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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 1 0 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in athletics. The director determined that the petitioner had not established the requisite extraordinary ability through extensive documentation and sustained national or international acclaim.

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.

On appeal, counsel asserts that the petitioner meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3) and that he submitted comparable evidence of his extraordinary ability pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). For the reasons discussed below, the AAO will uphold the director's decision.

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.* and 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that an alien demonstrate his or her sustained acclaim and the recognition of his or her achievements in the field. Such acclaim and achievements must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through meeting at least three of the following ten categories of evidence:

(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(ii) 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;

(iii) 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;

(iv) 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 specialization for which classification is sought;

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

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

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

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)). The court also explained the "final merits determination" as the corollary to this procedure:

> If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both 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 "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). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at 1119-20.

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 reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *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).

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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. *Evidentiary Criteria*

This petition, filed on September 24, 2010, seeks to classify the petitioner as an alien with extraordinary ability as a ballroom dance competitor and teacher. At the time of filing, the petitioner was working at Vivo Dancesport Center in Hacienda Heights, California. The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(h)(3).[2]

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

The petitioner submitted evidence showing that he received nationally recognized awards in "Junior," "Amateur," and "Rising Star" levels of dance competition. For instance, the petitioner placed 2nd in the U.S. Open Professional "Rising Star" Competition in September 2009 and 2nd at the Polish Championships in the "Junior" category in February 1999. The AAO affirms the director's finding that these awards meet the plain language requirements of this regulatory 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 AAO withdraws the director's finding that the petitioner meets this regulatory criterion. In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.[3]

The petitioner submitted event results for the German Open Championships (1999) listing the petitioner among the numerous other Polish contestants who placed in the competition. The results indicate that the petitioner and his partner placed 14th in the Junior II Latin category, 6th in the Junior II Standard category, and 9th in the Junior II Ten Dance category. The petitioner also submitted information entitled "Sport ranking of Polish Dance Organization for 1st of October 1999" listing the petitioner and his partner as 1st in the Junior II Standard category and 3rd in the Junior II Latin

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

[3] Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

category. Aside from listing the petitioner's name and ranking, the submitted material does not include any further information about the petitioner relating to his work. Further, the name of the publication, its date, and the author of the preceding material were not identified as required by plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, there is no documentary evidence (such as circulation data) showing that the preceding event results and rankings were in a major trade publication or some other form of major media.

The petitioner submitted two January 1999 articles in *The International News* entitled "Sunny Dance Festival 'Allasio 1999'" and "14th Dance Festival in Mannheim," but the English language translations accompanying the articles were not full and complete translations as required by the regulation at 8 C.F.R. § 103.2(b)(3). Any document containing foreign language submitted to USCIS shall be accompanied by a *full* English language translation that 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. *Id.* Further, the articles appear to be about the 11th Italian Open Championships in Allasio and the 14th Dance Festival Competition in Mannheim rather than the petitioner himself. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about the alien." *See, e.g., Accord 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, there is no circulation evidence showing *The International News* is a major trade publication or some other form of major media.

The petitioner submitted an article in *Dance Beat* entitled "U.S. Open Professional Standard Championship," but the date of the article was not provided as required by the plain language of this regulatory criterion. Further, the article only briefly mentions the petitioner in two sentences and it is not about him. Instead, the article is about the U.S. Open Professional Standard Championship in general. The petitioner also submitted a February 25, 2010 letter from the Editor of *Dance Beat* stating: "*Dance Beat* began publishing in 1990 and continues to the present day. . . . We distribute between 2,500 to 5,000 copies of the newspaper per month. This is the largest circulation of any dancesport publication in the USA." Regarding the self-serving assertions from *Dance Beat*'s editor, USCIS need not rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). The petitioner has failed to submit objective circulation evidence showing the distribution of *Dance Beat* relative to other newspapers or magazines (such as *DanceSport Magazine*) to demonstrate that the submitted article was published in a "major" trade publication or some other form of "major" media.

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

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

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. Neither the petitioner nor counsel has explained how dance performances equate to visual art exhibits. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires "[e]vidence

of the display of the alien's work in the field at artistic exhibitions or showcases." The petitioner is a ballroom dancer. When he is dancing in competition or before an audience at events such as Vivo Dancesport Center's annual New Year's Eve parties, he is not displaying his work in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The petitioner is performing his work, he is not displaying his work. In addition, to the extent that the petitioner is a ballroom dancer, it is inherent to his occupation to compete and perform. The AAO notes that the ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

The petitioner submitted a July 10, 2010 letter from stating that she has "trained nearly all of the professionals on 'Dancing With the Stars' shows around the world." further states:

> In Season 6, week 9 of "Dancing with the Stars," the producers of the television show conducted a professional standard group class for Olympic Figure Skating Champion, , and her professional partner, The purpose of the professional group class was to advise on how to add passion and emotion to her tango performance.

The letter from indicates that the petitioner and his partner, were part of a special tango group class that attended for advice and instruction. The May 13, 2008 ABC "Dancing with the Stars" video clip identified by shows and visiting a dance class taught by instructor . The tango group class included five or six other professional dance couples in attendance and did not specifically focus on the petitioner or identify him by name. Instead, the focus of the video clip from the "Dancing with the Stars" television episode was tango training. Accordingly, the petitioner has failed to demonstrate that his work was specifically singled out for display in the episode. The AAO notes that the petitioner was not paired with a celebrity to perform weekly on the television series in the same manner as professional dancer

Regardless, 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. *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *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)). As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Accordingly, the petitioner has not established that he meets this regulatory criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

On appeal, counsel asserts that the petitioner has performed in a leading or critical role for Vivo Dancesport Center. The petitioner initially submitted a July 6, 2010 letter from and , stating:

> Vivo Dancesport Center (Vivo) is the leading competitive dance studio and has a distinguished reputation in the United States. From the beginning, Vivo's vision was to create a highly renowned studio known in the ballroom dance community for its exceptional dancers in Southern California and throughout the world. In ten years, Vivo has surpassed all neighboring dance studios to become an instantly recognizable name in Ballroom and Latin Dancesport.
>
> * * *
>
> Since joining our studio as a competitive Ballroom dancer in 2007, [the petitioner] has played a critical role in our studio. He has become our top Ballroom dancer, as he has won numerous championships titles and represented our studio in major national dance competitions such as Golden State Challenge 2008, Vegas Showdown 2009, Windy City Open 2009, U.S. Nationals Professional Standard, and Ohio Star Ball Professional Standard. Due to [the petitioner's] reputation as a championship level dancer, he is the most distinguished Ballroom dancer and coach at our studio. He currently is the highest paid male teacher at our studio. [The petitioner] earned a minimum of $25 for a fifty (50) minute dance sessions during his first year of employment and is currently earning $40 for a fifty (50) minute dance session while other teachers are only paid $25 for a fifty (50) minute session. He is also prominently featured in all of our studio's showcases and other dance activities, such as team matches and medal tests, throughout the year. . . . In three years, [the petitioner] has increased the number of students at the studio and is the leading male Ballroom instructor in Southern California. In conclusion, [the petitioner] has played and continues to play a critical role in our studio, which itself is a distinguished dance studio in the United States.

In response to the director's request for evidence, the petitioner submitted a January 22, 2011 letter from Mr. Dixon stating:

> [The petitioner] is the leading male ballroom dancer at Vivo Dancesport Center for the past three years. He teaches private dance lessons to 34 active ballroom students out of a total 65 active ballroom students, which is 52.3% of the studio's total client base. [The petitioner] has the highest percentage of clients compared to all other ballroom instructors.
>
> * * *
>
> [The petitioner] has the highest retention rate of clients year over year, compared to all other ballroom dancers. Approximately, 95% of clients whom [the petitioner] dances with, return the following year to purchase additional dance lessons at the studio. Therefore, [redacted] has significantly improved the retention of clients at the studio.
>
> * * *

> [The petitioner] is the most successful male ballroom dancer from Vivo Dancesport Center in 2009 and 2010. He represented the studio at the United States National Professional Standard Competition each year, placing higher than any other dancer at the studio. His success directly benefits the studio as he is the most successful ballroom dancer. . . . Furthermore, [the petitioner] was always chosen to perform in the studio's showcases such as annual Vivo New Year Show and his name was always placed prominently on all the showcase programs as a featured or star dancer to attract audiences since 2007 when he started working at the studio under O-1 status.
>
> * * *
>
> [The petitioner] has demonstrated in the past three years that he has achieved the highest ranking in the U.S., among all ballroom dancers at the studio. Additionally, he has the largest number of students over the past years which have remained with the studio. Based on these two factors, [the petitioner] is paid the highest rate of $40 per 50 minute lesson at the studio.
>
> * * *
>
> [The petitioner] has earned a significant amount of revenue for the studio from 2007 through 2010. A single private dance lesson typically costs $80. [The petitioner] teaches an average of 1,000 lessons per year, from 2007 to 2010, as evidenced by his detail earning statements. Thus, the total gross revenue which [the petitioner] brings to the studio is $80,000 (1,000 lessons per year x $80 per lesson). The amount represents a significant portion of Vivo Dancesport Center's annual net income.

The preceding information in the two letters from [redacted] is sufficient to demonstrate that the petitioner has performed in a critical role for Vivo Dancesport Center. The petitioner also submitted general information about Vivo Dancesport Center from its website. Regarding the information from Vivo Dancesport Center's website and the self-serving statements about the reputation of the studio from its owner and president, USCIS need not rely on self-promotional material. *See Braga v. Poulos*, No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 317 Fed. Appx. 680 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). In addition, the petitioner submitted a November 20, 2006 article posted on the *Los Angeles Times* website entitled "1-2-3, 1-2-3 -- this is a workout." The article only briefly mentions the Vivo Dancesport Center stating: "'The Waltz is more of a workout than aerobics or running,' says [redacted], [redacted]. On a Tuesday night last week, he was teaching both the slow (American) and faster (Viennese) style waltz to several dozen eager students." The preceding article is about the health benefits of the waltz and provides no information about the reputation of Vivo Dancesport Center. The petitioner also submitted a June 2008 article about the studio in *EDI City Newsweek* entitled "Vivo – Center of Ballroom Dancing," but the English language translation accompanying the article was not a full and complete translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). Regardless, this single article about the studio appearing in a Chinese language publication (whose distribution is limited to Chinese-speaking residents of

California) fails to demonstrate that Vivo Dancesport Center has earned a distinguished reputation relative to other ballroom dance studios in the United States. Accordingly, the petitioner has not submitted sufficient documentary evidence establishing that Vivo Dancesport Center has a distinguished reputation.

Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence that the petitioner has performed in a leading or critical role for distinguished "organizations or establishments" in the plural. The use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at *1, *12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *1, *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials). Therefore, even if the petitioner were to submit documentary evidence showing that Vivo Dancesport Center's reputation meets the elements of this regulatory criterion, which he has not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence of a leading or critical role for more than one distinguished organization or establishment.

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

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

In response to the director's request for evidence, the petitioner submitted his Forms 1099-MISC from Vivo Dancesport Center reflecting earnings of $50,008.93 in 2008 and $38,427.26 in 2009. The petitioner also submitted the following:

1. A list of prize monies received by the petitioner in 2009 totaling $6,400;
2. 2009 Competition Results;
3. Online announcements for various competitions listing available prize monies;
4. Online information from the U.S. Bureau of Labor Statistics for "Dancers" indicating that they earn a mean hourly wage of $16.37 ($34,049 annually) and that *the top ten percent earn in excess of $29.18 hourly ($60,694.40 annually)*;
5. U.S. Department of Labor "Prevailing Wage" search results indicating that the Level 4 (fully competent) wage for "Dancers" in the Los Angeles - Long Beach - Glendale, California metropolitan area is $30,077 per year;
6. Online information from SalaryExpert.com indicating that the "average" salary for a ballroom dancer in Los Angeles, California is $31,911; and

7. Letters from three California dance studios listing their pay rates for teaching dance lessons.

With regard to items 4 and 6 above, the petitioner's reliance on "mean" or "average" salary data relating to "Dancers" and "Ballroom Dancers" is not a proper basis for comparison. The petitioner must submit evidence showing that he has earned a "high" salary or other "significantly high" remuneration in relation to others in the field, not simply earnings that are above average in the field. The AAO notes that the petitioner's earnings for 2008 and 2009 are well below the $60,694.40 yearly earnings for the top ten percent of dancers (item 4). Further, regarding items 5 – 7 above, the petitioner's reliance on wage data limited to regions in California is not an appropriate basis for comparison in demonstrating that his earnings constitute a high salary or other significantly high remuneration in relation to others in his occupation working outside of those regions. In regard to items 1 – 7, the submitted documents fail to demonstrate that that the petitioner has received "significantly high remuneration" in comparison to other professional ballroom dance competitors and teachers. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). Accordingly, the petitioner has not established that he meets this regulatory criterion.

Summary

The AAO withdraws the director's determination that the petitioner meets at least three of the ten categories of evidence that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3). The petitioner has failed to demonstrate that he satisfies the antecedent regulatory requirement of three types of evidence.

B. Comparable Evidence Under 8 C.F.R. § 204.5(h)(4)

In response to the director's request for evidence, the petitioner submitted July 15, 2010 letter from [redacted], stating:

> We sponsor over 20 couples in the United States, in all four competitive ballroom dancing styles. . . . Our sponsored couples must have achieved a placing within the top 6 in any professional or *amateur* division at the annual U.S. Nationals competition, otherwise known as United States Dancesport Championships, held in Orlando, Florida.
>
> We have chosen to sponsor [the petitioner] and his partner since June 2009. . . . [The petitioner] and his partner are one of the highest placing United States representative [sic] in the Professional *Rising Star* Standard division . . . .

[Emphasis added.]

The letter from states that Doré Designs sponsors both amateur and professional dance couples. letter does not specify the monetary value of the sponsorship received by the petitioner. Further, there is no documentation indicating the amounts received by the more than twenty other couples sponsored by Doré Designs.

On appeal, counsel states: "The evidence show [sic] that the petitioner and his partner were one of over 20 couples sponsored by Doré Designs, a major ballroom dress designer, based on their outstanding achievements in national competitions, out of 1,346 available couples in the United States."

The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten categories of evidence "do not readily apply to the beneficiary's occupation." Thus, it is the petitioner's burden to demonstrate why the regulatory criteria at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the alien's occupation and how the evidence submitted is "comparable" to the specific objective evidence required at 8 C.F.R. §§ 204.5(h)(3)(i) – (x). The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner submitted evidence that specifically addresses multiple categories of evidence set forth in the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to satisfy the plain language requirements of at least three categories of evidence at 8 C.F.R. § 204.5(h)(3), the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

Counsel's appellate brief does not explain why the regulatory criteria are not readily applicable to the petitioner's occupation. Further, counsel does not explain how the documentation indicating that the petitioner and his sponsor were able to secure a single sponsorship is "comparable" to any specific objective evidence required at 8 C.F.R. §§ 204.5(h)(3)(i) – (x). The AAO notes that the earnings received by the petitioner have already been addressed under the remuneration criterion at 8 C.F.R. § 204.5(h)(3)(ix). Regardless, business sponsorships are common at all levels of sports competition and there is no indication that the monetary value of the petitioner's Doré Designs sponsorship is indicative of sustained national or international acclaim at the very top of the field.

C. Final Merits Determination

The AAO will next conduct 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." Section 203(b)(1)(A) of the Act; 8 C.F.R. § 204.5(h)(3). *See also Kazarian*, 596 F.3d at 1119-20. In the present matter, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in the AAO's discussion of the categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(iii) and (vii) – (ix).

With regard to the category of evidence at 8 C.F.R. § 204.5(h)(3)(i), the petitioner submitted documentation indicating that he received nationally recognized awards in "Junior," "Amateur," and "Rising Star" levels of ballroom dance competition. For instance, the petitioner placed 2nd in the U.S. Open Professional "Rising Star" Competition in September 2009 and 2nd at the Polish Championships in the "Junior" category in February 1999. The AAO cannot conclude that petitioner's awards and results in competitions below the top professional level demonstrate that he "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 seeks a highly restrictive visa classification, intended for individuals already at the top of their respective field, rather than for "Junior," "Amateur," or "Rising Star" ballroom dancers progressing toward the top at some unspecified future time. USCIS has long held that even athletes performing at the major league level do not automatically meet the statutory standards for immigrant classification as an alien of "extraordinary ability." *Matter of Price*, 20 I&N Dec. at 953, 954; 56 Fed. Reg. at 60899. Likewise, it does not follow that a ballroom dancer who has won prizes in "Junior," "Amateur," and "Rising Star" levels of dance competition should necessarily qualify for approval of an extraordinary ability employment-based immigrant visa petition. While the AAO acknowledges that a district court's decision is not binding precedent, the AAO notes 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. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor."

The AAO acknowledges that the petitioner has won Open Professional Standard championships in competitions such as the Golden State Challenge (2008) and the Windy City Open (2009), but there is no documentary evidence showing that the petitioner faced a significant pool of top professionals in those competitions or that his specific prizes from the Golden State Challenge and the Windy City Open were nationally or internationally recognized in the field of endeavor. For instance, the competitive results submitted by the petitioner for the 2009 Windy City Open indicate that only three other dance couples competed against the petitioner and his partner. Receiving a prize in a regional competition (such as the Golden State Challenge) or in a competitive division that attracted only a small number of national contestants (such as the Professional Standard Division at Windy City Open) is not indicative of sustained national or international acclaim at the very top of the field. Further, the plain language of the regulation 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 his burden to establish every element of

this criterion. In this case, there is no documentary evidence demonstrating that the petitioner has received an award in the highest division of professional ballroom competition that is well recognized beyond the presenting organization and therefore commensurate with nationally or internationally recognized award for excellence in the field.

Regarding the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(iii), all of the petitioner's submissions were deficient in multiple regulatory requirements such as not including a date, not being about the petitioner, not including a full English language translation, or not being accompanied by evidence that they were published in major trade publications or other major media. The petitioner has failed to submit published material about him that is indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of the field.

With regard to the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(vii), the petitioner failed to demonstrate that the submitted evidence equated to visual art exhibitions or showcases of his work. Regardless, none of the documentary evidence submitted for this regulatory criterion is indicative of or consistent with sustained national acclaim or a level of expertise indicating that the petitioner is one of that small percentage who have risen to the very top of his field. The petitioner submitted a letter from [redacted] indicating that he and his partner, [redacted] were part of a special tango group class that [redacted] attended for advice and instruction as part of her appearance on ABC's "Dancing with the Stars" television series. The May 13, 2008 ABC "Dancing with the Stars" video clip identified in [redacted] letter shows [redacted] and [redacted] visiting a dance class taught by instructor [redacted] The tango group class included five or six other professional dance couples in attendance and did not specifically focus on the petitioner or identify him by name. Thus, the petitioner has failed to demonstrate that his involvement in the television episode garnered him national or international acclaim. The petitioner also submitted documentation indicating that he has performed at Vivo Dancesport Center events (such as New Year's Eve celebrations), at a political fundraiser for California State Senator [redacted] and at NSZZ "Solidarity" in Gdansk, Poland. The petitioner failed to submit any documentation establishing that these venues are of such a caliber that his performance there was consistent with or indicative of sustained national or international acclaim. For example, the petitioner failed to submit documentation demonstrating that his performances attracted unusually large audiences, garnered any critical acclaim, received favorable press reviews, or otherwise drew a significant level of interest commensurate with national or international acclaim at the very top of the field.

In regard to the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(viii), the petitioner has not established that he has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. The documentation submitted by the petitioner is not indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of his field.

Regarding the category of evidence at 8 C.F.R. § 204.5(h)(3)(ix), the documentation submitted by the petitioner fails to demonstrate that his remuneration is "significantly high" in relation to

others performing similar work or that his level of compensation places him among that small percentage who have risen to the very top of the field. The documentation submitted by the petitioner is not indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of his field.

In this matter, the petitioner has not established that his achievements at the time of filing were commensurate with sustained national or international acclaim as a ballroom dance competitor and teacher, and 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 himself to qualify for the classification sought, it appears that the very top of his field of endeavor is above the level he has attained.

D. Prior O-1 Nonimmigrant Visa Status

The AAO notes that the alien is the beneficiary of approved O-1 nonimmigrant visa petitions for an alien of extraordinary. These prior approvals do not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased standard. Each case must be decided on a case-by-case basis upon review of the evidence of record. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of the alien's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'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*, No. 98-2855, 2000 WL 282785, *1, *3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

III. Conclusion

Review of the record does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.