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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

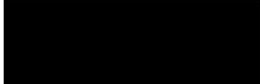
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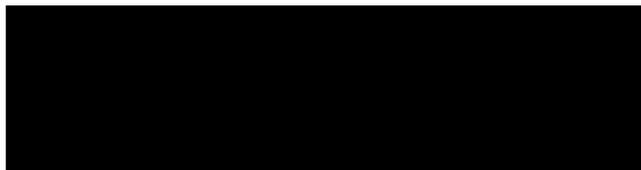
Office: NEBRASKA SERVICE CENTER

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 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 with the field office or service center that originally decided your case by filing a 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 *Yes*
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 “alien of extraordinary ability” in athletics, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

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

The petitioner’s priority date established by the petition’s filing date is May 19, 2010. On June 17, 2010, the director served the petitioner with a request for evidence (RFE). After receiving the petitioner’s response to the RFE, the director issued her decision on September 16, 2010. On appeal, the petitioner submits a brief with no additional evidence. For the reasons discussed below, the AAO upholds the director’s ultimate determination that the petitioner has not established his eligibility for the classification sought.

I. LAW

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

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

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

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

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

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

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. See H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

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

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

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

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

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. Previously Approved O-1 Nonimmigrant Petition

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

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

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center as the law is clear that an agency is not bound to follow an earlier determination as to a visa applicant where that initial determination was based on a misapplication of the law. *Glara Fashion, Inc. v. Holder*, 11 CIV. 889 PAE, 2012 WL 352309 *7 (S.D.N.Y. Feb. 3, 2012); *Royal Siam v. Chertoff*, 484 F.3d 139, 148 (1st Cir.2007); *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 177 (D.Mass.2000) (Dkt.10); *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp.2d 800, 803 (E.D.La.1999), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

B. Area of Expertise

Counsel's fundamental assertion on appeal is that the director erred in failing to consider the petitioner's accomplishments as an athlete because he intended to work as a coach. Counsel references several unpublished and nonbinding AAO decisions regarding the use of a competitor's accomplishments in an attempt to demonstrate eligibility as a coach. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. For the reasons specified above, the AAO is not persuaded that the findings within the unpublished AAO decisions impact the present case.

An alien must intend to continue to work in his area of expertise. Section 203(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). Performing as an athlete and coaching are based on different skillsets. 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, [redacted] 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. USCIS has recognized that there exists a nexus between playing and coaching a given sport. To assume that every extraordinary athlete's area of expertise includes coaching, however, would be too speculative. To resolve this issue, the following balance is appropriate. In a case where an alien has clearly achieved recent national or international acclaim as an 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 petitioner's area of expertise.

At issue is the recent nature of the petitioner's national or international acclaim as an athlete. The petitioner provided a website printout from *Voice of America* as evidence of his second place finish at the May 2005 Stanford University Invitational Grand Prix. The petitioner also provided several other printouts from various websites listing his placement at swimming competitions. These are examples of secondary evidence. Where the regulations require specific, objective evidence of achievements, such as awards, the primary evidence of such awards would be copies of the awards themselves. The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence.

There is no primary evidence demonstrating the petitioner received the award for a second place finish at the Stanford University Invitational Grand Prix or any of the other awards listed on the printouts from various websites. In this case, while the petitioner submitted articles reflecting his awards, he failed to submit any documentary evidence demonstrating that primary evidence does not exist or cannot be obtained. As such, the website printouts and articles will not serve to demonstrate his receipt of awards as a competitor. The petitioner also provided a document that indicates that he was one participant on a four person, 200 meter freestyle relay team, which finished in first place [redacted]

[redacted] The document does not bear any indication of the issuing authority; it merely appears to be information typed on a page. As such, this document will not serve as probative evidence demonstrating that the petitioner received this second place award. Regardless, the petitioner's most recent athletic awards predate the petition by five years. Beyond his prizes or awards as a competitor, his most recent athletic accomplishment dates back to 2008, when he competed in the Olympics. Thus, there is nearly a two year gap between his latest athletic accomplishment and the petition filing date and the AAO will not consider the petitioner to have recent national or international acclaim as an athlete.

Moreover, the petitioner has had ample opportunity to develop acclaim as a coach as would be demonstrated through evidence relating to his accomplishments as a coach under at least three of the regulatory criteria. According to the petitioner's resume, he has been instructing and coaching intermittently since 2002, and consistently since 2006. This timeframe has afforded the petitioner a sufficient opportunity to develop acclaim as a coach at the national or international level. However, he has failed to provide evidence of such acclaim and counsel does not challenge the director's finding in this regard on appeal other than to assert generally that the AAO should consider the level at which the petitioner coaches. The only one-time achievement that can establish eligibility, however, is a major, internationally recognized prize or award. 8 C.F.R. § 204.5(h)(3). Absent such an award, the petitioner must submit evidence under at least three criteria.

Consequently, the director properly declined to consider the petitioner's accomplishments as an athlete.

C. Evidentiary Criteria²

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 evidence submitted pursuant to 8 C.F.R. § 204.5(h)(3)(i) and found that the petitioner failed to establish his eligibility. Accepting that the awards of the petitioner's students while under his tutelage could serve as comparable evidence under this criterion, the director noted the lack of such evidence. On appeal, counsel asserts that the director's decision "neglects [that the petitioner] is currently coaching swimmers of all different age levels, including Masters Swimmers who are past champions. We find that this criteria [sic] is beyond the scope of the regulation or policy to meet the criteria of extraordinary ability." Counsel continues that the petitioner is coaching "Masters Swimmers who are past champions" and that the director should have considered the petitioner's competitive athletic accomplishments.

For the reasons discussed above, the petitioner's own awards as a competitor will not be considered in this antecedent procedural step. The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable evidence where the above standards are not readily applicable to the petitioner's occupation. The record contains evidence that [REDACTED] one of the petitioner's references, won a Coaching Award from the Pacific Masters Association, revealing that this criterion is applicable to the petitioner's occupation. Even if the AAO accepted that the awards of the petitioner's students under his tutelage could serve as comparable evidence, the director noted the lack of such evidence. A review of the record reveals that the petitioner has not submitted documentary evidence that any of his students have received prizes or awards while under his instruction, and that the receipt of the prize or award is attributable to the petitioner's actions as the coach. Counsel has not adequately explained why coaching past champions is comparable to receiving nationally or internationally recognized awards such that the AAO can consider that claim.

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

In view of the foregoing, the petitioner's own awards as a competitor will not be considered in this antecedent procedural step, the petitioner has not demonstrated that consideration of comparable evidence is appropriate and the petitioner has not submitted evidence that is comparable to the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(i).

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

The director discussed the evidence submitted pursuant 8 C.F.R. § 204.5(h)(3)(ii) and found that the petitioner failed to establish his eligibility. Within the attachment to the appeal, the petitioner makes only passing reference to this issue, asserting that, "The AO [Adjudications Officer] misweighed [sic] the evidence and committed error in finding that the applicant's recent evidence and membership on his national Olympic Swimming Team and Championship Collegiate Team did not qualify him as a swimming coach of extraordinary ability." The AAO has already explained the reasoning behind not considering the petitioner's accomplishments as an athlete to establish his eligibility as a coach as he has not demonstrated recent acclaim as an athlete.

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The director discussed the evidence submitted pursuant 8 C.F.R. § 204.5(h)(3)(iii) and found that the petitioner failed to establish his eligibility. Within the attachment to the appeal, the petitioner makes only passing reference to this issue, asserting that, "The AO [Adjudications Officer] misweighed [sic] the evidence of published material about the alien in professional or other major media relating to the aliens [sic] work in his field of endeavor in the denial of the petition." The AAO has already explained the reasoning behind not considering the petitioner's acclaim as an athlete to establish his eligibility as a coach as he has not demonstrated recent acclaim as an athlete. The record contains no published material about the petitioner relating to his work as a coach that predates the filing of the petition, the date as of which the petitioner must establish he eligibility. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

D. Summary

The petitioner, who has been coaching for several years and seeks to continue coaching, has failed to satisfy the antecedent regulatory requirement of three types of evidence as a coach.

III. 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.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.³ Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

³ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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).