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



**U.S. Citizenship
and Immigration
Services**

B2

DATE: **APR 05 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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:

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

We ask the AAO to re-evaluate all the evidence submitted demonstrating that the nexus between [the petitioner's] extraordinary acclaim as a Dancer/Performer supports her a finding of extraordinary ability as an Instructor/Coach on a totality of the evidence including her instruction of students who have competed and won at the national level.

In Part 5 of Form I-140, Immigrant Petition for Alien Worker, the petitioner listed her occupation as a "Latin Dance Instructor/Choreographer." In addition, in Part 6, the petitioner listed her proposed job title as a "Latin Dance Instructor/Choreographer" and indicated that the description of her proposed employment was to "[l]ead instruction in various forms of Latin dance, planning routines with choreographers, representing [redacted] at national and international conferences and competitions." Moreover, the petitioner submitted an employment letter from [redacted] who stated that "[s]ince April 2009, [the petitioner] has been employed by [redacted] as our resident Latin Dancer/Instructor." Furthermore, according to Form G-325A, Biographic Information, which the petitioner signed on January 8, 2010, the petitioner listed her current employment as a "Dance Instr[uctor]/Choreographe[r]" at [redacted] from March 2009 to the present, and previous employment as a "Dance Instructor" at [redacted] from November 2008 to March 2009, and as a "Dance Instructor" at [redacted] from December 2002 to October 2008.

Thus, the record reflects that the petitioner is seeking classification as an alien of extraordinary ability as an instructor and choreographer rather than as a competitive dancer. Even though the petitioner submitted documentation regarding her involvement in earlier competitions as a competitor, which will be discussed later in this decision, the record reflects the petitioner's intent to work in the United States as an instructor and choreographer.

The statute and regulations require the petitioner's national or international acclaim to be *sustained* and that she seeks to continue work in her area of expertise in the United States. *See* sections 203(b)(1)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1153(b)(1)(A)(i) and (ii), and 8 C.F.R. §§ 204.5(h)(3) and (5). While an instructor/choreographer and dancer share knowledge of the sport, the two rely on very different sets of basic skills. Thus, dance instruction/choreography and dance competition are not the same area of expertise. This interpretation has been upheld in federal court. In *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

It is reasonable to interpret continuing to work in one's "area of extraordinary ability" as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee's extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

Id. at 918. The court noted a consistent history in this area. In the present matter, there is no evidence showing that the petitioner has sustained national or international acclaim through achievements as a dance competitor or that she intends to compete here in the United States. While the AAO acknowledges the possibility of an alien's extraordinary claim in more than one field, such

as dance competition and dance instruction/choreography, the petitioner, however, must demonstrate “by clear evidence that the alien is coming to the United States to continue work in the area of expertise.” *See* the regulation at 8 C.F.R. § 204.5(h)(5).

Based on the petitioner’s answers to the questions on Form I-140 and the submitted documentation, the record reflects that the petitioner intends to continue to work in the area of dance instruction/choreography rather than the area of dance competition. Ultimately, the petitioner must satisfy the regulation at 8 C.F.R. § 204.5(h)(3) through her achievements as a dance instructor or choreographer.

II. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available ... to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien’s entry into the United States will substantially benefit prospectively the United States.

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

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien’s sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international

recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

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

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

III. ANALYSIS

A. Evidentiary Criteria²

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

In the director's decision, she determined that the petitioner established eligibility for this criterion. Specifically, the director stated:

The record contains sufficient evidence to conclude the petitioner's role as an instructor and coach has resulted in several first place finishes for her students in

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

² On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

The following publicity has been done in regards of performances of [the petitioner] and Nexdoyminoga Yuri.

The attached article "[redacted]" has been printed at the Newspaper "Fashion Industry" on February 2002. The second attached flyer has been advertised at the newspaper [redacted]

At the outset, the regulation at 8 C.F.R. § 103.2(b) provides in pertinent part:

(3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a *full* English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English [emphasis added].

As cited above, the regulation at 8 C.F.R. § 103.2(b)(3) specifically requires that any foreign language document that is submitted to USCIS must be accompanied by a *full* and *certified* English language translation. The petitioner's uncertified and summary translation does not comply with the regulation at 8 C.F.R. § 103.2(b)(3). Regardless, the summary translation appears to refer to the petitioner as a dance performer rather than as a dance coach or choreographer. *See Lee v. I.N.S.*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise). Moreover, the petitioner failed to submit any documentary evidence reflecting that *Fashion Industry* and *Results* are professional or major trade publications or other major media. In addition, the petitioner failed to submit the authors of the documentation as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Finally, flyers, advertisements, posters, and other promotional material do not equate to "published material" consistent with the plain language of this regulatory criterion as they are not independent, journalistic coverage of the petitioner relating to her work.

Similarly, the petitioner submitted another summary and uncertified translation, which fails to comply with the regulation at 8 C.F.R. § 103.2(b)(3), that appears to reflect summary translations for two documents. While the first summary translation appears to mention the petitioner as a teacher for "[redacted]" the second summary translation appears to mention the petitioner as placing third place as a dance competitor in "[redacted]" *See Lee v. I.N.S.*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise). Regardless, the petitioner failed to include the title, date, and author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Moreover, the petitioner failed to indicate where the material was published, let alone if they were published in professional or major trade publications or other major media.

The petitioner also submitted a new release, dated June 4, 2007, [redacted] entitled, "[redacted] Awards Featuring the Hottest Stars in Film, Music, and Television to Air Tuesday, June 5 on ABC." A review of the news release reflects that the petitioner was mentioned one time as being one of several performers in the opening number of the event. In general, news and press releases do not constitute published material as it is not

independent, journalistic coverage of the petitioner relating to her work. Further, the news release is not about the petitioner relating to her work. Rather, it is about NCLR's 2007 ALMA Awards. Articles that are not about the petitioner do not meet this regulatory criterion. *See, e.g., Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). Moreover, the petitioner failed to include the author of the material as required pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), and if the news release was published in a professional or major trade publication or other major media. Regardless, the news release refers to the petitioner as a performer rather than as an instructor or choreographer. *See Lee v. I.N.S.*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise).

Finally, the petitioner submitted an article entitled, [REDACTED] dated July 2007, by [REDACTED]. Although the petitioner is mentioned one time as performing, the article is about the [REDACTED]. *See, e.g., Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *7 (upholding a finding that articles about a show are not about the actor). Furthermore, the article does not relate to the petitioner's field as a dance coach or choreographer. *See Lee v. I.N.S.*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise). In addition, the petitioner failed to submit any documentary evidence establishing that *The Dancing Feet* is a professional or major trade publication or other major media.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “[p]ublished 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.” In this case, the petitioner’s documentary evidence fails to reflect any published material about the petitioner as a dance coach or choreographer in professional or major trade publications or other major media.

Accordingly, the petitioner 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.

In the director’s decision, she determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence 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 [emphasis added].” A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence demonstrating that she participated as a judge for the “Seasons of the Year” tournament from 2000 – 2002. As such, the petitioner has minimally met the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). Therefore, the AAO withdraws the findings of the director for this criterion.

Accordingly, the petitioner established 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.

The director determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a *leading or critical role* for organizations or establishments that have a distinguished reputation [emphasis added].” In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment.

A review of the record of proceeding reflects that the petitioner submitted a letter from Mr. Manh who stated that the petitioner “is a valuable dance instructor for [REDACTED]” and the petitioner “is an integral part of the future dancers at [REDACTED].”⁴ However, [REDACTED] failed to provide any further information to explain why the petitioner is a “valuable dance instructor,” so as to demonstrate that the petitioner performs in a leading or critical role for [REDACTED]. The lack of specific information provides the AAO no basis to gauge the role of the petitioner at [REDACTED]. There is no documentary evidence that differentiates the petitioner’s role from the roles of other instructors at [REDACTED], so as to established that the petitioner’s role was leading or critical. In fact, it appears that [REDACTED], the director and owner of [REDACTED], performs in a far more leading or critical role than the petitioner. In addition, the petitioner failed to submit any documentary evidence to demonstrate that [REDACTED] has a distinguished reputation.

The petitioner also submitted a letter from [REDACTED] who stated that the petitioner “is a great asset to our studio, her knowledge and compassion for the dancing is quite unique” and the petitioner “has a great talent working with our young dancers and she is well respected in our field.” Again, [REDACTED] failed to explain how the petitioner is “a great asset” to the studio, so as to reflect that the petitioner performs in a leading or critical role. Moreover, while the [REDACTED] acknowledges the petitioner’s talent and respect in the field, there is no indication that the petitioner’s talents and personal qualities equate to a leading or critical role. Merely having talent is not reflective of performing in a leading or critical role. Rather, the record must be supported by evidence that the petitioner has already her talent to perform in a leading or critical role. Assuming that the petitioner has talent as a coach, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm’r 1998). Further, the petitioner failed to submit any documentary evidence to reflect that IDC has a distinguished reputation.

⁴ The AAO notes that according to [REDACTED] website, <http://www.justdanceballroom.com/instructors/>, accessed on March 27, 2012, and incorporated into the record of proceeding, the petitioner is not currently listed as one of the instructors.

Furthermore, the petitioner submitted documentary evidence reflecting her participation in an instructional DVD entitled, "[REDACTED]." In addition, the petitioner submitted a letter from [REDACTED], who stated that the petitioner's "filming of the video added significantly to the appeal of the final product and its selling success." According to the promotional material, the DVD also reflected participation and instruction by [REDACTED]. Furthermore, the promotional material features a quote from [REDACTED] for his instruction, as well as quotes from [REDACTED] Season Three Semi-Finalist for [REDACTED] who commended [REDACTED] for her instruction. Besides the indication of the petitioner's name as a participant on the promotional material for the DVD, the record fails to reflect that the petitioner performed in a leading or critical role. Further, the AAO is not persuaded that sporadic, occasional, or one-time employment is reflective of leading or critical roles for organizations or establishments as a whole. In the case here, the record fails to reflect that the petitioner's single participation in an instructional video is consistent with a leading or critical role to [REDACTED] as a whole. Moreover, it appears that [REDACTED]'s role as the director and general manager for [REDACTED] is far more leading or critical than the petitioner who simply performed in one of [REDACTED]'s instructional video productions. Also, the petitioner failed to submit any documentary evidence demonstrating that [REDACTED] has a distinguished reputation.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." The burden is on the petitioner to establish that she meets every element of this criterion. Without documentary evidence demonstrating that the petitioner has performed in a leading or critical role for organizations or establishments that have a distinguished reputation, the AAO cannot conclude that the petitioner meets this criterion.

Accordingly, the petitioner failed to establish that she meets this criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

IV. O-1 NONIMMIGRANT ADMISSION

The AAO notes that at the time of the filing of the petition, the petitioner was last admitted to the United States as an O-1 nonimmigrant on January 7, 2010. However, while USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant

petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

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

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

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

V. CONCLUSION

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 the field of endeavor.

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); see also *Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.⁵ Rather, the proper conclusion is that the

⁵ The AAO maintains *de novo* review of all questions of fact and law. See *Soltane v. DOJ*, 381 F.3d at 145. In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). See also section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1

petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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.