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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: OCT 26 2009
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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).

Perry Rhew
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska 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. The director determined that 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 argues that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and that he submitted comparable evidence his extraordinary ability pursuant to the regulation at 8 C.F.R. § 204.5(h)(4).

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.

U.S. 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* 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). 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 March 19, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a competitive ballroom dancer and a dance instructor. 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 has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).¹

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

The petitioner initially submitted the following:

1. Online results list for the Constitution State Challenge Dancesport Championships (Connecticut, 2006) indicating that the petitioner and his partner placed fifth in "Pro heat 1" of the "Professional American Smooth Open" category;
2. Online results for the New Jersey State Open Championships (2006) indicating that the petitioner and his partner placed fifth in the "Pro 5" heat of the "Professional Open Smooth" category;
3. Excerpt from an online event list of the National Dance Council of America (NDCA) providing contact information for the Kings Ball Dancesport Championships (Newark Sheraton Airport Hotel, 2006). A handwritten notation added to the page states: "FINALE 1. PLACE;"
4. Excerpt from an online event list of the NDCA providing contact information for the Commonwealth Classic (Massachusetts, 2006). A handwritten notation added to the page states: "RISING STARS FINALE 2. PLACE, OPEN FINALE 4. PLACE;"
5. Excerpt from an online event list of the NDCA providing contact information for the Northeastern Open Dancesport Invitational (Sheraton Hotel, Stamford, Connecticut, 2007). A handwritten notation added to the page states: "FINALE 4. PLACE;"
6. Excerpt from an online event list of the NDCA providing contact information for the New York Dance Festival (2007). A handwritten notation added to the page states: "FINALE 5. PLACE;"

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

7. Excerpt from an online event list of the NDCA providing contact information for the Stardust Ball (Marriot Hotel, Islandia, New York, 2006). A handwritten notation added to the page states: “FINALE 6. PLACE;”
8. Excerpt from an online event list of the NDCA providing contact information for the American Star Ball Championships (Hilton Hotel, Hasbrouck Heights, New Jersey, 2006). A handwritten notation added to the page states: “FINALE 5. PLACE;”
9. Online results list for the Northeastern Open Invitational (Connecticut, 2007) indicating that the petitioner and his partner placed fourth in “Pro heat 3” of the “Professional American Smooth” category;
10. Certificate stating that the petitioner and his partner “won the 3rd prize in the Inter. Category Standard” at the “Bentheim – Berg – Cup” Dancing Sport Tournament (1989);
11. Certificate stating that the petitioner and his partner “won the 3rd prize in the Inter. Category” at the “Latin Cup of Obergrafschaft County” Dancing Sport Tournament (1989);
12. Certificate stating that the petitioner and his partner “won the 2nd prize in the Inter. Category” at the “Latin Cup of Norden” Dancing Sport Tournament (1989);
13. Certificate stating that the petitioner and his partner “won the 3rd prize in the Inter. Category” at the “Rheiderland Cup” Dancing Sport Tournament (1989);
14. Certificate of Honor stating that the petitioner and his partner “won the first prize in the B – La Category at the Dancing Tournament in Salzwedel” (1991); and
15. Certificate from Dancing Club VSZ stating that the petitioner won “3rd place in the contest of social dancing” in the Amateur Latin category (1991).

With regard to items 1, 2, and 4 – 9, the plain language of this regulatory criterion requires evidence of the petitioner’s receipt of “nationally or internationally recognized prizes or awards.” In these instances, there is no evidence from the competitions’ organizers showing that the petitioner received a prize or an award for placing fourth, fifth, or sixth. Further, regarding items 1 – 15, there is no evidence showing that these honors are nationally or internationally recognized prizes or awards for excellence rather than forms of local, regional, or institutional recognition.

In regard to items 3 – 8, the record does not include evidence of official results or awards from the competitions’ organizers corroborating the information stated in the petitioner’s handwritten notations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

With regard to items 10 – 15, we note that the petitioner submitted a recommendation letter from of the Poprocky Dancing School, Slovakia stating: “[I]n the year 1998, [the petitioner and his partner] went over from amateur dancing to professional circles.” We cannot ignore that items 10 – 15 were won by the petitioner in 1989 and 1991, several years before the

petitioner switched from amateur to professional competition as indicated in [REDACTED] letter. With regard to items 4 and 10 – 15, we cannot conclude that awards won by the petitioner in youth, amateur, or “Rising Star” professional dance competition are an indication that he “is one of that small percentage who have risen to the very top of the field of endeavor.” 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 dancer who has had success in regional competitions at the youth, amateur, or “Rising Star” level 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.” The petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for amateurs or “Rising Star” competitors progressing toward the top at some unspecified future time.

Finally, regarding items 1 – 15, the plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that petitioner’s awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this case, there is no evidence establishing that the petitioner’s awards had a significant level of recognition beyond the context of the events where they were presented and commensurate with nationally or internationally recognized prizes or awards for excellence in the field.

In response to the director’s request for evidence, the petitioner submitted results for the All New North American Dancesport Championships in Cherry Hill, New Jersey (July 2008), the American Star Ball Championships in East Rutherford, New Jersey (May 2008), the Northeastern Open DanceSport Invitational in Stamford, Connecticut (January 2008), the Manhattan Amateur Classic (January 2008), the Constitution State Challenge Championships (October 2007), the Commonwealth Classic (November 2007), the Philadelphia Festival (April 2007), the Empire State Dance Sport Championships (August 2008), and the Tri-State Challenge (March 2008). The petitioner also submitted results from the Philadelphia Festival (April 2008) and a certificate from its organizers honoring the petitioner as a top teacher at the festival. The preceding competitive results and top teacher certificate post-date the filing of this petition. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45,

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.

49 (Regl. Commr. 1971). Accordingly, the AAO will not consider the preceding results and top teacher certificate in this proceeding. The petitioner's response also included results for the Summer Sizzler '06 and the Clover Star Classic (2007), but there is no evidence showing that the petitioner received a nationally or internationally recognized prize or award at any of the preceding competitions (including those that post-date the filing of this petition).

Nationally or internationally recognized prizes or awards won by dancers coached primarily by the petitioner may also be considered for this criterion. The petitioner submitted a letter of support from [REDACTED] who identifies herself as Miss Sport Slovakia 2002 and Miss Sport Europe 2003. [REDACTED] states: "I asked [the petitioner] to help me out with my dance routine that I was preparing for upcoming Miss Sport of Europe. We had had a great time and the routine was successfully made and presented." [REDACTED] does not specify the dates she received assistance from the petitioner and she does not identify the petitioner as her primary coach. Further, the record does not include evidence of the awards she won after receiving his help. As discussed, the petitioner also submitted dance results for various competitions, but there is no evidence showing that the petitioner's students participated in top level (rather than amateur level) competition and received nationally or internationally recognized prizes or awards as of the petition's filing date. In this case, there is no evidence demonstrating that competitors coached primarily by the petitioner have won nationally or internationally recognized prizes or awards in professional dancing.

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

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner submitted a certificate indicating that he is "registered" with the National Dance Council of America, Inc. (NDCA) as a "Competing Professional" and a "Pro/Am Teacher." There is no evidence indicating that this registration equates to membership in the organization. Further, the record does not include evidence (such as membership bylaws) showing the admission requirements for the NDCA. There is no evidence demonstrating that the NDCA requires outstanding achievements of its members, as judged by recognized national or international experts in the petitioner's field or an allied one. Accordingly, the petitioner has not established that he 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

In response to the director's request for evidence, the petitioner submitted a photograph of him and more than a dozen other dance instructors who were named top teachers at the Philadelphia Festival Championships on page 20 of an unidentified publication. The petitioner also submitted an article entitled "The 2006 Northeastern Open Invitational" on page 56 of an unidentified publication. The article lists the petitioner and his partner, who placed 4th out of 5 couples in the Professional American Smooth category, among the results for numerous events at the competition. The plain language of this regulatory criterion requires "[p]ublished material about the alien in professional or major trade publications or other major media" including "the title, date, and author of the material." The documentation submitted by the petitioner does not meet the preceding requirements. Accordingly, the petitioner has not established that he meets this criterion.

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

The petitioner submitted several reference letters in support of the petition. We cite representative examples here.

[REDACTED] in Manhattan, states: "I am writing on behalf of [the petitioner and his partner] who have impressed me with their extraordinary talent and abilities as competitive Ballroom dancers. . . . I believe they are becoming a force in the United States Dance world"

[REDACTED] of TC Kosice Dance Club, Slovakia, states:

Since 1990 [the petitioner and his partner] participated in training and teaching junior and youth dance couples, leading formation B-team and also teaching senior couples They did their job dutifully, well-arranged and to my pleasure, couples were advancing and gaining success on competitions in their level and age category.

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.

[REDACTED], states:

I would like to speak on behalf of [the petitioner and his partner]. Both very accomplished dancers in their country of Slovakia. This very talented couple was willing to come to America to train and compete professionally for the U.S. Teachers and Competitors of this caliber are difficult to find and are a necessity for Dancesport to grow and develop in our country.

We acknowledge the petitioner's submission of reference letters from various individuals praising his talent as a dancer and teacher. Talent in one's field, however, is not necessarily indicative of original contributions of major significance. With regard to the petitioner's dancing and teaching achievements, the reference letters do not specify exactly what his original contributions in dancing have been, nor is there an explanation indicating how any such contributions were of major significance in his field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner may have helped various youth and amateur dancers improve their dancing skills, the documentation submitted by him does not establish that he has made original contributions of major significance in the field. For example, the record does not indicate the extent of the petitioner's influence on other dancers or instructors nationally or internationally, nor does it show that the field has somehow changed as a result of his work so as to demonstrate the petitioner's significant contribution to his field.

In this case, the reference letters submitted by the petitioner are not sufficient to meet this criterion. These letters, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from individuals selected by the petitioner is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of a dancer or an instructor who has sustained national or international acclaim. Without extensive documentation showing that the petitioner's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

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

The petitioner submitted photographs and video footage of him performing with his students and professional partner. The plain language of this regulatory criterion indicates that it applies to visual artists (such as sculptors and painters) rather than to dancers such as the petitioner. The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. The petitioner and his students' participation in dancing competitions has previously been addressed under the awards criterion at 8 C.F.R. § 204.5(h)(3)(i). Virtually every dancer "displays" his or her work in the sense of performing in front of an audience. Nevertheless, there is no evidence establishing that videotaped and photographed performances of the petitioner were consistent with sustained national or international acclaim at the very top of the field or that his performances equate to the exclusive showcases of an artist's work that are contemplated by this regulation for visual artists. For example, there no evidence showing that the petitioner's name received top billing at the events or that his performances were singled out from those of the other event participants. Accordingly, the petitioner has not established 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 initially submitted a March 12, 2007 letter from [REDACTED] Somerville, New Jersey, stating: "[The petitioner and his partner] are currently employed in my studio as Ballroom Dancers/Instructors at annual salaries of \$32,000 and \$28,000 respectively. They are paid \$30.00 per hour which is 40% higher than an average dance instructor's salary." The petitioner also submitted his Form W-2, Wage and Tax Statement, from the [REDACTED] for 2006 reflecting earnings of \$11,297.50. The petitioner's initial submission also included his Form 1099-MISC, Miscellaneous Income, from the [REDACTED] for 2006 reflecting non-employee compensation of \$20,928.00. Thus, the petitioner's total compensation from the [REDACTED] in 2006 was \$32,225.50. The petitioner also submitted Occupation Employment Statistics (OES) wage results from the U.S. Department of Labor for "Dancers" in the "Middlesex-Somerset-Hunterdon" New Jersey region for 2006. The OES wage results for dancers in New Jersey reflect a Level 1 wage (entry) of \$25,501 per year, a Level 2 wage (qualified) of \$31,429 per year, a Level 3 wage (experienced) of \$37,336 per year, and a Level 4 wage (fully competent) of \$43,264 per year.

We note that the petitioner's \$32,225.50 income for 2006 falls significantly below the median yearly earnings of experienced and fully competent dancers in the New Jersey region. Accordingly, the petitioner has not established that his 2006 income was significantly high in relation to others in his field. Further, with regard to the median regional wage statistics submitted by the petitioner, the petitioner must submit evidence showing that his earnings place him in that small percentage at the very top of his field, rather than simply in the top half of qualified dancers at the regional level. See 8 C.F.R. § 204.5(h)(2). Median regional wage statistics for dancers in New Jersey do not meet this requirement. Moreover, the petitioner provided wage results for "dancers" rather than "dance instructors." Accordingly, [REDACTED] comment that the petitioner and his partner "are paid \$30.00 per hour which is 40% higher than an average dance instructor's salary" is not corroborated by the documentation submitted. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22

I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The documentation initially submitted by the petitioner is not sufficient to demonstrate that he has commanded a high salary or significantly high remuneration in relation to others in his field.

In response to the director's request for evidence, the petitioner submitted a September 24, 2008 letter from [REDACTED] stating that the petitioner and his partner have worked part time for the [REDACTED] since September 2005 and that their current rate of pay is \$30 per hour. The petitioner also submitted a 2007 U.S. Individual Income Tax Return for him and his partner (spouse) reflecting that they earned combined "total income" of \$54,772.⁴ The petitioner's response also included a "Profit & Loss" statement from January 1 – September 15, 2008 reflecting that he and his partner had a combined net income of \$52,692 for that period. The petitioner also submitted Foreign Labor Certification (FLC) Wage Results from the U.S. Department of Labor's FLC Data Center for "Dancers" in the "Newark-Union" New Jersey and Pennsylvania region for 2008-09. The FLC Data Center wage results for dancers in this region reflect a Level 1 wage (entry) of \$17,285 per year, a Level 2 wage (qualified) of \$27,435 per year, a Level 3 wage (experienced) of \$37,586 per year, and a Level 4 wage (fully competent) of \$47,736 per year.

With regard to income earned by the petitioner subsequent to March 19, 2007, this remuneration post-dates the filing of the petition. As discussed previously, a petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider the petitioner's income from 2008 or the second, third, and fourth quarters of 2007 in this proceeding. Further, we cannot ignore that the evidence relating to the petitioner's income for 2007 and 2008 includes his spouse's earnings rather than his income alone. The amount of income specifically attributable to the petitioner in 2007 and 2008 has not been demonstrated. Moreover, regarding the untimely 2008-09 median regional wage results from the FLC Data Center, the petitioner must submit evidence showing that his earnings place him in that small percentage at the very top of his field, rather than simply in the top half at the regional level. Median regional wage statistics do not meet this requirement. Finally, the 2008-09 wage results submitted by the petitioner did not include information for dance instructors.

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

In this case, we concur with the director's finding that the petitioner has failed to demonstrate his receipt of a major, internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the national or international acclaim necessary to qualify as an alien of extraordinary ability. 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).

⁴ The petitioner's state and federal income tax returns for 2007 were not accompanied by his Form W-2 or Form 1099-MISC showing the specific earnings attributable to him versus those attributable to his spouse.

On appeal, counsel argues that the reference letters submitted by the petitioner should be considered as comparable evidence of his extraordinary ability. 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 evidence 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). Where an alien is simply unable to meet three of the regulatory 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.

Nevertheless, there is no evidence showing that the documentation the petitioner requests evaluation of as comparable evidence constitutes achievements and recognition consistent with sustained national or international acclaim at the very top of his field. We note that the petitioner’s reference letters have already been addressed under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(v). While reference letters can provide useful information about an alien’s qualifications or help in assigning weight to certain evidence, such letters are not comparable to extensive evidence of the alien’s achievements and recognition as required by the statute and regulations. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The classification sought requires “extensive documentation” of sustained national or international acclaim. *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). The commentary for the proposed regulations implementing the statute provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Primary evidence of achievements and recognition is of far greater probative value than opinion statements from individuals selected by the petitioner.

Documentation in the record indicates that the alien was the beneficiary of two approved O-1 nonimmigrant visa petitions filed by the [REDACTED]. On appeal, counsel states: “[The petitioner] has already been determined to be an alien of extraordinary ability by the Service. This prior determination by the Service, which must be considered a persuasive factor, together with other proofs presented, has clearly been ignored in the formulation of the denial.” Although the words “extraordinary ability” are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, “The term ‘extraordinary ability’ means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.” The O-1 regulation reiterates that “[e]xtraordinary ability in the field of arts means distinction.” 8 C.F.R. § 214.2(3)(ii). “Distinction” is a lower standard than that required for the immigrant classification, which defines 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 evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and

regulatory distinction between these two classifications, the petitioner's receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Further, we do not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each case must be decided on a case-by-case basis on the evidence of record.

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 the alien'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. 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).

Review of the record 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. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his 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 AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g., *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the

benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.