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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

[redacted]

DATE: AUG 0 9 2012

Office: TEXAS SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in athletics as a Wushu competitor, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A). 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.

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

The petitioner's priority date established by the petition filing date is August 4, 2010. On March 8, 2011, the director served the petitioner with a request for evidence (RFE). After receiving the petitioner's response to the RFE, the director issued her decision on June 23, 2011. On appeal, the petitioner submits a brief with new documentary evidence. For the reasons discussed below, the AAO upholds the director's ultimate determination that the petitioner has not established her eligibility for the classification sought.

## I. 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.*

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

## II. ANALYSIS

### A. One Time Achievement

Within the appellate statement, the petitioner asserts that just one of the five awards she received at the 4th Hong Kong International Wushu Festival, constitutes the receipt of "a one-time achievement (that is, a major, internationally recognized award)" pursuant to 8 C.F.R. § 204.5(h)(3). On appeal, the petitioner also states that the 4th Hong Kong International Wushu Festival is equivalent to the martial arts competitions in the Olympic Games, since Wushu is not a form of the martial arts competitions within the Olympics. As evidence of that the 4th Hong Kong International Wushu Festival is on par with the Olympics the petitioner identified a previously submitted form of evidence, the *Hong Kong International Wushu Review*. This document's translation into English indicated that the goal of the festival is to promote Wushu internationally thereby benefitting more people around the world. This evidence also indicated that for the first time, the festival would be issuing a first prize award of an amount of Chinese currency equal to approximately $30,000 U.S. dollars.

Within the appellate statement is the first instance that the petitioner articulated her eligibility under this regulatory provision. The methods vary by which a petitioner can be notified of evidentiary requirements. For example, a petitioner is considered to be on notice through the specific requirements outlined within the regulations, or through various forms of communication from USCIS to a petitioner or applicant noting an evidentiary deficiency or requesting more evidence. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The regulation at 8 C.F.R. § 204.5(h)(3) notified the petitioner of the specific filing requirements to demonstrate eligibility under the extraordinary ability classification. In addition, the instructions to the Form I-140 petition state that the petitioner "must attach evidence with [the] petition showing that the alien has sustained national or international acclaim" and then lists the ten regulatory criteria. Finally, the director issued a request for evidence listing all of the regulatory criteria. Therefore, the petitioner must claim every criterion that the petitioner would like to be considered before the director. In instances when the petitioner was notified of the types of evidence that are required to demonstrate eligibility and was afforded the opportunity to provide the evidence prior to the issuance of an adverse decision, new eligibility claims will not be considered on appeal. *See Matter of Soriano*, 19 I&N Dec. at 766.

If the petitioner would like for USCIS to consider claims to additional eligibility criteria, this must be accomplished through the filing of a new petition. *See id.* at 766. *Cf. Matter of Jimenez*, 21 I&N Dec. 567, 570 n.2 (BIA 1996) (finding that claims of eligibility for a waiver presented for the first time on appeal are not properly before the Board of Immigration Appeals and that the Board will not issue a determination on the matter.) Although the AAO maintains *de novo* review of appellate cases and a petitioner may supplement the record in regards to previous claims, a petitioner may not raise a previously unclaimed eligibility criterion on appeal. *Matter of Soriano*, 19 I&N Dec. at 766. Furthermore, the director considered the five awards in question under the lesser prizes or awards criterion, which the petitioner relied upon to satisfy the criterion at 8 C.F.R. § 204.5(h)(3)(i).

B. Evidentiary Criteria[2]

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

The director determined that the petitioner met the requirements of this criterion. The AAO concurs with the director's determination as it relates to 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.*

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish her eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO has reviewed the director's analysis of the relevant associations and committees (a committee membership is not covered by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) and affirms the director's analysis and conclusion. Accordingly, the petitioner has not submitted qualifying evidence under 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.*

The director discussed the evidence submitted pursuant 8 C.F.R. § 204.5(h)(3)(iii) and found that the petitioner failed to establish her eligibility. On appeal, the petitioner makes only passing reference to this issue, offering additional deficient evidence that was either not accompanied by translations that were in compliance with the regulation at 8 C.F.R. § 103.2(b)(3), or that the petitioner did not assert under which publication type the evidence qualified, i.e., professional or major trade publications or other major media. Additionally, the petitioner failed to identify an incorrect application of law or statement of fact underlying the director's findings that the previously submitted evidence was insufficient. The AAO has reviewed the director's analysis of the material in regional publications and affirms the director's analysis and conclusion. Accordingly, the petitioner has not submitted qualifying evidence under 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.*

The director determined that the petitioner met the requirements of this criterion. The AAO concurs with the director's determination as it relates to this criterion.

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[2] The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

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

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish her eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO has reviewed the director's concerns that the unsupported reference letters are insufficient to demonstrate the petitioner's impact in the field and affirms the director's analysis and conclusion. Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010).[3] Accordingly, the petitioner has failed to submit qualifying evidence under this criterion.

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

This criterion contains multiple evidentiary elements the petitioner must satisfy. The plain language requirements of this criterion requires that the work in the field is directly attributable to the alien. Additionally, the interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *See Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). The alien's work also must have been displayed at an artistic exhibitions or showcases (in the plural). While neither the regulation nor existing precedent speak to what constitutes an exhibition or a showcase, Merriam-Webster's online dictionary defines exhibition as, "a public showing (as of works of art)."[4] Merriam-Webster's online dictionary also defines showcase as, "a setting, occasion, or medium for exhibiting something or someone especially in an attractive or favorable aspect."[5] Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U.S. 304, 306 (1893). Therefore, it is the petitioner's burden to demonstrate that the display of her work in the field claimed under this criterion occurred at artistic exhibitions or at artistic showcases. The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion.

Martial arts exhibitions are athletic in nature and are not artistic exhibitions or showcases as contemplated under the regulation. As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, she has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Consequently, the AAO withdraws the director's determination as it relates to this criterion.

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[3] In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122.

[4] *See* http://www.merriam-webster.com/dictionary/exhibition, [accessed on July 3, 2012, a copy of which is incorporated into the record of proceeding.]

[5] *See* http://www.merriam-webster.com/dictionary/showcase, [accessed on July 3, 2012, a copy of which is incorporated into the record of proceeding.]

*Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.*

Within the appellate brief is the first instance that the petitioner articulated her eligibility under this criterion. As discussed above, the petitioner was on notice of this criterion from the regulation at 8 C.F.R. § 204.5(h)(3)(ix), the instructions to the Form I-140 and the director's RFE. *See Matter of Soriano*, 19 I&N Dec. at 766. Although the AAO maintains *de novo* review of appellate cases and a petitioner may supplement the record in regards to previous claims, a petitioner may not raise a previously unclaimed eligibility criterion on appeal. *See id.; cf. Matter of Jimenez*, 21 I&N Dec. at 570 n.2. Thus, the AAO will not consider this claim, raised for the first time on appeal.

C. Summary

The petitioner has not submitted relevant, probative evidence to satisfy the antecedent regulatory requirement of three types of evidence.

## III. FINAL MERITS DETERMINATION

Although the petitioner failed to satisfy at least three of the evidentiary criteria and a final merits determination is not required, the director performed this analysis and the AAO concurs with the director's determination. In accordance with the *Kazarian* opinion, the next step is 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," 8 C.F.R. § 204.5(h)(2); 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)(3). *See Kazarian*, 596 F.3d at 1119-20.

The receipt of three individual and two group awards at an event attended by representatives from several nations is not on par with the Olympic Games as the petitioner asserts on appeal. No evidence is on record to establish that this 2006 event utilizes a similar selection process used by the Olympics whereby a national authority selects those competing. who represent their respective nation. This process utilized within the Olympic Games attempts to ensure that only those who perform at the top level from each nation compete at this international level. Additionally, "popularization" awards, outstanding contribution certificates and a 1985 championship from an event that lacks national or international acknowledgement (the Worker Sport Meeting) are not demonstrative of the petitioner being among that small percentage who have risen to the very top of the field of endeavor. Additionally, the statute and regulations require the petitioner to demonstrate that her national or international acclaim has been *sustained*. *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 documentation submitted for the criterion at 8 C.F.R. § 204.5(h)(3)(i) is not commensurate with *sustained* national or international acclaim as of the petition's filing date.

The record reflects that the petitioner was invited to serve as a judge in 1997 and that she served as a judge in 2010. The nature of the petitioner's judging experience is a relevant consideration as to whether the evidence is indicative of the beneficiary's national or international acclaim. *See Kazarian*, 596 F.3d at 1122. However, the petitioner failed to document any prestige associated with the 2010 judging opportunity. Additionally, the portion of the 1997 invitation naming the recipient is in a foreign language and is not accompanied by a translation. A single occurrence of judging in a competitive career spanning nearly four decades does not demonstrate that the petitioner has attained sustained national or international acclaim nor does it demonstrate that she is one who is among that small percentage who have risen to the very top of her field of endeavor.

Regarding the remaining eligibility criteria previously claimed, the AAO affirms the director's findings. Regarding the new criteria the petitioner claims on appeal, the AAO will not consider claims raised for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 766; *cf. Matter of Jimenez*, 21 I&N Dec. at 570 n.2.

In this matter, the petitioner has not established that her achievements at the time of filing were commensurate with sustained national or international acclaim as a martial arts competitor, or being among that small percentage at the very top of the field of endeavor. The submitted evidence is not indicative of a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). The conclusion the AAO reaches by considering the evidence to meet each category of evidence at 8 C.F.R. § 204.5(h)(3) separately is consistent with a review of the evidence in the aggregate. Ultimately, the evidence in the aggregate 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). While the petitioner need not demonstrate that there is no one more accomplished than herself to qualify for the classification sought, it appears that the very top of her field of endeavor is far above the level she has attained.

## IV. JOB OFFER

The regulation at 8 C.F.R. § 204.5(h)(5) provides:

> *No offer of employment required.* Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

Within the initial filing brief, petitioner's counsel at the time simply indicated that she intended to work in her field upon the receipt of her adjustment of status. The director concluded in her decision that this was insufficient to meet the regulatory requirements. On appeal, the petitioner indicates that she came to the United States intending to open her own Kung Fu school. She also indicates that while she has

not taken the steps to open this business prior to being granted permanent resident status, that she has been in discussion with two different individuals regarding her venture. The appellate statement indicates that the petitioner is providing two forms of evidence in the form of notarized letters; however, such evidence is not part of the record. Based on the above information, the petitioner has not established she is coming to the United States to continue to work in her area of expertise in the martial arts.

## 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.

Review of the record, however, does not establish that the petitioner has distinguished herself as a martial arts competitor 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. The evidence indicates that the petitioner shows talent in her field, but is not persuasive that the petitioner's achievements set her significantly above almost all others in 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.

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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soriano*, 19 I&N Dec. at 766 (citing *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)). Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.