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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: FEB 2 1 2014 Office: NEBRASKA SERVICE CENTER [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. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, initially approved the employment-based immigrant visa petition. Subsequently, on April 25, 2013, the director issued a "Decision" advising that the approval was not "clearly correct," moving to reopen and affording the petitioner 30 days to rebut the bases of the motion. On July 2, 2013, the director denied the petition, finding that the approval was in error. The petitioner, who is also the beneficiary, appealed the decision to the Administrative Appeals Office (AAO) on August 2, 2013. The AAO will withdraw the director's July 2, 2013 decision based on procedural concerns; however, because the petition is not approvable, it is remanded to the director for further action and consideration.

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 as a ballroom dance teacher and trainer. In his July 2, 2013 decision, the director determined that the petitioner did not establish her sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act; 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 meet the basic eligibility requirements by presenting evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i)-(x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

For the reasons discussed below, the proceeding is remanded to the director for further action and consideration.

I. THE LAW

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.

United States Citizenship and Immigration Services (USCIS) 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* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement, that is, a major, internationally recognized award, or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of the evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Kazarian*, 596 F.3d at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner did not submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Kazarian*, 596 F.3d at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination.

II. PROCEDURAL AND FACTUAL HISTORY

The petitioner filed the petition on February 14, 2011, supported by a February 8, 2011 letter and a number of documents. On August 12, 2011, the director issued a Request for Evidence (RFE). The petitioner responded to the director's RFE with a November 1, 2011 letter, and additional supporting evidence. On December 2, 2011, the director approved the petition.

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[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and (vi).

Subsequently, on April 25, 2013, the director reopened the proceeding, advising the petitioner that the December 2, 2011 approval was not "clearly correct." The director afforded the petitioner 30 days to rebut the bases of the motion to reopen. The petitioner responded to the director's motion with a May 21, 2013 letter and resubmitted documents she had previously submitted in response to the August 12, 2011 RFE. Ultimately, on July 2, 2013, the director denied the petition. In the decision, the director found that the petitioner had met the published material about the petitioner criterion under 8 C.F.R. § 204.5(h)(3)(iii) and the display of the petitioner's work criterion under 8 C.F.R. § 204.5(h)(3)(vii), but concluded that the petitioner met no other criteria. Thus, the director found that the petitioner had not satisfied the antecedent regulatory requirement of presenting at least three types of evidence under the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x), and had not demonstrated that she was one of the small percentage at the very top in the field, or had achieved sustained national or international acclaim. *See* 8 C.F.R. §§ 204.5(h) (2), (3).

On appeal, the petitioner, through counsel, asserts that she has satisfied seven categories of evidence. Specifically, counsel asserts that the petitioner meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i), (ii), (iii), (v), (vii), (viii), and (ix). Moreover, counsel challenges the director's reopening of the proceeding "for unspecified reasons," asserting that the director had reopened the proceeding "as if the [director] had never received the additional evidence" the petitioner submitted in response to the August 12, 2012 RFE.

III. ADVERSE ACTION ON APPROVED PETITION

The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* Section 205 of the Act, 8 U.S.C. § 1155, provides the authority to revoke the approval of a petition for "good and sufficient cause." By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* at 590. The regulation at 8 C.F.R. § 205.2 provides the procedures to follow to revoke the approval of an approved petition on notice.

The director, however, did not follow the revocation procedures set forth at 8 C.F.R. § 205.2. Instead, the director, after approving the petition, reopened the matter pursuant to 8 C.F.R. § 103.5(a)(5) based on a determination that the approval "was not clearly correct." The AAO will therefore remand the proceeding back to the director to serve the petitioner with a notice of intent to revoke (NOID) under the regulation at 8 C.F.R. § 205.2(b). If the petitioner does not overcome the grounds of revocation stated in the NOID, the director may then revoke the approval of the petition under 8 C.F.R. § 205.2(c).

IV. ADDITIONAL ISSUES

As an additional issue, the director should consider if the petitioner has submitted sufficient evidence relating to her intent to continue working in her "area of extraordinary ability."

Competitive athletics and coaching are not within the same area of expertise. *See Lee v. Ziglar*, 237 F. Supp. 2d 914, 918 (N.D. Ill. 2002). In this case, the petitioner stated in her February 8, 2011 letter initially filed in support of the petition, that she "received a lot of awards as a ballroom dancer," and that when she ended her competitive dancing career, she "became a dance trainer specializing in children." This letter, as well as other evidence in the record, including the petition, appears to indicate that the petitioner seeks to enter the United States to work as a ballroom dance teacher and trainer, not as a competitive ballroom dancer.

While a dancer and a dance teacher and trainer share knowledge of dance, the two rely on very different sets of basic skills. Thus, competitive dancing and dance instruction are not the same area of expertise. *See id.* Nevertheless, there does exist a nexus between dancing and teaching a certain dance style. To assume that every extraordinary dancer's area of expertise includes dance instruction, however, may be too speculative. To resolve this issue, the following balance might be appropriate. In a case where the petitioner has clearly achieved recent national or international acclaim as a competitive dancer and has sustained that acclaim in the field of dance instruction at a national level, USCIS can, in the context of the final merits determination, consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability consistent with a conclusion that dance instruction is within the petitioner's area of expertise. Specifically, in such a case the level at which the alien acts as a dance teacher and trainer is a consideration. A dance teacher and trainer who has an established successful history of teaching and training dancers who compete regularly at the national or international level has a credible claim; a dance teacher and trainer of novice dancers does not. In this case, the director should consider if the petitioner has submitted sufficient evidence relating to her "area of extraordinary ability" in support of the petition.

Moreover, in light of the partial and incomplete English translations of published material that the petitioner has submitted, the director should consider if the petitioner has met the published material about the petitioner criterion under 8 C.F.R. § 204.5(h)(3)(iii). Specifically, the regulation at 8 C.F.R. § 103.2(b)(3) states: "Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Most of the English translations in the record, including those relating to published material, are partial and incomplete translations, containing only the information that another party determined to be relevant. On remand, the director should consider whether these partial and incomplete translations comply with the regulation at 8 C.F.R. § 103.2(b)(3), and if not, whether these translations are sufficient to establish that the petitioner meets the published material about the petitioner criterion under 8 C.F.R. § 204.5(h)(3)(iii).

Furthermore, in light of the longstanding USCIS interpretation that the display at artistic exhibitions or showcases criterion is limited to evidence relating to the visual arts, the director should consider if the petitioner's dance-sport performances at athletic competitions have met the display at artistic exhibitions or showcases criterion under 8 C.F.R. § 204.5(h)(3)(vii). *See Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 1, 7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under the regulation at 8 C.F.R. § 204.5(h)(3)(vii)).

V. SUMMARY

Based on the reasons stated above, this proceeding will be remanded. If the director believes that USCIS approved the petition on December 2, 2011 in error, the director must issue a NOID and proceed under the regulation at 8 C.F.R. § 205.2. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The director's July 2, 2013 decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.