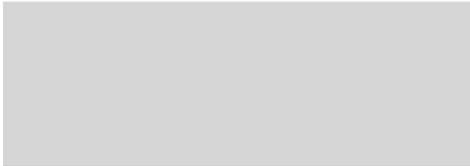




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 22 2015**

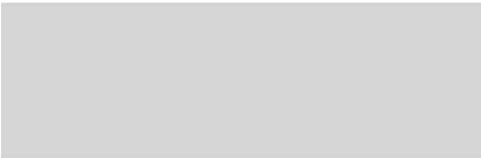
FILE # [REDACTED]

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary as an “alien of extraordinary ability” in business, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), which makes visas available to aliens who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation. The director determined that the petitioner had not satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3), which requires documentation of a one-time achievement or evidence that meets at least three of the ten regulatory criteria.

On appeal, the petitioner submits a brief with additional documentary evidence. For the reasons discussed below, we agree that the petitioner has not established the beneficiary’s eligibility for the exclusive classification sought. Specifically, the petitioner has not submitted qualifying evidence of a one-time achievement pursuant to 8 C.F.R. § 204.5(h)(3), or evidence that satisfies at least three of the ten regulatory criteria set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x). As such, the petitioner has not demonstrated that the beneficiary is one of the small percentage who are at the very top in the field of endeavor, and that the beneficiary has sustained national or international acclaim. *See* 8 C.F.R. § 204.5(h)(2), (3). Accordingly, we will dismiss the petitioner’s appeal.

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) sets forth a multi-part analysis. First, a petitioner can demonstrate the beneficiary’s sustained acclaim and the recognition of the beneficiary’s achievements in the field through evidence of a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit this evidence, then a petitioner must submit sufficient qualifying evidence that meets at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i) – (x).

The submission of evidence relating to at least three criteria, however, does not, in and of itself, establish eligibility for this classification. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination). *See also Rijal v. USCIS*, 772 F.Supp.2d 1339 (W.D. Wash. 2011) (affirming USCIS’ proper application of *Kazarian*), *aff’d*, 683 F.3d 1030 (9th Cir. 2012); *Visinscaia v. Beers*, 4 F.Supp.3d 126, 131-32 (D.D.C. 2013) (finding that USCIS appropriately applied the two-step review); *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the “truth is to be determined not by the quantity of evidence alone but by its quality” and that USCIS examines “each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true”).

II. ANALYSIS

A. Previously Approved O-1 Petition

While U.S. Citizenship and Immigration Services (USCIS) has approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). We are 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). Moreover, we need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center as the law is clear that an agency is not bound to follow an earlier determination as to a visa applicant where that initial determination was based on a misapplication of the law. *Glara Fashion, Inc. v. Holder*, 11 CIV. 889 PAE, 2012 WL 352309 *7 (S.D.N.Y. Feb. 3, 2012); *Royal Siam v. Chertoff*, 484 F.3d 139, 148 (1st Cir.2007); *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 177 (D.Mass.2000) (Dkt.10); *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp.2d 800, 803 (E.D.La.1999), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

B. Evidentiary Criteria¹

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

The director determined the petitioner met the requirements of this criterion. The petitioner has submitted sufficient evidence to establish that the beneficiary's evidence meets this criterion.²

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 did not establish the beneficiary's eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional discussion. Therefore, the petitioner has abandoned its eligibility claims under this criterion. *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 submitted qualifying evidence under this criterion.

¹ We have reviewed all of the evidence the petitioner has submitted and will address those criteria the petitioner claims to meet or for which the petitioner has submitted relevant and probative evidence.

² The regulation requires that the beneficiary be the actual recipient of any qualifying award. While the petitioner did not submit award certificates or official announcements crediting the beneficiary as the winner (including as a named member of a winning team) of many of the awards, the record does contain some evidence from the award-issuing entities confirming that the beneficiary was a named recipient of the award. For example, the letter from [REDACTED] affirms that the beneficiary was personally nominated as part of a team for an award that the team won. Similarly, [REDACTED] strongly implies the beneficiary personally won awards in [REDACTED] and [REDACTED].

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.

This criterion contains multiple evidentiary requirements the petitioner must satisfy. First, the published material must be about the beneficiary and the contents must relate to the beneficiary's work in the field under which he seeks classification as an immigrant. The published material must also appear in professional or major trade publications or other major media. Professional or major trade publications are intended for experts in the field or in the industry. To qualify as major media, the publication should have significant national or international distribution and be published in a predominant national language. The final requirement is that the petitioner provide each published item's title, date, and author and if the published item is in a foreign language, the petitioner must provide a translation that complies with the requirements found at 8 C.F.R. § 103.2(b)(3). The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The petitioner initially provided a [REDACTED] online article titled "[REDACTED]" [REDACTED]. The petitioner also provided other published material. The director determined that the petitioner did not submit evidence meeting the requirements of this criterion. The appeal focuses on the [REDACTED] article, and does not challenge in the director's determination that the remaining material is not about the beneficiary, or that it did not appear in one of the required publication types.

In addition to the [REDACTED] article, the record consists of the following Internet articles:

- [REDACTED]
- [REDACTED]
- [REDACTED]

While these articles may be about projects with which the beneficiary has some association, they are not articles about him. The regulation requires that the published material be "about the alien . . . relating to the alien's work in the field." The submitted articles do not mention the beneficiary by name. Published material that mentions or even focuses on projects with which the beneficiary is associated does not meet the plain language requirements of the regulation. The published piece itself must be about the person and relating to his or her work in the field for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iii): *see Noroozi v. Napolitano*, 905 F.Supp.2d 535, 545 (S.D.N.Y. 2012); *see also generally Negro-Plumpe v. Okin*, No. 2:07-CV-820-ECR-RJJ, 2008 WL 10697512, at *3 (D. Nev. Sept. 9, 2008) (upholding a finding that articles about a show are not about the actor). The petitioner also submitted a biography relating to the beneficiary from the website [REDACTED]. Although this one-paragraph biography is about the beneficiary, the petitioner has not provided

evidence demonstrating this website is a professional or major trade publication or other major media, and as such it does not meet the plain language requirements of this criterion.

While the [REDACTED] clearly qualifies as a form of major media, the evidence is not about the beneficiary, relating to his work in the field. The article is entitled [REDACTED] relating to Media and Advertising and lists new appointments of at least 18 individuals in the advertising field. An article that is not about the beneficiary does not meet this regulatory criterion. *See Noroozi*, 905 F.Supp.2d at 545; *see also generally, Negro-Plumpe*, 2008 WL 10697512, at *3 (upholding a finding that articles about a show or a character within a show are not about the performer). Further, as noted by the director, this article does not indicate its author, which is a requirement within the regulation.

As such, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

This criterion contains multiple evidentiary elements the petitioner must satisfy. The plain language requirements of this criterion require that the work in the field is directly attributable to the beneficiary. Generally, 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts. This interpretation is longstanding and has been upheld by a federal district court in *Negro-Plumpe*, 20008 WL 10697512, at *3 (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). *See also Visinscaia*, 4 F. Supp. 3d at 135-136. The beneficiary's work also must have been displayed at artistic exhibitions or showcases. The petitioner must satisfy all of these elements to meet the plain language requirements of this criterion.

The petitioner provided evidence relating to two advertising campaigns that it asserts are on permanent display at the [REDACTED] but it did not indicate that this evidence should apply to the display criterion in the proceedings before the director. In fact, the petitioner's response to the director's request for evidence (RFE) lists this evidence as applicable to the awards criterion. Consequently, the director did not issue a determination under this regulatory provision. On appeal, the petitioner indicates that the director should have considered the evidence under the display criterion.

The relevant evidence consists of two letters that the petitioner resubmits on appeal. [REDACTED] the Director of Events at the [REDACTED] is the author of both letters. The letters indicate that each year the top advertising is "honored and made part of the archive of the Department of Film of the [REDACTED]" Each letter also attributes the relevant commercial to the beneficiary. Materials that the museum maintains in an archive but does not display do not meet this criterion. The petitioner did not submit letters from anyone at the museum confirming that archived items are on display. As such, the content of Ms. [REDACTED] letters does not establish that the beneficiary meets this criterion.

Accordingly, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

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

The director determined the petitioner met the requirements of this criterion. The petitioner has submitted sufficient evidence, including the beneficiary's roles for the petitioner as well as for [REDACTED], to meet this 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 plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires the petitioner to submit evidence of the beneficiary's "high salary or other significantly high remuneration for services, in relation to others in the field." Average salary information for those performing work in a related but distinct occupation with different responsibilities is not a proper basis for comparison. The petitioner must submit documentary evidence of the earnings of those in the beneficiary's occupation performing similar work at the top level of the field.³ The petitioner must present evidence of objective earnings data showing that the beneficiary has earned a "high salary" or "significantly high remuneration" in comparison with those performing similar work during the same time period. 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 *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).

Although the petitioner mentioned the beneficiary's salary in the initial filing, it did not indicate that this salary is sufficient to meet the high salary or other significantly high remuneration criterion in the proceedings before the director. Consequently, the director did not address this regulatory provision. On appeal, the petitioner only mentions the beneficiary's salary in the context of a final merits determination, in the event that the petitioner has satisfied at least three of the regulatory criteria on appeal. The salary related documents the petitioner has provided consist of the appeal brief and a letter from the petitioner submitted with the initial petition that lists the beneficiary's future salary.

The plain language of this regulatory criterion requires evidence of "a high salary or other significantly high remuneration for services, in relation to others in the field." The petitioner offers no basis for

³ While we acknowledge that a district court's decision is not binding precedent, we note that in *Racine v. INS*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated, "[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with . . . the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99."

comparison showing the beneficiary's salary was high or his other remuneration was significantly high in relation to others in his 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 Grimson*, 934 F. Supp. at 968 (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). In the present case, the evidence submitted by the petitioner does not establish the beneficiary has received a high salary or other significantly high remuneration for services in relation to others in the field.

As a result, the petitioner has not submitted evidence that meets the plain language requirements of this criterion.

C. Summary

For the reasons discussed above, we agree with the director that the petitioner has not submitted the requisite initial evidence; in this case, evidence that satisfies three of the ten regulatory criteria.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the beneficiary has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of his or her 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 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. As the petitioner has not done so, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of presenting evidence that satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3) and (4). *Kazarian*, 596 F.3d at 1122. Nevertheless, although we need not provide the type of final merits determination referenced in *Kazarian*, a review of the evidence in the aggregate supports a finding that the petitioner has not demonstrated the level of expertise required for the classification sought.⁴

⁴ We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, we maintain 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* INA §§ 103(a)(1), 204(b); 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).

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NON-PRECEDENT DECISION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.