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

PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 03 2009

LIN 08 005 54548

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).

for 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 the arts. 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 she 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 she has sustained national or international acclaim at the very top level.

This petition, filed on August 17, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a "performing artist - dancer." 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 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).

We note that although the record contains evidence of the petitioner's prior approval as an O-1 non-immigrant, 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. 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 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).

Although the words "extraordinary ability" are used in the Act for both the nonimmigrant O-1 classification and the first preference employment-based immigrant classification, the applicable regulations define the terms differently for each classification. The O-1 regulation explicitly states that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(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(o)(3)(iv)(A), but the immigrant classification requires actual receipt of awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear regulatory distinction between these two classifications, the petitioner's receipt of O-1 nonimmigrant classification is not evidence of her eligibility for immigrant classification as an alien with extraordinary ability.

The petitioner has submitted evidence that, she claims, meets 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 provided a list of awards that she stated she had won and submitted documentation regarding the following:

1. Showstopper Awards. The petitioner submitted documentation indicating that she won first place and the top solo award at the 1996 Showstopper American Dance Championship (Showstopper) finals held in Myrtle Beach, South Carolina and was awarded the Top Senior Solo Overall at the 2001 National Championships. In a September 13, 2006 letter, [redacted], the national director of Showstopper, stated that the competition "has for many years been the largest dance competition in the world" and "has been nationally televised for over 10 years and was nominated for Emmy Awards in 1996 and 1997." The petitioner submitted a copy of a television schedule showing when the finals of the 2001 competition was scheduled to air in various cities in the United States. However, she submitted no documentation to confirm that the Showstopper competition had been nominated for an Emmy award.

   In denying the petition, the director noted that the information about the competition indicated that it was for "young dancers" and that the rules for the 2001 competition indicated that the competition is divided into age groups. In 1996 at the age of 13, the petitioner won in the junior category and in 2001 at the age of 18, she won in the senior category of 15 and over. The director determined that the petitioner was "primarily

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

competing among other young dancers within her age group" and that "[a]ge restricted competitions . . . are generally not commensurate with this criterion."

On appeal, counsel asserts that the director "failed to note that the field of expertise of the petitioner is dependent upon age restrictions." [Emphasis excluded.] Counsel also asserts that the competition has been televised for the past 19 years throughout the United States and Canada, and that the broadcast has been nominated for an Emmy award. Nothing in the record, however, supports counsel's assertions, either about the age restrictions of the petitioner's field or about the show's nomination for an Emmy award. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

According to the copy of the East Coast 2001 National Finals Rules and Regulations for the Showstopper awards, contestants compete in age categories ranging from "4 and under" to "70 and over." The document also indicates that there may be multiple awards in each age group and category, with a special award in the competitive division. The rules provided that "[o]verall recognition and medals will be given in the following four age groups: 8 years & under Junior, 9-12 years Junior, 13-14 years Senior and 15 years & over Senior."

With regard to awards won by the petitioner in age-group competitions involving only a small number of competitors in her category, we do not find that such awards indicate that she "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 her field, rather than mostly limited to a few individuals in age-based 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]

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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.

Likewise, it does not follow that a dancer who has had success in age-group 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." On the other hand, the petitioner's award as the top soloist in the senior category was not similarly restricted by age as she competed with all dancers over the age of 15.

Nonetheless, 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 her 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. The petitioner submitted an undated article from an unidentified publication reporting that she had won first place and the top solo award at the 1996 Showstopper finals and a December 4, 2001 press release reporting the petitioner's receipt of the solo award. The documentation indicates that the finals were televised in the United States and the Virgin Islands, the schedule indicates that the show was aired in only about 75 markets and over a three-month period. While [redacted] and counsel stated that the competitions are televised internationally and has received two Emmy nominations, 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 recognition. Accordingly, the petitioner has not established that the categories in which she successfully competed resulted in her receipt of nationally or internationally recognized prizes or awards in her field.

2. Miss Dance of Canada. The petitioner submitted documentation from the website of Dance Masters of America, Inc. (DMA), accessed by the petitioner on September 5, 2008, which describes the organization as "an International Organization of dance educators who have been certified by test to teach." The history of the organization, also obtained from the organization's website, and accessed by the petitioner on February 5, 2008, indicates that the organization had its roots in two organizations established in 1884 and 1894 that joined forces in 1926. The documentation indicates that the DMA began offering scholarships in 1963 and that "each Chapter Miss Dance winner is eligible to compete for the national title." The petitioner provided a copy of the official rules, regulations and general information about the DMA scholarship competitions for 2002. The document indicates that the competition was limited to members or a student of a member in good standing with the DMA. The rules imposed other restrictions on competitors, including limiting entrants to those who were unmarried and childless and imposed age limits on the competitors. The rules also required that competitions in the Miss Dance America competition must represent an affiliated chapter as its title holder.

Other documentation provided by the petitioner indicates that she was a member of "Chapter 43" of the DMA. A document indicating that it is a "History of Pageant Titlists" for the chapter shows that the petitioner held the 1995 Petite Miss, the 1998 Teen Miss and the 2002 Miss Dance titles. The documentation includes a handwritten note apparently from the director of the Miss Dance Pageant, congratulating the petitioner on winning the title. The note is not dated and contains no letterhead or other indication of its source. Additionally, the other documentation, including the history of the pageant titlists, does not reflect the source of the information provided. The petitioner's evidence does not establish that any of the DMA scholarships, particularly those won at the local chapter level, are nationally or internationally recognized prizes or awards of excellence in her field. Additionally, as previously discussed, awards won by the petitioner in age-group competitions involving only a small number of competitors in her category do not indicate that she "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).

3. American Dance Awards. The petitioner submitted a copy of a certificate indicating that she won first place in the American Dance Awards (ADA) National Tour 2000. A page from the ADA website, accessed by the petitioner on October 5, 2008, indicates that the ADA is "one of the largest International Dance Championships in North America." The document also indicates that to compete in the contest, the individual "must qualify in a regional event by receiving a Silver Medal standing or higher" and that the individual's "school then compete[s] all week against other schools . . . to ultimately get into the danceoff." As discussed above, awards won by the petitioner in age-group competitions involving only a small number of competitors in her category do not indicate that she "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). The petitioner did not face significant competition from throughout her field but rather her competition was limited to a few individuals in a school competition.

4. ProDance Top Scholarship Award. The petitioner stated that she was the recipient of the 2005 ProDance Top Scholarship Award. A page from the website of ProfessionalDancer.net, accessed by the petitioner on April 30, 2008, reflects that ProDance was founded in 1999 as a convention or camp for dancers for professional sports teams. The document, which announced the 2005 event, indicated that scholarships would be provided but did not indicate the purpose of the scholarships, any level of award, who would be eligible for the scholarship, or how winners would be selected. The petitioner submitted two photographs of herself that she stated were at the ProDance Convention; however, she submitted no documentation to corroborate her receipt of any scholarship at the event or the significance of winning a scholarship. The petitioner also failed to provide any evidence that an award of a ProDance scholarship is nationally or internationally recognized as a prize or award of excellence in her field of endeavor.

5. New York City Dance Alliance (NYCDA). The petitioner submitted a copy of a certificate indicating that she had won a "Senior Outstanding Dancer Scholarship" during

the NYCDA scholarship audition and convention held in Niagara Falls, New York from March 27 to March 28, 1999. The guidelines indicated that competition was divided into three age groups, with the senior division comprised of those 13 to 15 and 16 to 18. Points determined awards of gold, high silver, silver and bronze. The documentation did not specify the requirements for winning a scholarship or if the scholarships and various "metal" awards were the same. An undated letter from the director of the NYCDA indicated that the "ultimate goal of NYCDA is to bring each individual one step closer to achieving their dreams of becoming a professional dancer." Accordingly, the competition for the scholarships and awards appears to be limited to amateurs. As with awards won in age-based competitions, the petitioner has not demonstrated that her amateur recognition constitutes nationally or internationally recognized prizes or awards. Awards won by the petitioner in competitions that were limited by her amateur status, such awards do not indicate that she "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).

As noted, the petitioner indicated that she had been the recipient of other awards. However, she provided insufficient evidence to establish that any of the awards that she received are nationally or internationally recognized as prizes or awards of excellence in her field of endeavor.

The petitioner has failed to establish that she 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.*

To demonstrate that membership in an association meets this criterion, the 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 work 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. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

In her letter submitted with the petition, counsel stated that the petitioner claimed to meet this criterion based on her membership in the Royal Academy of Dance (RAD), Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the Toronto Raptors Basketball Club, the American Musicians' Union, and Showstopper. The petitioner submitted an April 17, 2006 letter from Courtney Niven, dance team director for the Toronto Raptors Basketball Club, verifying that the petitioner had been employed by Maple Leaf Sports and Entertainment Ltd. as a member of the Toronto Raptors Dance Pak since 2003. The documentation indicates that the petitioner's position with the Toronto Raptors Basketball Club was as an employee. The petitioner submitted no documentation to establish that the Toronto Raptors Dance Pak requires outstanding achievements of its employees as judged by national or international experts in their

fields. The petitioner also submitted a copy of her membership card in ACTRA and an April 2001 certificate from the RAD, indicating that she was commended for her successful completion of the intermediate examination in classical ballet. The petitioner submitted no other documentation with the petition regarding membership requirements in the RAD, ACTRA, American Musicians' Union or Showstopper. The petitioner also failed to provide evidence of her membership in the American Musicians' Union and Showstopper.

In response to the RFE, the petitioner submitted a May 5, 2008 letter from [redacted] National Administrator/Canada for the RAD, in which she stated that the petitioner had "achieved a high level of professional dance training in her years of study in Canada, and since eligible for Membership three years ago, she has maintained her membership status consistently." A page from the RAD's website identifies five levels of membership: (1) affiliate member for "students of dance, who wish to benefit from the support, knowledge and expertise of the Academy," (2) full membership for dance professionals, (3) registered teacher for "students [who] have graduated from a course at the faculty of Education, endorsed by the [RAD], (4) "teachers recognized by mutual agreement . . . between the RAD and IDTA," and (5) friends of the Academy for those who "are passionate about dance and wish to support and share in its future." Documentation in the record indicates that the petitioner is a full member of the RAD. Full membership can be obtained by graduating with by a bachelor's degree in certain fields, a diploma in dance education, or a teaching certificate or diploma. Nothing in the documentation indicates that membership in the RAD requires outstanding achievements of its members, as judged by recognized national or international experts in their disciplines or fields.

Documentation provided for ACTRA indicates that it is the collective bargaining union "in English-language recorded media in Canada." The petitioner's documentation indicates that she is an apprentice member of ACTRA, which is obtained by "[landing] a qualifying role in a production under ACTRA's jurisdiction." Qualifying credits includes off-camera voice role or a speaking role. Full membership in ACTRA is gained by obtaining five additional qualifying credits or a total of six. Nothing in the membership requirements for ACTRA, therefore, reflect that the organization requires outstanding achievement of its members.

The petitioner has failed to establish that she 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 order to meet this criterion, published materials must be primarily 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 several copies of a picture of herself depicted as the "Face of the Raptors Dance Pak," allegedly printed in full page advertisements in major Toronto papers, on posters, on the Raptors website, on the team's season schedule, on game tickets, in a mural at the Air Canada Centre where the Raptors play, on a backdrop for the Raptors televised games, and in a basketball annual published by Street & Smith. The picture also appeared with a November 2, 2005 article in the *Toronto Sun* about an attempt by the Raptors Game Operations to entertain fans. Two other undated articles that the petitioner stated also appeared in the *Toronto Sun* featured a picture of the petitioner and another dancer "as they show off the game cards" in a promotion for the Raptors, and a picture of the petitioner accompanying an article about the Raptors charity events. The petitioner submitted other photographs that she indicated were from Raptor TV, of her signing autographs and interacting with fans, of her on the JumboTron and at other events. However, photographs of the petitioner used to promote the Raptors are not published materials about the petitioner or her work. As this criterion specifically requires an author, title, and translation, the publication of photographs do not qualify the petitioner under this criterion. Those specific requirements reference published written work instead of visual work. As such, photographs, whether they are published or not, do not qualify the petitioner under this criterion.

The petitioner also stated that she was featured in Ontario Tourism advertisements, including television commercials, in print ads in publications such as *Vogue*, *Vanity Fair*, *Gourmet*, and *Architectural Digest*, and in a storefront window mural. As discussed immediately above, these photographs of the petitioner do not meet the requirements of "written work" and do not qualify the petitioner under this criterion. Photographs are not published material about the petitioner or her work.

The petitioner submitted a copy of an article that appeared in the July/August 2006 issue of *Dance Spirit* about how to "handle celebrity." The article includes a vignette by the petitioner describing an encounter with a fan and a picture of her with another Raptors dancer. The petitioner also submitted copies of a September 11, 1996 and a December 24, 2001 article about her from *The Record*. The record contains insufficient evidence that either of these publications is either a professional, major trade publication, or other major media. On appeal, counsel asserts that the articles in *The Record* were "published in the mainstream media of Petitioner's country of residence at the time of publication thus evidence her national recognition. Web articles had an international audience." Nonetheless, *The Record* appears to be a local paper, limited to the "Waterloo Region." Moreover, the submitted article appears in the "local" section of the regional newspaper. Furthermore, in today's world, many newspapers, regardless of size and distribution, post at least some of their stories on the Internet. To ignore this reality would be to render the "major media" requirement meaningless. We are not persuaded that international accessibility via the internet by itself is a realistic indicator of whether a given publication is "major media." The petitioner must still provide evidence such as a widespread distribution, readership, or overall interest in the publication in order to demonstrate that the publication is a professional or major trade publication or major media in order for us to credit these articles.

While the petitioner may have been briefly mentioned or her photographs displayed alongside an article, the evidence is insufficient to establish that this material is about her or her work. The petitioner has failed to establish that she 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.*

With the petition, the petitioner submitted a copy of an August 9, 2007 letter from [redacted], National Director of Showstopper. stated that the petitioner had worked "during the past year as both a workshop teacher/choreographer and as an adjudicator at our Regional Dance Competition in Anaheim CA" and that Showstopper planned "to use her as an adjudicator at some of our Competitions/Conventions during our 30th Anniversary cross-USA tour." The petitioner also submitted a copy of an August 8, 2007 letter from [redacted], director of Jump Shout Boogie, who confirmed that the organization "has contracted [the petitioner] as an adjudicator for Dance Competitions in both the Toronto area and Niagara Falls" in 2007. The petitioner submitted no further documentary evidence with the petition to demonstrate that she had performed "adjudications" with either Showstopper or Jump Shout Boogie. Contrary to counsel's argument that the director failed to consider Jump Shout Boogie, the director did consider the evidence submitted and found it lacking for the same reason as articulated here.

In response to the RFE, the petitioner submitted copies of her evaluations from her own performance during her 1996 Showstopper competition. The petitioner submitted no other documentation in the record confirming her participation as a judge in any competition with Showstopper. The petitioner also submitted a copy of the "Adjudication Contract" with Jump Shout Boogie, a copy of the adjudicator's schedule for April 25-29, 2007 and a copy of a check indicating that the organization had paid her the amount agreed upon in the contract.

On appeal, counsel asserts that "the statute does not specify whether the judging event be of national or international acclaim" and that:

> [T]he Service fails to consider the national acclaim of the events itself is immaterial to this issue for the essential element of the competition to be related to the field is met and its professional nature is an additional element showing that the Petitioner is not merely judging the talents of amateurs but is evaluating the skills and talents of professional dancers, teachers and professional choreographers.

Nonetheless, 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 or a competition for top artists or performers is of far greater probative value than judging, as the petitioner claims she has judged, a local or regional competition or a youth, student, or amateur competition. Furthermore, the petitioner submitted no documentation to establish that she evaluated the skills of "professional dancers, teachers and professional choreographers" as alleged by counsel.

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

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

In her letter submitted with the petition, counsel claimed that the petitioner meets this criterion based on her awards, her "preeminence in her field," her "extensive career in large-scale, live dance performances," her "extensive record of critically acclaimed and successful professional achievement and experience as demonstrated by her numerous appearances in the popular press and in trade magazines." In addition, counsel notes the petitioner's expertise in modern dance as well as in classical the classical form, and her "yet further qualifications and achievements as a dancer" as demonstrated by the documentation submitted in support of the other criterion. In other words, counsel alleged that the petitioner meets this criterion because she meets other regulatory criteria.

It should be emphasized that the regulatory criteria are separate and distinct from one another. The ten regulatory criteria are designed to assist the petitioner in establishing eligibility for this visa preference classification and are designed to cover different areas; not every criterion will apply to every occupation. Because separate criteria exist for prizes, publications, and display of one's work at artistic exhibitions or showcases, USCIS clearly does not view these criteria as being interchangeable. If evidence sufficient to meet one criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three criteria would be meaningless and would be inconsistent with the requirement at section 203(b)(1)(A)(i) of the Act which requires the petitioner to demonstrate sustained national or international acclaim through extensive documentation.

To establish that she meets this criterion, the petitioner also submitted several letters of support attesting to her talent and skill as a dancer. For example, [redacted] stated that the petitioner "has extraordinary talents, exceptional technical skills and wonderful stage presence." [redacted] of Faux Riche Entertainment, Inc. stated that the petitioner "dances circles around many dancers who have the opportunities that she doesn't" and that in his opinion, the petitioner "is one of the greatest dancers of this generation." [redacted] stated that she was the choreographer for *Ratatouille* at El Capitan Theater, and that the petitioner's "unique style and

rare abilities make her a definite asset to the future of creative dance." [redacted] further stated that the petitioner was "what they call a 'triple threat' at the top of her field; strong in all aspects of the industry." However, none of the petitioner's supporters specifically describe what the petitioner's purported contributions are and how such contributions are of major significance to her field.

In response to the RFE, the petitioner claimed to meet this criterion based on her choreography and teaching at the Kicks Dance Studio, her choreography with the Toronto Raptors and her position and work with the Bette Midler show "The Showgirl Must Go On." Counsel stated that the petitioner's choreography "has won numerous awards in Canada," and that her choreography with the Raptors "has been displayed to hundreds of thousands of people through Raptor home games and workshops." However, while arguably original, the petitioner provided no evidence of how her choreography was of major significance to her field of endeavor.

Counsel also stated that the petitioner "is an integral part of the workshop and creative stages" of the [redacted] show "as well as being one of the lead dancers, thus playing a critical role in the overall production of the show." The petitioner again submitted no documentation to establish that her position with [redacted] was a contribution of major significance to her field. However, as counsel alleges that the petitioner's position was in a lead and/or critical role for the production, we will consider the petitioner's evidence under the criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii).

On appeal, counsel contests the director's determination and states that "it is not required that petitioner be able to show some original work or techniques which has been adopted by others." Nonetheless, a plain reading of the regulation at 8 C.F.R. § 204.5(h)(3)(v) reveals that the petitioner must establish that she has impacted her field in a significant manner. Counsel asserts that among the petitioner's original contributions of major significance is her choreography "which has consistently been established by her exceptional performance in that capacity." Counsel alleges that:

> Before [the petitioner], Canadian stars were measured by their popularity rather than their professionalism and virtuosity. [The petitioner's] popularity brought forth a new paradigm in how the audience saw dancers worldwide. Fans and the public started to see her as the sole center of her performances in the compositional aspect. One of [the petitioner's] great qualities was that she composed unique, stylistic parts for her performance.

Nothing in the record supports counsel's assertions, however. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The petitioner has provided no evidence that her work has influenced others or advanced the field of dance in any manner. While we do not dispute counsel's contentions regarding the

petitioner's popularity and talent, neither attribute is sufficient to show that the petitioner has made a contribution of major significance to her field.

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

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

As noted by the director, the petitioner did not initially claim to meet this criterion. In response to the RFE, the petitioner claimed to meet this criterion based on her performances in various venues, including her photographs in the media and on Internet websites and in the various competitions. This criterion, however, relates to the visual arts. The petitioner is a performing artist. It is inherent to the field of performing arts to perform. Duties or activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself. Not every performance is an artistic exhibition or showcase. We find that the petitioner's performances are best considered under the leading or critical role criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii) and commercial success under 8 C.F.R. § 204.5(h)(3)(x), which is specifically for the performing artist, both of which are discussed below. Additionally, we have considered the petitioner's performances at competitions under 8 C.F.R. § 204.5(h)(3)(i) and her appearances in media under 8 C.F.R. § 204.5(h)(3)(iii).

The petitioner has failed to establish that she 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 she performed a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

The petitioner claims to meet this criterion based on her performance as a lead dancer for Disney at the El Capitan Theatre, with the Jean Ann Ryan Company, with the Toronto Raptors Dance Pak, and a dance part in the movie *House Bunny*. The petitioner also stated that she has performed for organizations such as the U.S. Navy, the Canadian Forces, L'Oreal, Mary Kay, Hyundai, Coca Cola, and Microsoft. The petitioner submitted no documentation with the petition to establish that her performances with or for any of these organizations were in a leading or critical role.

In response to the RFE, the petitioner claimed to meet this criterion based on her performance with [redacted] "The Showgirl Must Go On" show in Las Vegas. The petitioner submitted a May 8, 2008 letter from [redacted], who stated that the petitioner "has been a vital part of our cast" and that she is "a lead dancer and has a critical role within my show." [redacted] also stated that the show opened in February 2008. As such, the petitioner's role with the show is not evidence that she has performed in a leading or critical role under this criterion. 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) and (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). On appeal, counsel asserts that this evidence must be considered because the petitioner had been "confirmed for her position" prior to filing the petition. However, the petitioner had not begun her work at the time of filing and therefore could not have *performed* in a lead or critical role if she had not started work under her contract.

The petitioner also claims to meet to this criterion based on her position as lead dancer and choreographer with the Toronto Raptors Dance Pak. In her April 17, 2006 letter, [redacted] director of the dance team, stated that the petitioner's responsibilities included "performing a variety of routines at Raptor home games, choreography, and participating in countless promotional events." While [redacted] stated that the petitioner was "selected to appear in numerous television and print advertisements" and the evidence reflects that the petitioner was featured as the "face of the Toronto Raptors Dance Pak," nothing in [redacted]'s letter indicates that the petitioner served as lead dancer or sole choreographer or that her role with the dance team was in a lead or critical capacity. In an August 22, 2006 letter, [redacted], Manager of Game Operations and Special Events for the Raptors, stated that the petitioner had been an "integral part of the game operations team" and "provides leadership to new members of the team and coaching to returning members." However, the petitioner submitted no documentation to establish that the Toronto Raptors Dance Pak or the Game Operations and Special Events for the Raptors enjoyed a distinguished reputation.

The petitioner claims to also meet this criterion based on her dancing at Macy's Passport 2007, a "fashion theatre event." According to documentation from the Macy's website, the venue serves as an HIV/AIDS fundraising event. The petitioner was apparently one of two dancers chosen by the choreographer to participate in a dance segment. However, the documentation indicates that the event occurred in September 2007, after the petitioner filed her petition. Therefore, her performance in the event is not evidence that she has performed in a leading or critical role and therefore not evidence of her eligibility for this criterion. *Id.*

Finally, the petitioner claims to meet this criterion based on her role in a live production of *Ratatouille* at El Capitan Theatre. In a May 7, 2008 letter, [redacted], the choreographer, stated that she chose the petitioner for the lead because she "was the only girl, out of the 200 girls auditioning, that possessed the extraordinary talent and incredible stage presence that was necessary for the part." The petitioner submitted documentation about El Capitan Theatre from its website and a press release retrieved from "Mouse Planet," a Disney website, announcing the performance of *Ratatouille* at the theater from June 29 to August 2, 2007. The petitioner submitted no documentation to corroborate the self-promoting information found on El Capitan's website or to otherwise establish that El Capitan or the musical version of *Ratatouille* enjoyed a distinguished reputation.

The petitioner has failed to establish that she 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 did not initially claim to meet this criterion; however, in response to the RFE, she provided documentation from the Occupational Outlook Handbook of the Bureau of Labor Statistics, which showed that in May 2006, the top ten percent of dancers earned "more than $25.75 per hour. The petitioner submitted a copy of a September 14, 2007 contract with Divine Tours to perform with the Bette Midler tour. As previously discussed, as this performance occurred after the filing date of the petition, it is not evidence of this criterion. *Id.* Counsel argues that the "Service's erroneous exclusion" of this evidence "is akin to selective consideration of evidence provided that Petitioner had been confirmed for her position before filing of this Petition." However, the evidence does not support counsel's assertion. In an August 9, 2007 letter, [redacted], dance director with Clear Talent Group, the petitioner's talent representative, stated that [redacted] "wants to consider [the petitioner] for one of the dancers to be cast for the new Bette Midler show." This is not a confirmation of employment at a specific rate of compensation at the time of filing. If the petitioner's pay was contingent upon her performance and the performance had yet to occur at the time of filing, the petitioner cannot establish that she "commanded" a high salary based on her contract with the Bette Midler tour.

The petitioner also submitted a June 6, 2007 letter from Volt Services Group confirming the petitioner's assignment as a performer with *Ratatouille* and her compensation at the rate of $21 per hour for rehearsals and $240 per day on performance days. The letter does not specify the hours that the petitioner was scheduled to work on performance days. On appeal, counsel asserts that on performance days, the petitioner worked five hours or less per day, and therefore her earnings were the equivalent of at least $48 per hour. However, nothing in the record supports counsel's assertions regarding the petitioner's working hours. Counsel's assertions are not evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The petitioner's evidence does not provide an hourly rate of pay for this performance such that the record clearly establishes that she earned an hourly rate above the top tier of dancers.

As noted by the director, the petitioner's contract with Jump Shout Boogie was not for her performance as a dancer. However, her profession as a dancer was the basis for her selection to adjudicate other dancers' performances. Thus an analysis of her payment in this instance is appropriate. The contract with Jump Shout Boogie indicates that the petitioner was to be paid $3,500 for approximately 93 hours of work, or in excess of $37 per hour. This exceeds the lesser amount of $25.75 earned by the top 10% of dancers.

Nonetheless, the contract was for a two-week period in April and May of 2007, four months before the petitioner filed her appeal. As previously discussed, in determining whether the alien meets a given criterion, the evidence must be evaluated as to whether it is indicative of or consistent with national or international acclaim. Even if we were to consider the petitioner's performance in *Ratatouille*, which was for approximately two months, the evidence does not establish a consistent rate of pay that is significantly high relative to others in the field. The

petitioner's documentation indicated that in 2007, she earned $7,902 in Canada and $1,763 in the United States. This is less than $10,000 per year. The petitioner submits no documentation to establish how this yearly compensation compares with others in her field.

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

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.*

The petitioner claims to meet this criterion based on her performance with Bette Midler, with Disney's live show *Ratatouille* at El Capitan Theatre, and as part of the Toronto Raptors Dance Pak. The petitioner submitted no documentation to establish the commercial success of *Ratatouille*. She provided a copy of an article from *Wikipedia*, the online user-edited encyclopedia to establish the success of the Toronto Raptors. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.[3] *See Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8th Cir. 2008). Accordingly, we will not assign weight to information for which *Wikipedia* is the only cited source. The regulation at 8 C.F.R. § 204.5(h)(3)(x) requires that proof of this criterion must be shown by box office receipts or sales of records, cassettes, compact disks or videos. Further, the petitioner provided no documentation to establish that her participation as a member of the Toronto Raptors Dance Pak contributed to the success of the basketball team. The petitioner submitted no documentation of the commercial success of the dance team.

As discussed previously, as the Bette Midler show began after the filing of the visa petition, it cannot constitute evidence of the beneficiary's eligibility under this criterion. 8 C.F.R. §§ 103.2(b)(1) and (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Regardless, the record contains insufficient evidence to establish that the success of the shows or the dance troupe is based solely or even primarily on the petitioner's performances.

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

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[3] Online content from *Wikipedia* is subject to the following general disclaimer:

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*See* http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on September 2, 2009, a copy of which is incorporated into the record of proceeding.

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 her field of endeavor. Review of the record, however, does not establish that the petitioner has distinguished herself to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her 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.