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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

PUBLIC COPY

[redacted]

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DATE: MAY 16 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[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 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
Chief, Administrative Appeals Office

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

The petitioner seeks classification as an "alien of extraordinary ability" in athletics, 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 ultimate conclusion that the petitioner has not established his eligibility for the exclusive classification sought. In addition, as noted by the director in his denial, the evidence submitted does not establish that the petitioner is "coming to the United States to work as an athlete," as required by 8 C.F.R. § 204.5(h)(5).

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)).

While counsel asserts that the final merits determination "is still in [sic] issue," counsel's assertions are not persuasive. Counsel relies on *Buletini v. INS,* 860 F. Supp. 1234 (E.D. Mich. 1994) for the proposition that submission of evidence under three criteria alone is sufficient to establish eligibility. Notably, the court in *Buletini* did not reject the concept of evaluating the quality of the evidence at any time. Specifically, the court in *Buletini* acknowledged that "the examiner must evaluate the quality, including the credibility, of the evidence presented to determine if it, in fact, satisfies the criteria." *Buletini,* 860 F. Supp. at 1234. The court continued:

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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).

> Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 C.F.R. § 204.5(h)(3), the alien must be deemed to have extraordinary ability *unless the INS sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard.*

Id. (Emphasis added.) As is clear from the italicized language, the *Buletini* court considered the possibility that an alien can submit evidence satisfying three criteria and still not meet the extraordinary ability standard provided legacy INS explains its reasoning.

Regardless, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. Ultimately, the subsequent reasoning of a circuit court decision outweighs the reasoning of an earlier district court decision. Significantly, the *Kazarian* court cited *Buletini* for the nature of the alien's achievements in that case.

In this matter, the AAO will review the submitted evidence under the plain language requirements for each applicable criterion. While the director concluded that the petitioner met at least three of the ten regulatory categories of evidence, the AAO finds that the petitioner met only two of the criteria. *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). Therefore, 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.

II. ANALYSIS

A. Evidentiary Criteria[2]

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

The director found that the petitioner satisfied the plain language requirements of the regulation at § 204.5(h)(3)(i) and the AAO concurs with that finding.

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.

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

The director concluded that the petitioner did not meet this criterion under 8 C.F.R. § 204.5(h)(3)(ii). Although the AAO finds that the director erred when he determined that the International Olympic Committee (IOC) is the only membership associated with the Olympic Games, the AAO agrees with the director that this criterion has not been satisfied.

An athlete can earn a place on an Olympic team through rigorous competition which separates the very best from the great majority of participants in a given sport. The AAO agrees with counsel's assertion that an athlete's membership on an Olympic team or a major national team may serve as evidence to qualify as membership in an association, as such teams are limited in the number of members and have a rigorous selection process. The AAO reiterates, however, that it is the petitioner's burden to demonstrate that he or she meets every element of a given criterion, including that membership on the team requires outstanding achievements of its members, as judged by recognized national or international experts. The AAO will not presume that every national "team" is sufficiently exclusive.

In addition, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires "evidence of the alien's membership in associations" in the plural, which 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.[3]

Among the documentation contained in the record is evidence that the petitioner was a member of the Chinese delegation at the 2008 Olympic Games in Beijing, the 10th and 11th National Games of the P.R. of China, as well as a member of the Chinese Athletic Association (CAA).

As stated above, it is the petitioner's burden to demonstrate that membership requires outstanding achievements of its members, as judged by recognized national or international experts. While the AAO finds that the petitioner's membership on the Chinese delegation at the 2008 Olympic Games in Beijing is evidence of membership in one association, the petitioner did not submit any evidentiary documentation regarding the requirements for the others, including the National Games of the P.R. of China and the CAA. As such, the AAO is unable to determine whether these memberships satisfy this criterion.

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[3] *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)(ii).

> *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 found that the petitioner satisfied the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The AAO finds that director erred in his finding. The plain language of the regulation requires "any necessary translation." The petitioner submitted copies of a number of publications written in Chinese accompanied by translations into English. However, the petitioner provided only one "Certificate of Accuracy" for the "annexed documents." The certificate of accuracy does not identify which translations the affiant is certifying. Therefore, the translations of the publications did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

> T*ranslations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which 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.

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

> *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 did not meet this criterion under 8 C.F.R. § 204.5(h)(3)(v). While the AAO agrees with the director that "[l]etters of support alone are not sufficient to meet this criteria," the AAO finds that the director erred in his conclusion. Although the AAO concurs with the director that this criterion could be satisfied "with a World Record," the AAO agrees with counsel that, "in the regulation, nothing indicates that the contributions of major significance in the field must be international." The record contains evidence that the petitioner holds the record in China in the 800m, was the first athlete to compete for China in the 800m at the Olympics and was the first person to win Gold medals in two consecutive games at the National Games of the P.R. of China in the 800m.

In light of the above, the petitioner has 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 under 8 C.F.R. § 204.5(h)(3)(viii). The record does not support this conclusion. The AAO finds that the director erred when he stated in the denial that "it can be said that your consistent 1st place finishes indicate that you

have performed in a leading role for the CAA." The petitioner's first place finishes have already been addressed under 8 C.F.R. § 204.5(h)(3)(i). The AAO will not presume that evidence relating to or even meeting the awards criterion is presumptive evidence that the petitioner also meets this criterion. To hold otherwise would render meaningless the regulatory requirement that a petitioner meet at least three separate criteria. Therefore, the petitioner's awards will not be considered under this criterion, as the awards criterion has already been addressed above.

In addition, as previously discussed, the use of the plural is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Therefore, even if the AAO agreed with the director, which it does not, the plain language of this regulatory criterion requires evidence of performing in a leading or critical role for more than one organization or establishment.

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 discussed the evidence submitted for this criterion 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. Upon review of the evidence, the AAO concurs with the director.

B. Summary

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.

C. Continue to work in the area of extraordinary ability

While counsel is correct that the classification sought does not require an "employment letter," it is an employment-based classification that requires that the alien seek to enter the United States to continue working in his area of expertise. Section 203(b)(1)(A)(ii) of the Act. It is "by virtue of such work" that aliens under this classification will substantially benefit prospectively the United States as envisioned under section 203(b)(1)(A)(iii) of the Act. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). Congress did not intend for aliens of extraordinary ability to immigrate to the United States and remain idle. 56 Fed. Reg. 30703, 30704 (July 5, 1991). While neither the statute nor the regulations specify that the employment must be full-time, minimal hours of employment as a hobby or incidental to the alien's primary source of income does not substantially benefit prospectively the United States.

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

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

While the petitioner did submit a statement, he does not provide sufficient detail regarding his intentions to continue to work in the United States. The petitioner states that he hopes to "first enter an American College [*sic*] to study for a doctoral degree," "find a suitable athletic coach" and "gradually merge [him]self into the American track and field circle." It is clear from the petitioner's own statement that his initial focus will be on attending school. Beyond vague references that the petitioner hopes to find a coach and compete, the record contains no evidence that the petitioner will be employed as an athlete. On appeal, counsel asserts that a recommendation letter from [redacted] should be considered as evidence that the petitioner is coming to the United States to work as an athlete. Review of the letter fails to support this claim. According to [redacted] 'after he has got [*sic*] his green card, he will be able to make more contributions to promoting the exchange between the [*sic*] Chinese and American athletes and the US National Track and Field Team may have another excellent runner in [the] men's 800m." This is an employment-based visa classification and the petitioner has offered no evidence that his athletic career will continue on anything more than an extra-curricular basis. Even counsel states on appeal that "[i]t is reasonable for a graduate and postgraduate student to concentrate on his study [*sic*] and temporarily out [*sic*] off many track meets."

For these reasons, the AAO concurs with the director's finding that the petitioner has not submitted qualifying evidence under 8 C.F.R. § 204.5(h)(5).

III. CONCLUSION

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.[4] Rather, the proper conclusion is that the petitioner has failed to satisfy the

[4] 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;

antecedent regulatory requirement of three types of evidence. *Id.* at 1122. Furthermore, the petitioner has also failed to provide sufficiently detailed evidence that he intends to continue to work in his area of expertise.

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.

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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).