AAO within 30 days." In addition, in Part 3, counsel indicated that "[a]ll arguments will be discussed in the Legal Brief which will be filed with AAO within 30 days of the current filing." Counsel dated the appeal on January 13, 2011. As of this date, approximately 15 months later, the AAO has received nothing further.

On April 12, 2012, the AAO received a letter entitled "Supplemental Evidence" from counsel who stated:

> We believe that the extensive evidence submitted in support of the petition was sufficient to grant the approval of the petition. However, on 12/16/2010 a denial of her petition was issued. On January 14, 2011 we filed an I-290B appeal of the

> petition denial and on February 14, 2011 we received notification that the case was transferred to your officer for further processing.
>
> We are hereby writing this letter to present to your attention some additional information which we believe might assist you in taking your decision.

Counsel made no indication that she previously filed a brief in support of the appeal. Nonetheless, counsel submitted documentary evidence reflecting that the petitioner was approved for O-1 nonimmigrant status on [redacted] and [redacted], based on two separate petitions filed by [redacted], LLC and [redacted], Inc. In addition, counsel submitted copies of the petitioner's paychecks from [redacted] Inc. for pay periods [redacted] to [redacted], [redacted] to [redacted], and [redacted] to [redacted]. Counsel further stated:

> We urge you to consider the above information as additional evidence of [the petitioner's] extraordinary ability in the field of endeavor. We also urge you to consider the above information as evidence that [the petitioner] will be working in the future in her professional field as a makeup artist but not necessarily in the film and movie industry. Finally, we would like you to consider [the petitioner's] current compensation for services which is well above the normal in the field (please see the attached paychecks for [the petitioner's] current employment) and determine that [the petitioner] has satisfied the requirement for commanding "a high salary or other significantly high remuneration in relation to others in the field."

Counsel does not challenge any of the director's specific findings regarding the membership criterion, the original contributions, and the final merits determination. Instead, as indicated above, counsel submits evidence of recent approvals for O-1 nonimmigrant status. While USCIS has approved O-1 nonimmigrant visa petitions filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of the alien, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Regarding counsel's reference to the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix), the petition was filed on November 12, 2010. However, the petitioner's employment with Keseff, Inc. commenced after the filing of the petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Regardless, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires "[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, *in relation to others in the field* [emphasis added]." On appeal, counsel submitted no evidence that compared the petitioner's salary to others in her field. Rather, counsel claims that the petitioner's compensation "is well above the normal in the field." The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). Counsel failed to establish that the petitioner meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix). Even if counsel were to prevail on this single issue, the petitioner still has failed to satisfy the antecedent regulatory requirement of three types of evidence.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) provides that "[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." In this case, counsel has not identified as a proper basis for the appeal an erroneous conclusion of law or a statement of fact in the director's decision. Counsel offers no argument that demonstrates error on the part of the director based upon the record that was before her.

As stated in the regulation at 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. As counsel did not contest any of the specific findings of the director and offers no substantive basis for the filing of the appeal, the regulations mandate the summary dismissal of the appeal.

ORDER: The appeal is dismissed.