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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

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[redacted]

DATE: MAY 23 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.

I. Intent to Continue to Work in the Area of Expertise in the United States

The AAO notes here that in Part 5 of Form I-140, Immigrant Petition for Alien Worker, the petitioner listed his occupation as a "Professional Coach." In addition, in Part 6, the petitioner listed his proposed job title as "Kickboxing Coach." Further, the petitioner submitted a personal statement detailing his plans to work as a kickboxing coach and instructor in the United States. Thus, the record reflects that the petitioner is seeking classification as an alien of extraordinary ability as an instructor or coach rather than as a competitor. Even though the petitioner submitted documentation regarding his involvement in earlier tournaments as a competitor, the record reflects the petitioner's intent to work in the United States as a coach.

The statute and regulations require the petitioner's national or international acclaim to be *sustained* and that he seeks to continue work in his area of expertise in the United States. *See* sections 203(b)(1)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1153(b)(1)(A)(i) and (ii), and 8 C.F.R. §§ 204.5(h)(3) and (5). While a kickboxing coach and a kickboxer share knowledge of the sport, the two rely on very different sets of basic skills. Thus, instruction and competition 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 petitioner intends to works as a coach, there is no evidence indicating that he intends to compete as an athlete in the United States. While the AAO acknowledges the possibility of an alien's extraordinary claim in more than one field, such as kickboxing coach and kickboxer, the petitioner, however, must demonstrate "by clear evidence that the alien is coming to the United States to continue work in the area of expertise." *See* the regulation at 8 C.F.R. § 204.5(h)(5).

Based on the petitioner's answers to the questions on Form I-140 and the submitted documentation, the record reflects that the petitioner intends to continue to work in the area of coaching rather than competition. It should also be noted that according to [redacted] the petitioner has been coaching for 13 years and, thus, has had plenty of opportunity to earn acclaim as a coach. Ultimately, the petitioner must satisfy the regulation at 8 C.F.R. § 204.5(h)(3) through his achievements as a kickboxing coach. As such, the evidence submitted by the petitioner regarding his achievements as a competitor will not be considered here.

II. 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).

III. 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.

While the AAO concurs with the director's finding that "the evidence submitted does not meet this criterion," the AAO disagrees that "[t]he awards of your students will be considered for this criterion because they reflect on your coaching." The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the *alien's* receipt of lesser nationally or internationally recognized prizes or awards for excellence in the *field of endeavor* [emphasis added]." USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir. 2008). Moreover, as the petitioner has not demonstrated that the standards at 8 C.F.R. § 204.5(h)(3) are not readily applicable to his occupation, the AAO will not consider comparable evidence pursuant to 8 C.F.R. § 204.5(h)(4). Therefore, any prizes or awards that may have been garnered by the petitioner's students, rather than by the petitioner, do not meet the plain language of this regulation, nor do any prizes or awards that may have been garnered by the petitioner as a competitor, as they are not within the petitioner's field of endeavor as a kickboxing coach. *See Lee v. I.N.S.*, 237 F. Supp. 2d at 914 (upholding a finding that competitive athletics and coaching are not within the same area of expertise).

On appeal, counsel references and includes a copy of an unpublished 2009 AAO decision. While counsel asserts that the petitioner's students have competed at age-limited competitions that are "national in scope," he does not explain how they are nationally recognized, as required by the regulation. It should be noted that the unpublished decision referenced by counsel found that the age-limited national/international competitions were not nationally or internationally recognized. 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.

In regard to the evidence submitted as awards won by the petitioner as a coach, the AAO concurs with the director's findings that "the Certificate for Best Thai-kickboxing Trainer of NY State... is limited to NY state, so it cannot be considered for this criterion" and that "the Certificate of Rank of Professional Kickboxing Trainer and Borodin's Gym's Certificate of Rank of Kickboxing Instructor... are not considered awards." Furthermore, the petitioner failed to submit any documentary evidence establishing that these are nationally or internationally recognized prizes or awards for excellence as a kickboxing coach.

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

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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.

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 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. 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).

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 determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished 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." In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.[3]

On appeal, counsel asserts that "the articles in the [redacted]..should be deemed acceptable." Counsel also references another unpublished AAO decision stating "it was found that if a number of local publications were equivalent to a national publications [*sic*] such articles should be acceptable to meet the Code's criterion." Counsel did not include a copy of the decision. As previously stated, AAO precedent decisions are binding on all USCIS employees, but unpublished decisions are not.

As evidence, the petitioner provided circulation information from the papers' own websites. The petitioner failed to submit any independent, objective evidence to demonstrate that either of these papers is a professional or major trade publication or other major media. *See Braga v. Poulos,* No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as

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

major media). Counsel also asserts that both newspapers have a "web site," [*sic*] which allows for global access. Many newspapers, regardless of size and distribution, post at least some of their stories on the Internet. To ignore this reality would be to render the "major media" requirement meaningless. International accessibility by itself is not a realistic indicator of whether a given publication is "major media." The AAO will not presume that the articles' mere inclusion on the Internet notably increases the readership of a paper.

Regardless, the AAO is not convinced that two U.S. newspapers written in Russian, which is not a predominant language in the United States, with a limited distribution area and readership of 100,000 or less are major media. Furthermore, the articles in Russian Reklama and Russian Bazaar are not "about" the petitioner.

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

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The director found that the petitioner "refereed two kickboxing tournaments" and "the evidence submitted meets this criterion." The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence of the alien's participation...as a judge of the work of others." Based on a review of the record of proceeding, the AAO must withdraw the findings of the director for this criterion.

The petitioner submitted two certificates with accompanying translations as evidence. One certificate is a fill-in-the-blank type from February 22-25, 2001 for [redacted]." The second certificate was "for great assistance in refereeing in the 2nd International Kickboxing Tournament in the memory of Warrior-Internationalist B. Nametov." The second certificate does not include a date.

There is no evidence showing the names of the athletes evaluated by the beneficiary or the paperwork documenting his assessments. The submitted documentation does not establish that serving as a referee in the above instances equates to participating as a judge of the work of others. There is no evidence demonstrating that the petitioner actually judged the work of competitors, such as assigning points or determining winners, rather than merely enforcing the rules and maintaining a sense of fair play. The absence of evidence of the beneficiary's participation (such as judging slips, event programs identifying the beneficiary as a judge, or a judge's credential from the events) is a significant omission from the record. The benefit sought in the present matter is not the type for which documentation is typically unavailable and the statute specifically requires "extensive documentation" to establish eligibility. *See* section 203(b)(1)(A)(i) of the Act.

The petitioner also submitted a letter from [redacted] which states, "[m]any times I have seen him judging and refereeing during some highest [sic] level tournaments" and "[h]e was successful passing all the requirements to get an international license of

world class referee and judge." However, the petitioner did not submit evidence of the international license or any other corroborating evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

It should be noted that the petitioner also submitted additional evidence under this criterion with the original petition, including a certificate for [redacted] tournament referenced above and several letters of reference. As the certificate and all of the letters but the one referenced above did not mention the petitioner acting as a judge, they will not be considered under this criterion.

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

B. Letters of Reference

The petitioner submitted a number of letters of reference from colleagues, students and parents of students. While recommendation letters can provide useful information about an alien's qualifications or help in assigning weight to certain evidence, such letters are not a substitute for objective evidence of the alien's achievements and recognition as required by the statute and regulations. The letters primarily contain bare assertions of acclaim and compliments on the petitioner's coaching. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Further, 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 provides 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.

Since these letters do not directly address any of the criterion listed at 8 C.F.R. § 204.5(h)(3)(i)-(x), the AAO will not consider them here.

C. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

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.

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 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.

[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; 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).