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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

DATE: **MAY 07 2013**

Office: TEXAS SERVICE CENTER

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 in accordance with the instructions on 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas 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 (the Act), 8 U.S.C. § 1153(b)(1)(A) as a professional jockey. The director determined that the petitioner had not established the requisite extraordinary ability 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 under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserts that the petitioner meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i), (iii), and (viii) – (x) and that the petitioner has submitted comparable evidence of his eligibility 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*, 580 F.3d 1030 (9<sup>th</sup> Cir. 2009) *aff'd in part* 596 F.3d 1115 (9<sup>th</sup> 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. ANALYSIS

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

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

The petitioner submitted an August 12, 1994 “Good Standing Certificate” from the [REDACTED] stating:

We certify that the professional jockey [the petitioner] has had excellent conduct since he started performing as apprentice jockey, that he has had no problems at our racetrack, that due to this competence, hard work and performance he has been successful, which includes being the leader of the 1994 jockeys’ standings.

The preceding certificate states that the petitioner was “the leader of the 1994 jockeys’ standings” at the [REDACTED] racetrack, but there is no documentary evidence demonstrating that he received a nationally or internationally recognized prize or award for the achievement. The petitioner also submitted a May 24, 2004 certification from the [REDACTED] listing his racing record and stating that he performed at [REDACTED] as a professional jockey. Neither of the preceding documents specifically identifies any “nationally or internationally recognized prizes or awards for excellence in the field” received by the petitioner.

The petitioner submitted a March 10, 2009 letter from [REDACTED] “a thoroughbred jockey from Peru” and a [REDACTED] stating:

I am familiar with [the petitioner’s] reputation and racing record in Peru. It is clear to me from [the petitioner’s] racing history in Peru alone that he is a jockey of extraordinary ability and achievement in the field of thoroughbred racing. Moreover, [the petitioner’s] overall achievements in Peru and in the U.S., where he has competed with great success at several local tracks, further corroborate and cement his standing as a thoroughbred jockey of extraordinary ability.

In my opinion, the statistics issues by the [REDACTED] alone serve as definitive proof that [the petitioner] is a jockey of extraordinary ability.

[REDACTED] comments that the petitioner has “competed with great success at several local tracks,” but he does not specifically identify any “nationally or internationally recognized prizes or awards for excellence in the field” that were received by the petitioner. While [REDACTED] repeatedly refers to the petitioner as a “jockey of extraordinary ability,” merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F. 2d 41 (2d. Cir.

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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.

1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Further, 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). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of reference letters 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").

The petitioner submitted photographs showing that he received the "Leading Jockey" trophy at the [REDACTED] and that he received the "Leading Jockey" award plaque at the [REDACTED]. There is no documentary evidence showing that the petitioner's "Leading Jockey" awards from [REDACTED] are nationally or internationally recognized awards for excellence in the field rather than local awards issued by the racetrack where the petitioner often competed.

The petitioner submitted his "Jockey Profile Page" posted on the website of [REDACTED] an online thoroughbred racing information source. According to the petitioner's [REDACTED] profile, his "Best Racing Class Achieved" was "Multiple Stakes Winning Jockey." In addition, the petitioner ranked [REDACTED]. The petitioner also submitted multiple photographs from his winning rides at [REDACTED] in Ohio and [REDACTED] in West Virginia. There is no documentary evidence showing that any of the racing stakes won by the petitioner were equivalent to nationally or internationally recognized prizes or awards for excellence in the field.

With regard to the above documentation submitted by the petitioner, he did not submit evidence demonstrating the national or international *recognition* of his particular awards and honors. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this case, there is no documentary evidence demonstrating that the petitioner's specific awards and honors were recognized beyond the presenting organizations at a level commensurate with nationally or internationally recognized prizes or awards for excellence in the field. Accordingly, the petitioner has not established that he meets this regulatory criterion.

*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 petitioner submitted a January 24, 2011 article in [REDACTED] (Hot Springs, Arkansas) entitled "[REDACTED]". The newspaper article is about brothers [REDACTED] first stakes victory at [REDACTED] and the \$50,000 American Beauty stakes race; the article is not about the petitioner. The petitioner is only briefly mentioned in the article and two captioned photographs from the event. The plain language of the regulation at 8 C.F.R.

§ 204.5(h)(3)(iii) requires that the published material be “about the alien . . . relating to the alien’s work in the field.” Thus, an article that mentions the petitioner but is “about” someone or something else cannot qualify under the plain language of this regulation. *See Noroozi v. Napolitano*, 11 CV 8333 PAE, 2012 WL 5510934 at \*1, \*9 (S.D.N.Y. Nov. 14, 2012); *also see generally Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at \*1, \*7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show or a character within a show are not about the performer). In addition, there is no circulation evidence showing that *The Sentinel-Record* qualifies as a form of major media.

The petitioner submitted a May 1, 2009 article in [REDACTED] (Cleveland, Ohio) entitled [REDACTED]. The newspaper article is about the Thistledown racetrack and its financial situation, not the petitioner. The petitioner is only briefly mentioned in a captioned photograph accompanying the article. Further, there is no circulation evidence showing that [REDACTED] qualifies as a form of major media.

The petitioner submitted a captioned photograph entitled [REDACTED] but the English language translation accompanying the material was not a full translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that 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. *Id.* Further, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “published material about the alien” including “the title, date and author of the material.” The captioned photograph does not meet these requirements. In addition, there is no evidence showing that the captioned photograph was in a professional or major trade publication or some other form of major media.

The petitioner submitted an article entitled [REDACTED] but the English language translation accompanying the article was not a full translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). Without a full English language translation, the petitioner has not established that the article is about him. The date of the article was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, there is no documentary evidence showing that the article was in a professional or major trade publication or some other form of major media.

The petitioner submitted an article entitled [REDACTED] but the English language translation accompanying the article was not a full translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). Without a full English language translation, the petitioner has not established that the article is about him. In addition, the date of the article was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Furthermore, there is no documentary evidence showing that the article was in a professional or major trade publication or some other form of major media.

The petitioner submitted a “cover page” dated November 28, 2000 and entitled [REDACTED] but the English language translation accompanying the material was not a full

translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, the author of the material was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, there is no documentary evidence showing that the material was from a professional or major trade publication or some other form of major media.

The petitioner submitted the cover page of [REDACTED] dated June 7, 1997, but the author of the material was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Furthermore, there is no documentary evidence showing that [REDACTED] qualifies as a professional or major trade publication or some other form of major media.

The petitioner submitted an August 6, 2001 article in [REDACTED] entitled '[REDACTED]' but the English language translation accompanying the article was not a full translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). Without a full English language translation, the petitioner has not established that the article is about him. The petitioner also submitted a December 15, 2003 article about himself (accompanied by a full English language translation) in [REDACTED] entitled '[REDACTED]'. The author of the preceding articles in [REDACTED] was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, there is no circulation evidence showing that [REDACTED] qualifies as a form of major media.

The petitioner submitted information about the horse [REDACTED] on the cover page of [REDACTED] the official magazine of the [REDACTED]. The date and author of the material were not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). The petitioner also submitted information about the horse [REDACTED] on the cover page of the May 3, 2003 issue of [REDACTED] but the author of the material was not identified. The preceding material on the two cover pages of [REDACTED] focuses on the horses and only briefly mentions the petitioner. In addition, there is no documentary evidence showing that [REDACTED] qualifies as a professional or major trade publication or some other form of major media.

The petitioner submitted an article entitled '[REDACTED]' but the English language translation accompanying the material was not a full translation as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, the author of the material was not identified as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). In addition, the date of the article is illegible and there is no documentary evidence showing that the article was in a professional or major trade publication or some other form of major media.

None of the above articles meet all of the requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). For example, the articles were deficient in that they did not include a date or an author, they were not about the petitioner, they lacked a full English language translation, or they lacked evidence that they were published in major media.

On appeal, counsel asserts that the submitted articles should be considered as comparable evidence for this regulatory criterion. Counsel states:

As stated in the RFE, the stories in this field are not focused on jockeys and their success. Most mentions of jockeys in published material are about what place they came in, the time and winnings. For this reason, the petitioner presented comparable evidence to show that even being mentioned in publications is equivalent to publication in this field. In the original filing, [the petitioner] included material published about him and his success in racing. In addition, he has included articles dating back to his career in Peru, where he was mentioned and celebrated several times.

The regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim “shall” include evidence of a one-time achievement or evidence of at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. The AAO further acknowledges that the regulation at 8 C.F.R. § 204.5(h)(4) provides that “[i]f the above standards do not readily apply to the [petitioner’s] occupation, the petitioner may submit comparable evidence to establish the [petitioner’s] eligibility.” It is clear from the use of the word “shall” in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner’s burden to explain why the regulatory criteria are not readily applicable to his occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i) – (x).

Counsel asserts that “stories in this field are not focused on jockeys and their success” and that “[m]ost mentions of jockeys in published material are about what place they came in, the time and winnings,” but there is no evidence demonstrating that the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(iii) is not readily applicable to the jockey profession. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). After first claiming that published material does not focus on jockeys and their success, counsel then undermines his claim by stating: “In the original filing, [the petitioner] included *material published about him* and his success in racing.” [Emphasis added.] In addition, as previously discussed, the petitioner submitted a December 15, 2003 article “about the alien” in [redacted] entitled ‘[redacted]

[redacted] The submission of this article is not consistent with counsel’s assertion that the “published material about the alien” criterion does not readily apply to the petitioner’s occupation. As such, the petitioner has failed to demonstrate that the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(iii) does not apply to his occupation as required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(4).

In addition, there is no evidence that eligibility for visa preference in the petitioner’s occupation as a jockey cannot be established by the ten categories of evidence specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, the petitioner has submitted evidence that pertains to multiple

categories as indicated in this decision. An inability to meet a criterion is not necessarily evidence that the criterion does not apply to the petitioner's occupation.

Even if the petitioner demonstrated that he was eligible for the provisions of the regulation at 8 C.F.R. § 204.5(h)(4), which he clearly did not, the petitioner failed to establish that only being briefly mentioned in an article is *comparable* to the regulation at 8 C.F.R. § 204.5(h)(3)(iii) that 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." Lesser evidence and less restrictive standards are not equivalent to "comparable evidence." The regulation at 8 C.F.R. § 204.5(h)(4) is not a provision to simply allow an alien to circumvent the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i) – (x) when an alien is unable to meet or submit documentary evidence of the criteria. Rather than submitting evidence that is comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), counsel asserts that simply "being mentioned in publications" demonstrates the petitioner's eligibility. As "being mentioned in publications" is less restrictive than the plain language of the regulation, the AAO cannot conclude that the petitioner's evidence is comparable. Where an alien is simply unable to meet or submit documentary evidence of three of the criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3), the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

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

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

The director discussed the evidence submitted for this regulatory criterion and found that the petitioner failed to establish his eligibility. 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); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not established that he meets this criterion.

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

The petitioner submitted a May 7, 2012 letter from [REDACTED] stating:

I . . . declare (i) that I am a professional Thoroughbred Trainer currently licensed in the States of West Virginia, Ohio, Pennsylvania and Kentucky; (ii) that I have performed and perform as such in the United States; (iii) that I currently rank [REDACTED] in North American racing starters; and (iv) that I currently rank [REDACTED] among the leading North American Trainers in earnings.

I also declare that I am familiar with Professional Jockey [the petitioner's] performance at the Racetracks of [REDACTED]. In my opinion, [the petitioner's] international experience and strong work ethic make him uniquely qualified to fulfill his duties as a Professional Jockey in the U.S.

As an expert in Thoroughbred racing and from my knowledge of [the petitioner's] abilities and qualifications, I write in support of the request to obtain immigration visa classification, based on the reputation he has built for himself.

The petitioner also submitted a May 3, 2012 letter from [REDACTED] stating:

I . . . declare (i) that I am a professional Thoroughbred Trainer currently licensed in the States of West Virginia, Ohio, Pennsylvania and Kentucky; (ii) that I have performed and perform as such in the United States; (iii) that I currently rank [REDACTED] in North American racing starters; and (iv) that I currently rank [REDACTED] among the leading North American Trainers in earnings.

I also declare that I am familiar with Professional Jockey [the petitioner's] performance at the [REDACTED]. In my opinion, [the petitioner's] international experience and strong work ethic make him uniquely qualified to fulfill his duties as a Professional Jockey in the U.S.

As an expert in Thoroughbred racing and from my knowledge of [the petitioner's] abilities and qualifications, I write in support of the request to obtain immigration visa classification, based on the reputation he has built for himself.

In addition, the petitioner also submitted a May 3, 2012 letter from [REDACTED] stating:

I . . . declare (i) that I am a professional Thoroughbred Trainer currently licensed in the States of West Virginia, Ohio, Pennsylvania and Kentucky; (ii) that I have performed and perform as such in the United States; (iii) that I currently rank [REDACTED] in North American racing starters; and (iv) that I currently rank [REDACTED] among the leading North American Trainers in earnings.

I also declare that I am familiar with Professional Jockey [the petitioner's] performance at the [REDACTED]. In my opinion, [the petitioner's] international experience and strong work ethic make him uniquely qualified to fulfill his duties as a Professional Jockey in the U.S.

As an expert in Thoroughbred racing and from my knowledge of [the petitioner's] abilities and qualifications, I write in support of the request to obtain immigration visa classification, based on the reputation he has built for himself.

The second and third paragraphs of the preceding three references' letters contain identical language when describing the petitioner's qualifications, suggesting the language in at least two

of the three letters is not the authors' own. *Cf. Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an immigration judge's adverse credibility determination in asylum proceedings based in part on the similarity of some of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source). While it is acknowledged that [REDACTED] have lent their support to this petition, it appears that at least two of them did not independently prepare the full content of their letters. Accordingly, the AAO finds their duplicative statements to be of limited probative value. Regardless, none of the three trainers state that the petitioner has "performed in a leading or critical role" for their horse training operations or the [REDACTED]. Instead, they simply express familiarity with the petitioner's racing performances and compliment him on his international experience, strong work ethic, abilities, and qualifications.

On appeal, counsel states: "[The petitioner] has held leading positions at [REDACTED] track and was awarded as the "Leading Jockey" at [REDACTED] in 2010 and 2009. He is ranked first place jockey at [REDACTED] and is ranked seventh at [REDACTED]." As previously discussed, the petitioner submitted photographs showing that he received the "Leading Jockey" trophy at the [REDACTED] and that he received the "Leading Jockey" award plaque at the [REDACTED]. The petitioner also submitted statistics from the [REDACTED] website for the period "7/01/12 – 9/30/12" indicating that the petitioner was the seventh-ranked jockey by race earnings at [REDACTED]. In addition, the petitioner submitted statistics from the [REDACTED] website for the period "5/4/12 – 5/14/12" indicating that the petitioner was the first-ranked jockey by race earnings at [REDACTED]. The petitioner also submitted information about [REDACTED] from the online encyclopedia *Wikipedia*. With regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.<sup>3</sup> *See Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8<sup>th</sup> Cir. 2008). Accordingly, the AAO will not assign weight to information for which *Wikipedia* is the source. Thus, the petitioner has not established that the preceding organizations have a distinguished reputation.

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<sup>3</sup> Online content from *Wikipedia* is subject to the following general disclaimer:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . ***Wikipedia cannot guarantee the validity of the information found here.*** The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

*See* [http://en.wikipedia.org/wiki/Wikipedia:General\\_disclaimer](http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer), accessed on April 25, 2013, copy incorporated into the record of proceeding.

In general, a leading role is evidenced by the nature of the role itself and a critical role is one in which the individual was responsible for the success and standing of the organization or establishment. While the petitioner's participation may have been leading at the two [REDACTED] (2009 and 2010) and while his race earnings for the ten-day period of "5/4/12 – 5/14/12" made him the first-ranked jockey by race earnings at [REDACTED], such evidence does not translate to a leading or critical role for the [REDACTED] as a whole. Regarding the statistics from the [REDACTED] website for the period "7/01/12 – 9/30/12" indicating that the petitioner was the seventh-ranked jockey by race earnings at [REDACTED] the AAO cannot conclude that being the seventh-ranked jockey for the preceding three-month period is equivalent to a leading or critical role for that organization. This criterion has not been met because the submitted evidence does not indicate that the role the petitioner performed for the above racetracks was leading or critical. Moreover, the letters from [REDACTED] fail to adequately explain how the petitioner's role as a jockey was leading or critical to their racing operations and the racetracks where he competed.

Counsel asserts that the above evidence should be considered as comparable evidence for this regulatory criterion. Counsel states:

[T]he petitioner does not have a fixed role at the track. The petitioner presented comparable evidence that he has performed as a jockey for several well-known and prominent trainers. . . . Without the petitioner's stellar performances, the trainers for whom he rides would see no winnings, and it is his exceptional ability to hold top spots that makes him invaluable.

The AAO notes that none of trainers who submitted letters of support claim to be ranked in the top two hundred in racing starters or earnings for North America. Counsel fails to explain how the rankings mentioned in the trainers' letters demonstrate that they "have a distinguished reputation" in the sport of horseracing. In addition, none of the trainers' letters mention any specific "stellar performances" or "top spots" held by the petitioner. 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).

Regardless, there is no evidence demonstrating that the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(viii) is not readily applicable to the jockey profession. In addition, there is no evidence that eligibility for visa preference in the petitioner's occupation as a jockey cannot be established by the ten categories of evidence specified by the regulation at 8 C.F.R. § 204.5(h)(3). Once again, an inability to meet a criterion is not necessarily evidence that the criterion does not apply to the petitioner's occupation. Even if the petitioner demonstrated that he was eligible for the provisions of the regulation at 8 C.F.R. § 204.5(h)(4), which he clearly did not, the petitioner failed to establish that submitting duplicative letters from trainers expressing familiarity with the petitioner's racing performances and complimenting him on his international experience, strong work ethic, abilities, and qualifications is *comparable* to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) that requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." Rather than submitting evidence that is comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), counsel

asserts that performing well for three Ohio horse trainers at nearby race tracks demonstrates the petitioner's eligibility. As the quality of the submitted documentation is not equivalent to the more restrictive evidence required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the AAO cannot conclude that the petitioner's evidence is comparable.

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

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

The petitioner submitted statistics from the [REDACTED] website reflecting race earnings of \$933,167 in 2012, \$1,005,509 in 2011, \$948,756 in 2010, \$1,067,739 in 2009, \$801,066 in 2008, \$446,933 in 2007, \$717,266 in 2006, \$481,326 in 2005, and \$165,634 in 2004. The submitted information, however, does not specify the petitioner's share of the preceding race earnings. In counsel's November 4, 2012 letter responding to the director's request for evidence, counsel noted that winnings are divided among multiple parties including the horse owners, trainers, and jockeys. There is no documentary evidence (such as payment records or U.S. income tax forms) showing the yearly remuneration actually paid to the petitioner. 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 petitioner also submitted information from the U.S. Bureau of Labor Statistics for "Athletes and Sports Competitors" reflecting that they earn a mean annual wage of \$79,830.

On appeal, counsel states:

The petitioner presented comparable evidence to show the amount he makes would constitute high remuneration. The evidence provided from the Department of Labor is for athletes and sports competitors. The petitioner presented that information as the closest available from the Bureau of Labor Statistics. That is the general title given to what the petitioner does. As a sports competitor, he earns well above average.

As a professional jockey, the petitioner must submit evidence showing that he has earned a "high salary" or other "significantly high remuneration" in relation to others performing similar work in his specific field, not simply relative to the broad occupational group of "Athletes and Sports Competitors." In addition, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires the petitioner to submit evidence showing that he has earned a "high salary" or other "significantly high remuneration" in relation to others in the field, not simply a salary that is above "average" in his field. Mean annual wage information is not a proper basis for comparison. Instead, the petitioner must submit documentary evidence showing the earnings of those in his occupation performing similar work at the top level of the field. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding average salary information for those performing lesser duties is not a comparison to others in the field); *Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996)

(considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N.D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

Regarding counsel's statement that the petitioner submitted "comparable evidence to show the amount he makes would constitute high remuneration," there is no evidence demonstrating that the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ix) is not readily applicable to the jockey profession. Moreover, even if the petitioner demonstrated that he was eligible for the provisions of the regulation at 8 C.F.R. § 204.5(h)(4), which he clearly did not, the petitioner failed to establish that submitting documentation which does not show the petitioner's specific remuneration and which includes only average salary data across a large group of occupations is *comparable* to the regulation at 8 C.F.R. § 204.5(h)(3)(ix) that requires "[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field." Rather than submitting evidence that is comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(ix), counsel points to the petitioner's undocumented share of race earnings and asserts that the petitioner's remuneration is "above average" for the broad occupational cluster of "Athletes and Sports Competitors." As the quality of the submitted documentation is not equivalent to the more restrictive evidence required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix), the AAO cannot conclude that the petitioner's evidence is comparable.

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

*Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.*

The regulatory criterion at 8 C.F.R. § 204.5(h)(3)(x) focuses on volume of sales and box office receipts as a measure of "commercial successes in the performing arts." The petitioner's field, however, is not in the performing arts. None of the evidence submitted by the petitioner demonstrates that he has achieved "commercial successes in the performing arts."

On appeal, counsel states:

The petitioner presented comparable evidence of earnings to satisfy this criterion. The petitioner has enjoyed commercial success when looking at his earnings, which are similar to counting tickets sold or box office earnings. . . . The petitioner included several photos of successes at races that indicate commercial gains to owners and trainers, as well as to himself, which were completely overlooked.

As previously discussed, the race earnings information for the petitioner from the website does not specify his actual share of the winnings. In addition, while the photographs submitted by the petitioner show the "purse" for the horse races that were won, the submitted documentation again fails to indicate the petitioner's specific share of the race earnings. 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. at 165. Moreover, even if

the petitioner demonstrated that he was eligible for the provisions of the regulation at 8 C.F.R. § 204.5(h)(4), which he clearly did not, the petitioner failed to establish that submitting documentation which does not show the petitioner's specific earnings is *comparable* to the regulation at 8 C.F.R. § 204.5(h)(3)(x) that requires "[e]vidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales." Rather than submitting evidence that is comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(x), counsel asserts that the petitioner's undocumented share of race earnings demonstrates eligibility. As the quality of the submitted documentation is not equivalent to the more restrictive evidence required by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x), the AAO cannot conclude that the petitioner's evidence is comparable.

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

### B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence or to submit comparable evidence demonstrating his eligibility.

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

The petitioner submitted documentation indicating that he 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). USCIS or any agency is not required to treat acknowledged errors as binding precedent. *See Sussex Eng'g 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).

### 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.

Even if the petitioner had 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.<sup>4</sup> Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three categories 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 AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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>4</sup> 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).