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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted]
LIN 06 219 50058

Office: NEBRASKA SERVICE CENTER

Date: APR 03 2009

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:

[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).

JF Grissom
John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska 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 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.

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.

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 seeks to classify the petitioner as an alien with extraordinary ability as a jockey. 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.

The petitioner has submitted evidence that appears to be relevant to 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 a copy of a page from the website of [REDACTED] accessed on July 14, 2006, which indicates that the petitioner was among the leading jockeys at [REDACTED] from April 26, 2004 to August 31, 2004. The petitioner also submitted a copy of a page from the website of [REDACTED], accessed on July 14, 2006, which indicates that the petitioner was among the leading jockeys at [REDACTED] from January 1, 2006 to April 15, 2006. Neither of these documents listed the petitioner as the number one leading jockey for the race course.

In response to a request for evidence (RFE) dated May 18, 2007, the petitioner submitted a page from the website of [REDACTED] accessed on August 2, 2007, indicating that he was one of the leading jockeys at the Timonium racecourse from August 26, 2006 to September 4, 2006. However, these dates are after the filing date of the petition, July 19, 2006. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1),(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the document does not serve to establish the petitioner's acclaim and accomplishments as of the filing date of the petition.

The petitioner has failed to submit evidence of his receipt of any nationally or internationally recognized prize or award. Accordingly, he has failed to establish that he meets this criterion.

Published materials 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 order to meet this criterion, published materials must be about the petitioner and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

The petitioner submitted copies of articles from several documents that are in Spanish, accompanied by only partial translations of the articles. The regulation at 8 C.F.R. § 103.2(b)(3) requires that documents submitted in a foreign language must be accompanied by a full English translation. Accordingly, the partial translations submitted by the petitioner are not in compliance with the requirements of the regulation and therefore are of no probative value in this proceeding. Even if they were probative, however, we note that while the articles appear to mention the petitioner, they are not about the petitioner or his work. Further, many of the

documents do not identify the media in which they appeared, the date, or the author of the material, as required by the regulation at 8 C.F.R. 204.5(h)(3)(iii).

The petitioner provided a copy of an article about his agent; however, the article is not about the petitioner or his work, does not identify the media in which it appeared or the date of the article. Other articles that appeared on the website [REDACTED] in the [REDACTED] and [REDACTED] describe an accident in which the petitioner was involved, and although they mention his name, are not about the petitioner.

Regardless, even if the materials could be considered to be about the petitioner, the petitioner failed to provide evidence that any of the publications in which his name or photo appears are considered professional, major trade publications or major media. Counsel's mere assertion that these publications are "leading sources" or the top 7th or 11th newspapers in the U.S., without documentary evidence, are not sufficient to meet the petitioner's burden of proof. 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).

Finally, the petitioner submitted a copy of a Google search of his name. An internet search of an alien's name does not amount to published material about the alien. Further, the material does not include the information required by the regulation including the title of the piece, the date, the author's name, or information about the publication so as to qualify it as a professional or major trade publication or other form of major media.

The petitioner has failed to establish 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 submitted copies of numerous photographs of himself astride horses at different race courses where he was identified as the winning jockey. However, the petitioner submitted no documentation that any of the individuals who owned the horses, the horses themselves, or the courses in which he rode, enjoyed a distinguished reputation within the field of horse racing. Thus, while his performance as a winning jockey may be considered a leading or critical role, he has failed to demonstrate that this role was performed for any organization or establishment with a distinguished reputation.

The petitioner failed to establish that he meets 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.

The petitioner submitted copies of his federal income tax returns for the years 2004 and 2005. However, the petitioner submitted no documentation regarding salaries earned by leading jockeys to establish that his earnings as reported on his tax returns are significantly high in relation to others in his field.

The petitioner failed to establish that he meets this criterion.

The regulation at 8 C.F.R. § 204.5(h)(4) states: “*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.*” [Emphasis added].

In response to a request for evidence (RFE) and again on appeal, counsel asserts:

In the horse racing industry it is well established that the ability of a jockey, or of a trainer for that matter, is measured solely by races won.

Receipt of international awards, association membership that require outstanding achievements, acting as a judge, authorship of scholarly articles, display of work at artistic exhibitions, critical roles for reputable organizations clearly do not apply in the case of any professional jockey, who furthermore are not teachers.

We are not persuaded by counsel's assertion that the regulatory criteria are inapplicable to the petitioner. The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the petitioner's occupation. It is clear from the record that a jockey could be the subject of published materials about him or his work, that a jockey could play a leading or critical role for an organization with a distinguished reputation, and that a jockey could command a significantly high remuneration in relation to others in his field. Further, although the petitioner failed to claim these additional criterion, we do not find that a jockey could not receive awards, either major international or lesser nationally or internationally recognized, could not participate as a judge, or make an original contribution of major significance. The petitioner provided no documentation as to why these provisions of the regulation would not be appropriate to the profession of a jockey.

On appeal, counsel again states that the petitioner was among the leading jockeys at [REDACTED] in Florida in 2004 and 2007, at Laurel Park in Maryland in 2006 and Timonium in Maryland in 2006. The petitioner submits additional documentation dated subsequent to the filing date of the petition, including his standing as one of the leading jockeys at [REDACTED] in 2008. The petitioner's status as a jockey in 2007 or 2008 is not relevant for this proceeding, as it occurred after the filing date of the petition, July 19, 2006. These documents are not probative

in determining the petitioner's eligibility for this visa preference petition at the time of filing. 8 C.F.R. §§ 103.2(b)(1),(12); *Matter of Katigbak*, 14 I&N Dec. at 49.

Finally, we note that although the record contains evidence of the petitioner's prior approval as a P-1 nonimmigrant, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different 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 CIS 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. at 597. 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 at 1090. 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 had approved the nonimmigrant petitions on behalf of the beneficiary, 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).

The documentation submitted by the petitioner does not show that he is among the top of his profession as a jockey. While he submitted documentation that placed him among the leading jockeys at two race tracks for a period in 2004 and 2006, a review of the evidence indicates that he placed at the lower end of the scale, with others placing far ahead of him in wins and earnings. Further, the petitioner submitted no documentation as to his standing among all jockeys, not just a discrete few at two race courses.

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 as a jockey 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. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his 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.