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



U.S. Citizenship  
and Immigration  
Services

B2



DATE: **MAR 28 2012** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:   
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:



INSTRUCTIONS:

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

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

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**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 is a fencing club. It seeks to classify the beneficiary 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 for the beneficiary and failed to submit extensive documentation of his 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 for the alien under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserts that the beneficiary meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3) and that the petitioner submitted comparable evidence of the beneficiary's 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. 723 101<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 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. INTENT TO CONTINUE WORK IN THE AREA OF EXPERTISE IN THE U.S.

The statute and regulations require that the beneficiary seeks to continue work in his area of expertise in the United States. See section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). On the Form I-140, Immigrant Petition for Alien Worker, in Part 6, "Basic Information About the Proposed Employment," the petitioner lists the beneficiary's job title as [REDACTED]. Subsequent to his arrival in the United States in 2007, the record reflects that the beneficiary has worked as the [REDACTED]. The petitioner submitted a letter [REDACTED] stating: "As our [REDACTED] [the beneficiary] will recruit and coach our nationally renowned fencers for international, national and local fencing competitions." Based on the content of the preceding letter from [REDACTED] the beneficiary's employment as a fencing coach after his arrival in this country in 2007, and the information provided on the Form I-140, the record is clear that the beneficiary intends to continue to work in the area of coaching in the United States.

Aside from documentation establishing the beneficiary's intention to continue to work in the United States as a fencing coach, the petitioner submitted evidence of the beneficiary's athletic awards as a fencing competitor from the mid-1990s to 2004. There is no documentary evidence showing that the beneficiary has competed nationally or internationally as a fencer since that time period. While a fencing competitor and a coach may share knowledge of the sport, the two rely on very different sets of basic skills. Thus, competitive athletics and coaching are not the same area of expertise. This interpretation has been upheld in Federal Court. In *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

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

*Id.* at 918. The court noted a consistent history in this area. While the record demonstrates that the beneficiary intends to continue working as a fencing coach, there is no evidence indicating that he intends to compete as fencer in the United States. The AAO acknowledges the possibility of an alien's extraordinary claim in more than one field, such as a coaching and competitive fencing, but the petitioner must demonstrate "by clear evidence that the alien is coming to the United States to continue work in the area of expertise." See 8 C.F.R. § 204.5(h)(5). In this case, there is no documentary evidence establishing that the beneficiary intends to continue working in the United States as a competitive fencer. Accordingly, the beneficiary must satisfy the statutory requirement at section 203(b)(1)(A)(i) of the Act as well as the regulations at 8 C.F.R. §§ 204.5(h)(2) and (3) through his achievements as a coach.

USCIS recognizes that there exists a nexus between competing and coaching in a given sport. To assume that every extraordinary athlete's area of expertise includes coaching, however, would be too speculative. To resolve this issue, a balanced approach is appropriate when reviewing the

evidence of record. Specifically, in a case where an alien has achieved *recent* national or international acclaim as a competitive athlete and has sustained that acclaim in the field of coaching at a national level, the AAO can consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability such that the AAO can conclude that coaching is within the alien's area of expertise. However, as the beneficiary in the present matter has had an extended period of time to establish his reputation as a coach beyond the years in which he competed as an athlete (1990s – 2004), the petitioner must demonstrate the beneficiary's extraordinary ability as a coach.

### III. ANALYSIS

#### A. Evidentiary Criteria

The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(h)(3).<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 petitioner submitted documentation showing that the beneficiary received nationally recognized awards in [REDACTED] from 2000 – 2004. For instance, the petitioner submitted documentation indicating that the beneficiary won first place in “Cadet” (under age 17) foil fencing at the [REDACTED] in 2000 and that he was presented his gold medal by the president of the Ukraine. The “field of endeavor” for which classification is sought, however, is coaching. There is no evidence indicating that the beneficiary seeks to work in the United States as a competitive fencer. Awards resulting from the beneficiary's athletic victories as a competitor in fencing championships during the first half of the 2000s cannot be considered evidence of his national recognition as a coach. As previously discussed, the statute and regulations require that the beneficiary seeks to continue work in his area of expertise in the United States. *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). *See also Lee v. I.N.S.*, 237 F. Supp. 2d at 914. Accordingly, awards won by the beneficiary in national or international fencing competitions do not meet the elements of this regulatory criterion for purposes of establishing his extraordinary ability as a coach.

The director found that the evidence submitted by the petitioner “does not establish that the beneficiary has ever received a nationally or internationally recognized prize or award for excellence as a coach.” The AAO notes that the submitted documentation shows that such awards do exist for fencing coaches. For instance, the petitioner submitted a reference letter from [REDACTED] stating that he “was inducted in the U.S. Fencing Association Hall of Fame” in 2010 based on his achievements as a coach. Similarly, [REDACTED] states that he “was named the USFA national development coach of the year.” There is no evidence showing that

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

the beneficiary has received nationally or internationally recognized prizes or awards for excellence in coaching.

On appeal, counsel asserts that the director should have considered the gold, silver, and bronze medals won by the beneficiary's students at national and international fencing tournaments. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires documentation of "the alien's receipt" of nationally or internationally recognized prizes or awards for excellence in the field of endeavor. Prizes or awards received by individuals other than the beneficiary himself do not meet the plain language requirements of the regulation. "[N]either USCIS nor an AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5." See *Kazarian v. USCIS*, 596 F.3d at 1121 (citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008)). Awards received by the beneficiary's students in fencing competitions do not equate to his receipt of those prizes. Nevertheless, the awards received by athletes the beneficiary has coached will not be ignored and shall be considered later in this decision under the category of evidence at 8 C.F.R. § 204.5(h)(3)(v).

As there is no evidence demonstrating that the beneficiary has received nationally or internationally recognized prizes or awards for excellence in coaching, the petitioner has not established that the beneficiary meets the plain language requirements of this regulatory 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 petitioner submitted documentation indicating that the beneficiary competed for Ukrainian Cadet, Junior, and Senior national fencing teams. The petitioner also submitted evidence showing that the beneficiary was admitted to the [REDACTED] in 1999 at the age of 15. In response to the director's request for evidence, the petitioner submitted a letter from [REDACTED], stating:

The [REDACTED] is an elite club that only accepts the top 3 national athletes in every sport category each year. The [REDACTED] provides sponsorship and grants to these top athletes . . . .

\* \* \*

[The beneficiary] was invited to join because of his outstanding fencing performance and results at the cadet, junior, and senior levels.

The petitioner also submitted a letter from [REDACTED], stating:

The [REDACTED] is a special fencing club with [sic] takes the top 3 national fencers every year. Upon signing a contract, the [REDACTED] pays these fencers a salary and all expenses, to include [REDACTED] competitions and training expenses, etc. [The beneficiary] had a contract with the [REDACTED] for a total of seven years.

The plain language of this regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires evidence of the “alien’s membership in associations in the field for which classification is sought.” The petitioner has not established that executing a contract with a sports school and competing for Cadet, Junior, and Senior national fencing teams equate to “membership in associations in the field.” Regardless, the “field for which classification is sought” in this matter is coaching. The beneficiary was selected for the [REDACTED] national fencing teams based on his ability as a competitive athlete, not as a coach. As previously discussed, there is no evidence indicating that the beneficiary seeks to work in the United States as a competitive fencer. The statute and regulations require that the beneficiary seeks to continue work in his area of expertise in the United States. See section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). See also *Lee v. I.N.S.*, 237 F. Supp. 2d at 914. As such, the beneficiary’s contract with the [REDACTED] and his selection for Ukrainian national teams (based on his accomplishments as a fencing competitor in the late 1990s and early 2000s) do not meet the elements of this regulatory criterion for purposes of establishing his extraordinary ability as a coach.

The petitioner submitted a letter from the [REDACTED] of Ukraine [REDACTED] stating:

[The beneficiary] has completed his undergraduate degree with honors. This degree is recognized internationally and enables him to coach national and international Cadet and Junior Fencing teams anywhere in the world. This specialty degree is only granted to 2-3 fencing coaches throughout Ukraine every year . . . .

The English language translation accompanying the preceding letter does not identify the author of the letter.

In response to the director’s request for evidence, the petitioner submitted the beneficiary’s diploma and academic transcript from the [REDACTED] indicating that the beneficiary received a “diploma for Olympics and Professional Sports and coach mastership in fencing.” The petitioner has not established that earning an undergraduate specialty degree or master’s diploma constitutes membership in an association in the field. Further, the AAO cannot conclude that successfully completing the required coursework to attain an undergraduate degree or master’s diploma equates to “outstanding achievements.” The legislative history makes clear that Congress intended this classification for those with a career of acclaimed work rather than those whose achievements are academic in nature. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). Regardless, there is no documentary evidence (such as official rules or entrance standards) showing that the [REDACTED] requires outstanding achievements of those accepted for admission, as judged by recognized national or international experts in the field.

In light of the above, the petitioner has not established that the beneficiary meets the plain language requirements of this regulatory criterion.

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

The petitioner submitted a letter of support from the NUFVVSU stating:

[The beneficiary] has already earned his reputation as a national and international coach due to the high results of his national champion students, including [REDACTED] won 3<sup>rd</sup> place in the [REDACTED] in 2006. She won the gold medal at the [REDACTED] in Ukraine in Dec. 2006.

The English language translation accompanying the preceding letter does not identify the author of the letter.

The petitioner submitted a June 6, 2007 letter from the [REDACTED] of Physical Education stating:

[The beneficiary] is well known within Ukraine as a coach of champions. He has coached the men's national team in Ukraine with great results and currently coaches his wife, [REDACTED] qualifier, and medalist many [sic] competitions throughout Ukraine Europe and the world.

The English language translation accompanying the preceding letter does not identify the author of the letter.

The petitioner submitted a June 6, 2007 letter from the [REDACTED] stating that the beneficiary prepared "national team members for the prestigious Junior and Cadet World Cups from 2004 to 2005" and that his "coaching resulted in . . . fencers achieving top placements in Europe and the world." The English language translation accompanying the preceding letter does not identify the author of the letter.

[REDACTED] states:

[The beneficiary] was chosen to coach two top Ukrainian national cadet fencers, [REDACTED] . . . His high level of coaching and strong preparation program helped the cadet fencers qualify for the junior national team, which achieved fourth place in the 2004 junior European championships which took place in Espinho, Portugal. Because of [the beneficiary's] program and . . . coaching, [REDACTED] obtained 7<sup>th</sup> place in the 2004 cadet [REDACTED], Bulgaria.

Due to [the beneficiary's] exceptional coaching and high quality training programs, [the beneficiary] was also chosen to coach [REDACTED]

[REDACTED] It is with [REDACTED] that we saw [the beneficiary] at his best. It is because of [the beneficiary's] extraordinary high-level Senior World Cup level coaching ability that [REDACTED] became a multiple World Cup and Grand Prix gold, silver and bronze medalist, ranking third in the world and qualifying for the 2004 [REDACTED] in Athens, Greece.

[REDACTED] states:

While a member of The [REDACTED] from 2004-2005 [the beneficiary] was chosen to coach two [REDACTED] and [REDACTED]. He coached the [REDACTED] at various World Cups, leading her to win multiple gold, silver and bronze medals at the International level. [REDACTED] ranked 3<sup>rd</sup> in the world and qualified for the 2004 [REDACTED] Greece.

The petitioner submitted additional letters of support from fencing coaches in the United States.

[REDACTED] states:

I know [the beneficiary] through his coaching of his [REDACTED] . . . She is a 2004 [REDACTED], an amazing accomplishment for a country known for its excellence in the sport of fencing. I have observed [the beneficiary] coach Nadya to victory at various high level international World Cups and competitions.

[REDACTED] in 1996 and 2004, states:

Due to [the beneficiary's] high caliber coaching and international experience, members of [REDACTED] such as [REDACTED] have won International and National awards and rankings. Three of their top fencers have gained coveted spots on Varsity Fencing teams of elite [REDACTED]. To have achieved such extraordinary results in such a short period of time is quite remarkable . . . .

[REDACTED] in 2008, states:

[The beneficiary's] coaching skills resulted in [REDACTED] winning the bronze medal at the Junior Olympics in Cadet in Feb. 2008, and established [REDACTED] as the alternate for the World Championship Cadet team in April 2008. This was an extraordinary feat for a young coach who had only worked with [REDACTED] a short period of time

states that the beneficiary “coached the [redacted] to victory at many World Cups.”

states:

I first met [the beneficiary] during the [redacted] in November and December of 2001 when he was chosen and sent by the [redacted] to help the [redacted] in preparation for upcoming Senior World Cups and Senior National Competitions.

\* \* \*

As the number one ranked fencer on the Ukrainian Cadet and Junior team, [the beneficiary] was invited to this U.S. National Senior Div-1 team camp at [redacted] to train the U.S. Senior National team including the Junior world championship gold medalist, [redacted] and the number one [redacted] team fencer, [redacted]. At the senior national competitions in [redacted] following this camp, [redacted] won the Bronze medal, and [redacted] and [redacted] both made top 8. [The beneficiary’s] world-class fencing was a great contributing factor in preparing these fencers in achieving such outstanding results.

\* \* \*

Upon his return to the United States in October 2005 as a guest fencer, [the beneficiary’s] expertise helped prepare a young American fencer, [redacted] win the national gold medal. He has coached [redacted] for the past two and a half years at the [redacted] helping him become the starter on the [redacted] . . . Furthermore, [redacted] is thrilled to have another one of [the beneficiary’s] top students, [redacted] bronze medalist, 2006 [redacted] bronze medalist, 2007 [redacted] bronze medalist and world cup finalist, join the team in fall 2010.

In support of the above references’ statements, the petitioner submitted documentary evidence of the awards, competitive results, and rankings of fencers coached by the beneficiary. The AAO finds that the preceding documentation is sufficient to demonstrate that the beneficiary meets this regulatory criterion as a coach.

*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 beneficiary performed in a leading or critical role as a coach for the [redacted]. As previously indicated, the petitioner submitted letters of support stating that beneficiary coached two National “Cadet” Team Members, [redacted]

[REDACTED] and his spouse who competed for the [REDACTED]. At issue is whether the beneficiary performed in a leading or critical role for the [REDACTED] as a whole rather than limited to two cadet fencers and his spouse. Not every member of a coaching staff who performs effectively for sports team meets this regulatory criterion. The petitioner's evidence fails to demonstrate how the beneficiary's coaching position differentiated him from the other fencing coaches working for the [REDACTED] Team, let alone its "Junior" and "Senior" team fencing coaches and head coach. Moreover, there is no organizational chart or other evidence documenting where the beneficiary's coaching position fell within the [REDACTED] general hierarchy. The evidence submitted by the petitioner does not establish that the beneficiary was responsible for the [REDACTED] success or standing to a degree consistent with the meaning of "leading or critical role."

Furthermore, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence that the beneficiary 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 the beneficiary's role for the Ukrainian National Team meets the elements of this regulatory criterion, which the petitioner 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 the beneficiary meets the plain language requirements of this regulatory criterion.

#### B. Summary

The petitioner has failed to demonstrate that the beneficiary satisfies the antecedent regulatory requirement of three types of evidence.

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

On appeal, counsel states: "Expert letters from Olympic Coaches, Medalists, and other prominent people in the field are 'comparable evidence' of [the beneficiary's] extraordinary

ability.” 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 beneficiary’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 four of the ten 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 beneficiary’s occupation. For instance, counsel does not explain why the published material, judging, and high salary categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(iii), (iv), and (ix) are not readily applicable to coaching. Moreover, counsel fails to explain how the letters of support submitted by the petitioner are “comparable” to any specific objective evidence required at 8 C.F.R. §§ 204.5(h)(3)(i)–(x).

Regarding the expert opinion letters submitted by the petitioner, the AAO notes that they have already been considered under the categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(ii), (v), and (viii). While such recommendation letters can provide useful information about an alien’s qualifications or help in assigning weight to certain evidence, such letters are not comparable to extensive evidence of the alien’s achievements and recognition as required by the statute and regulations. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The classification sought requires “extensive documentation” of sustained national or international acclaim. 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 commentary for the proposed regulations implementing the statute provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). Primary evidence of achievements and recognition is of far greater probative value than opinion statements from references selected by the petitioner or the beneficiary.

The opinions of experts in the field are not without weight and have been considered in the AAO’s discussion of the categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(ii), (v), and (viii). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien’s eligibility. See *id.* at 795-796; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to “fact”). Thus, the content of the experts’ statements and how they became aware of the

beneficiary's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a fencing coach who has sustained national or international acclaim at the very top of his field.

#### D. Prior O-1 Nonimmigrant Visa Status

The AAO notes that the alien is the beneficiary of an approved O-1 nonimmigrant visa petition for an alien of extraordinary. This prior approval does 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).

#### IV. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Even if the petitioner had submitted the requisite evidence for the alien 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>3</sup> Rather, the proper conclusion is that the petitioner failed to demonstrate that the beneficiary has satisfied the antecedent regulatory requirement of three categories 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>3</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).