



**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 business, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the 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.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the AAO upholds the director's conclusion that the petitioner has not established the beneficiary’s eligibility for the exclusive 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. 723 101<sup>st</sup> 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.<sup>1</sup> 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 antecedent regulatory requirement of three types of evidence. *Id.*

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<sup>1</sup> 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. Prior O-1

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, classification. 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).

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).

### B. Evidentiary Criteria<sup>2</sup>

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

The director discussed the submitted evidence and found that the petitioner failed to establish that the evidence was qualifying. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *see also Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

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<sup>2</sup> The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

*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 submitted evidence and found that the petitioner failed to establish that the evidence was qualifying. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Id.*

*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 submitted evidence and found that the petitioner failed to establish that the evidence was qualifying. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Id.*

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

The director concluded that the petitioner submitted qualifying evidence on behalf of the beneficiary under 8 C.F.R. § 204.5(h)(3)(v). Based on a review of the record of proceeding, the AAO must withdraw the findings of the director for this criterion. While the AAO concurs that the beneficiary's contribution to MEDEX 360m Global Medical Monitor qualifies as an original business-related contribution of major significance, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "contributions." 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.<sup>3</sup>

The burden is on the petitioner to establish that the beneficiary meets every element of this criterion. Without documentary evidence demonstrating that the beneficiary has made more than one original contribution of major significance in her field, the AAO cannot conclude that the beneficiary meets this criterion. As such, the AAO withdraws the finding of the director for this criterion.

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<sup>3</sup> See *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at \*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).

In light of the above, the petitioner has not submitted qualifying evidence under 8 C.F.R. § 204.5(h)(3)(v).

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

The director concluded that the petitioner submitted qualifying evidence on behalf of the beneficiary under 8 C.F.R. § 204.5(h)(3)(viii). Based on a review of the record of proceeding, the AAO must withdraw the findings of the director for this criterion. While the AAO concurs that the record contains sufficient evidence that the beneficiary has performed in a leading or critical role for the petitioner and that the petitioner has a distinguished reputation, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires the beneficiary to have performed in a leading or critical role for more than one organization or establishment with a distinguished reputation, which, as previously discussed, is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act.

The burden is on the petitioner to establish that the beneficiary meets every element of this criterion. Without documentary evidence demonstrating that the beneficiary has performed in a leading or critical role for more than one organization or establishment with a distinguished reputation, the AAO cannot conclude that the beneficiary meets this criterion. As such, the AAO withdraws the finding of the director for this criterion.

In light of the above, the petitioner has not submitted qualifying evidence under 8 C.F.R. § 204.5(h)(3)(viii).

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

The director concluded that the petitioner did not submit qualifying evidence on behalf of the beneficiary under 8 C.F.R. § 204.5(h)(3)(ii). On appeal, counsel asserts that “USCIS only looked at the salary data” and “the regulation require[s] consideration of the total remuneration.” While the AAO does not disagree, the petitioner failed to submit qualifying evidence that the beneficiary’s total remuneration was significantly high in relation to others in the field. Counsel incorrectly asserts that had USCIS “compared the [b]eneficiary’s 2010 total remuneration to the 2010 Department of Labor data, the results would have shown the [b]eneficiary’s total remuneration exceeded every metropolitan statistical area at its highest level 4 determination.” First, the submitted salary data does not provide information regarding total remuneration. Therefore, this is not a meaningful comparison. Second, as stated in the director’s notice of intent to deny, “U.S. Department of Labor prevailing wage rate information alone does not generally establish whether the salary or other remuneration is ‘significantly’ higher than that of others in the field.” The director also states that, if such prevailing wage rate evidence is submitted, “it should be accompanied by other corroborative evidence showing that the wage rate is high relative to others working in the field.” Third, salary information for those performing work in a related, but distinct occupation, with different responsibilities is not a proper

basis for comparison. Rather, the petitioner must submit documentary evidence of the earnings of those in the beneficiary's occupation performing similar work at the top level of the field.<sup>4</sup> In this instance, the record is void of information regarding the top salaries for other professionals who perform similar duties. The duties listed on the provided wage information for Emergency Management Specialists are as follows: "Coordinate disaster response or crisis management activities, provide disaster preparedness training, and prepare emergency plans and procedures for natural (e.g., hurricanes, floods, earthquakes), wartime, or technological (e.g., nuclear power plant emergencies, hazardous materials spills) disasters or hostage situations." According to the provided duties of the offered position, the beneficiary "directs [i]nternational [p]rovider relations" and her duties include "ongoing assessment of the company's contracts for provider services... creating and reviewing credentialing guidelines for international hospitals, clinics, air ambulance operators and international medical consultants... and maintaining the functionality of the MEDEX 360m Global Medical Monitor" for an international medical assistance company. The duties for the provided wage are not closely related enough to the beneficiary's duties to constitute evidence that the beneficiary's salary or remuneration is high "in relation to others in the field." 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).

In light of the above, the petitioner has not submitted qualifying evidence under 8 C.F.R. § 204.5(h)(3)(ix).

### C. Summary

As the petitioner did not submit qualifying evidence on behalf of the beneficiary under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

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<sup>4</sup> While the AAO acknowledges that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at \*4 (N.D. Ill. Feb. 16, 1995), the court stated:

[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

### III. CONCLUSION

On appeal, counsel asserts that “[i]f USCIS had reviewed the international evaluations, there would have been strong evidence that the Beneficiary is at [the] top of her field and has sustained national and international acclaim for her achievements in the field.” Had the petitioner submitted the requisite evidence on behalf of the beneficiary 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.<sup>5</sup> Rather, the proper conclusion is that the petitioner failed to demonstrate that the beneficiary has satisfied the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

The petitioner has not established the beneficiary’s 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.

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<sup>5</sup> 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 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).