



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-C-D-M-

DATE: NOV. 4, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a dancer, seeks classification as an individual “of extraordinary ability” in athletics. *See* Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A). The Director, Nebraska Service Center, denied the petition. The Director reaffirmed that decision on motion. The matter is now before us on appeal. The appeal will be dismissed.

The classification the Petitioner seeks makes visas available to foreign nationals who can demonstrate extraordinary ability through sustained national or international acclaim and achievements that have been recognized in the area of expertise through extensive documentation. The Director determined that the Petitioner did not show that she has sustained acclaim, that she seeks to enter the United States to work in her area of extraordinary ability, or that her entry would substantially benefit prospectively the United States.

I. LAW

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

(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.

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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. 8 C.F.R. § 204.5(h)(2). The regulation at 8 C.F.R. § 204.5(h)(3) sets forth two different methods by which a petitioner can demonstrate extraordinary ability sustained by national or international acclaim and the recognition of achievements in the field. First, a petitioner can submit a one-time achievement (that is, a major, internationally recognized award). Second, a petitioner can satisfy at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

Satisfying the requirements of 8 C.F.R. § 204.5(h)(3), does not, in and of itself, establish eligibility for this classification. If and when a petitioner has provided either a one-time achievement or meets at least three of the ten criteria listed, a final merits determination is then necessary to evaluate whether the totality of the record demonstrates, by a preponderance of the evidence, sustained national or international acclaim and recognition of accomplishments in the field of expertise. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first considered to determine if the required regulatory criteria are met, and then considered in the context of a final merits determination). *See also Rijal v. USCIS*, 772 F.Supp.2d 1339 (W.D. Wash. 2011) (affirming our 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 we 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”).

II. ANALYSIS

A. Extraordinary Ability

1. Evidentiary Criteria

Throughout the proceedings, the Petitioner has indicated she has extraordinary ability in dance. The Director found the Petitioner provided both a one-time achievement (a major internationally recognized award), as well as documentation satisfying at least three of the ten criteria listed under 8 C.F.R. § 204.5(h)(3). Specifically, the Director concluded that the Petitioner had (1) participated, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization; (2) displayed her work in the field at artistic exhibitions or showcases; and (3) performed in a leading or critical role for organizations or establishments that have a distinguished reputation. Upon review, we agree with the Director’s determination that the Petitioner submitted the required initial evidence.¹ *See* 8 C.F.R. § 204.5(h)(3). At issue on appeal is whether the Petitioner enjoys sustained acclaim and whether she demonstrated that she intends to continue working in her area of expertise.

¹ Although all performing artists’ shows are not necessarily artistic exhibitions or showcases, this Petitioner appeared twice at the [REDACTED] a televised event featuring chosen performers in a variety of art forms and genres. These performances constitute a display of the Petitioner’s work in an artistic exhibition or showcase.

2. Final Merits Determination

As the Petitioner satisfied the antecedent evidentiary requirement under the two-part *Kazarian* analysis, the Director conducted a final merits determination, concluding that the record did not reflect sustained acclaim. With her initial motion to reopen/motion to reconsider, the Petitioner asserted this analysis is not appropriate where a petitioner has a one-time achievement. In support of this position, she referred to: “[the] interim Memo of [U.S. Citizenship and Immigration Services (USCIS)] August 18, 2010 relating to Kazarian decision.” See USCIS Interim Policy Memorandum PM-602-0005, *Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions (AFM Update AD 10-41)*, (August 18, 2010), <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Kazarian%20Guidance%20AD10-41.pdf>. USCIS, however, subsequently finalized this memorandum. See USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*, (December 22, 2010), <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf>. It is this memorandum, therefore, that informs our analysis.

According to the Petitioner, the second part of the *Kazarian* analysis is limited to circumstances in which a petitioner meets the evidentiary requirements of 8 C.F.R. § 204.5(h)(3) by satisfying three of the ten criteria listed in 8 C.F.R. § 204.5(h)(3)(i)-(x), and not when a petitioner provides a one-time achievement. The Petitioner referred to both the *Kazarian* opinion and the USCIS interim policy memorandum and states that these support her position. Both of these authorities discuss the two-step analysis as the appropriate method for analyzing extraordinary ability petitions. See *Kazarian*, 596 F.3d 1115 at 1119-20 (indicating that an evaluation of whether the foreign national’s abilities are extraordinary occurs after the determination that evidentiary requirements of 8 C.F.R. § 204.5(h)(3) have been met); USCIS Policy Memorandum PM-602-0005.1, *supra*, at 5 (“USCIS officers should use a two-part analysis to consider the documentation submitted with the petition to demonstrate eligibility under 203(b)(1)(A) of the INA”). The regulation at 8 C.F.R. § 204.5(h)(3) defines the initial evidence for this classification as either a one-time achievement or accomplishments falling under “at least three of the following” categories set forth in subparagraphs (i)-(x).

Furthermore, the court’s reasoning in *Kazarian* and our published precedents do not support limiting the application of the two-part analysis. In *Kazarian*, the court held that we should not have considered the substantive quality of evidence during the first part of the analysis. Instead, the first part of the analysis involves an analysis regarding whether a petitioner submitted documentation that falls into categories listed at 8 C.F.R. § 204.5(h)(3). If we determine a petitioner does satisfy this initial requirement, we then evaluate the quality of the record in a final merits determination in order to decide if it demonstrates sustained national or international acclaim and achievements that have been recognized in the field of expertise. *Kazarian*, 596 F.3d at 1121-22; USCIS Policy Memorandum PM-602-0005.1, *supra*, at 5, 13-14.

In addition, we examine each item for relevance, probative value, and credibility, both individually and within the context of the totality of the record. *Chawathe*, 25 I&N at 376, *citing Matter of E-M-*,

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20 I&N Dec. 77, 79-80 (Comm'r 1989) (stating that the "[t]ruth is to be determined not by the quantity of evidence alone but by its quality"). As a result, a final merits determination is also necessary in cases of a one-time achievement. In this analysis, we evaluate whether the Petitioner has demonstrated, by a preponderance of the evidence, that she has sustained national or international acclaim and that her achievements have been recognized in the field of expertise, indicating that she is one of that small percentage who has risen to the very top of the field of endeavor.

The Petitioner has demonstrated a history of impressive achievements as a dancer. She received the [REDACTED] at the [REDACTED] the flagship annual competition hosted by the [REDACTED]. She completed three years of training through [REDACTED]. She then began a career as a performer and appeared in multiple productions that ran in [REDACTED] including [REDACTED]. She served as dance captain for [REDACTED] and [REDACTED]. She also appeared in the [REDACTED]. At this event she performed as one of several featured artists in a televised showcase of various performing arts.

The Petitioner submitted numerous letters speaking to her talents from respected individuals in the theater and dance industries. These letters include praise from [REDACTED] Managing Director of the [REDACTED] a choreographer and director, [REDACTED] Artistic Director of [REDACTED] Artistic Director of [REDACTED] Company, [REDACTED], a director and choreographer, [REDACTED] a choreographer, and [REDACTED] a dancer and performer. The evidence demonstrates that the Petitioner has in the past enjoyed national and international acclaim. However, in order to qualify for the classification sought, the Petitioner must show that such acclaim has been sustained. 8 C.F.R. § 204.5(h)(3). Black's Law Dictionary defines "sustain" as: "To support or maintain, esp. over a long period of time." Black's Law Dictionary 1039 (9th ed. 2009). As stated in the December 22, 2010, USCIS Memorandum, there is no definitive time frame that constitutes "sustained." If an individual has been recognized for a particular achievement, we must determine whether she continues to maintain a comparable level of acclaim in the field of expertise. An individual may have achieved national or international acclaim in the past, but then fail to maintain a comparable level of acclaim thereafter. See USCIS Policy Memorandum PM-602-0005.1, *supra*, at 5, 13-14.

We must also consider the requirement of sustained acclaim in the context of the visa classification sought. As indicated by the statutory requirements of the classification, the purpose of the visa is to allow individuals of extraordinary ability to immigrate to the United States in order to benefit the United States through work in the field of their extraordinary ability. See section 203(b)(1)(A) of the Act. In order for acclaim to be relevant to this overall purpose, it must be sufficiently recent, so that the United States would benefit from the individual's continued work in the field of extraordinary ability.

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In the instant case, the Petitioner has not demonstrated activity in the field of dance after [REDACTED]. The most recent examples of her efforts in the area of expertise are her work in the film [REDACTED] and [REDACTED] both of which ended by [REDACTED]. The Petitioner filed the underlying petition in September of 2013, nearly a decade later.

Although the Petitioner provided numerous letters from respected individuals who work in dance and theater, each of the letters based its opinion of the Petitioner's abilities occurring at least ten years ago. The opinions of the Petitioner's references are not without weight and have been considered. We may, in our discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we are ultimately responsible for making the final determination regarding eligibility for the benefit sought and evaluate the content of letters to determine to what extent they offer support. *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"). Thus, the content of the references' letters and how they became aware of the Petitioner's reputation are important considerations. Even when written by independent experts, letters solicited in support of an immigration petition are of less weight than preexisting, independent documentation that one would expect of a dancer who enjoys sustained national or international acclaim. *Visinscaia*, 4 F.Supp.3d at 134-35 (concluding that USCIS' decision to give little weight to uncorroborated assertions from professionals in the field was not arbitrary and capricious).

Without more accomplishments closer to the date of filing, the recent reference letters describing older achievements do not reflect that the Petitioner continues to enjoy sustained national or international acclaim in the field of her ability. When the Director specifically requested that the Petitioner show more recent acclaim, the Petitioner provided information regarding her work with Pilates. The Petitioner does not state that Pilates and dance are the same area of expertise, nor does she claim extraordinary ability in Pilates. The Petitioner offered material regarding [REDACTED]. These exhibits included an article from [REDACTED] entitled [REDACTED]. However, the relevant question is not whether Pilates is a good workout for dancers, but whether the Petitioner has continued to enjoy acclaim in the field for which she seeks classification. In this case, the Petitioner has not demonstrated by a preponderance of the evidence that she has sustained national or international acclaim in her field of dance. As a result, she has not established her extraordinary ability as defined in 8 C.F.R. § 204.5(h)(3) and required by section 203(b)(1)(A) of the Act.

² A letter from [REDACTED] Director of the [REDACTED] states that the Petitioner has been providing workshops at [REDACTED] since 2006 "and is someone who continues to teach and inspire our undergraduate students." However, the record is otherwise silent regarding [REDACTED] the Petitioner's involvement with the organization, or any workshops she gave there. The Director raised this issue, but the Petitioner does not address the concern on appeal. Without more detail or corroborating evidence, the letter from [REDACTED] is insufficient to establish that the Petitioner's involvement with [REDACTED] involved dance rather than Pilates.

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B. Intention to Continue Working in the Area of Extraordinary Ability

In addition to demonstrating extraordinary ability, the Petitioner must show that she seeks to enter the United States in order to work in the field of her extraordinary ability. The regulation at 8 C.F.R. § 204.5(h)(5) requires: “clear evidence that the alien is coming to the United States to continue to work in the area of expertise.” The regulation goes on to provide: “Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.” *Id.*

On the Form I-140, Immigrant Petition for Alien Worker, the Petitioner listed her proposed employment in the United States as a classical ballet dancer. However, this information is contradicted by the cover letters in the record, which indicate that the Petitioner initially expressed an intent to work as a dance instructor and mentor and has been working as a Pilates instructor. As evidence of potential future employment, the Petitioner initially provided a letter from [REDACTED] a resident voice teacher at the [REDACTED] located in [REDACTED] California. He stated: “The [REDACTED] would benefit greatly from having a teacher of [REDACTED] caliber, and we at the [REDACTED] relish the opportunity of having her guest teach for us.” While a performer and instructor certainly share knowledge of dance, the two rely on very different sets of basic skills. Thus, dance and dance instructor are not the same area of expertise. *See Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002)

When asked for additional information to demonstrate performances after 2004, the Petitioner provided materials regarding her work in Pilates. She included a copy of the Certificate of Incorporation for her company, [REDACTED]. A 2002 article in [REDACTED] entitled, [REDACTED] discusses her transition from dancer to Pilates teacher. Other items mention her work as a Pilates teacher, including a 2006 article in [REDACTED] and a 2008 article in [REDACTED]. The Petitioner modeled Pilates poses for a book entitled [REDACTED] by [REDACTED]. Other evidence of the Petitioner’s work in this area includes a schedule showing that she taught a class at the [REDACTED] a [REDACTED] event. She also submitted a note on a business card from a former ballerina who attended her Pilates classes.

From 2008 to 2010, the Petitioner was the [REDACTED] a website for women over 35. She provided a letter from the company’s CEO, [REDACTED], as well as print-outs of 27 articles she wrote for the site. YouTube videos posted by [REDACTED] feature the Petitioner providing advice on [REDACTED] and [REDACTED]. The Petitioner

³ The Petitioner’s RFE response stated that she appeared in two other books, [REDACTED] and [REDACTED]. Upon examination, the Petitioner appeared in one book, which was republished in other languages under the translated title, [REDACTED].

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and [REDACTED] also attended the [REDACTED] California as the guests of insurance company, [REDACTED]

On appeal, the Petitioner also includes a Microsoft Word document with the reproduced contents of two emails. The regulations at 8 CFR §§ 103.2(b)(4) and 204.5(g)(1) provide that acceptable forms of evidence are originals or photocopies. In this case, the Petitioner states that she previously submitted true reproductions of these emails. However, a thorough review of the record indicates that true copies of the emails were never provided. Notably, the index provided with the original petition contains a heading: "Letter of Interest from prospective employers," under which is a single bullet point: [REDACTED] The emails are similarly absent from supplemental submissions from the Petitioner. The Word document reproduction does not show the source of the email and is not a true copy. As a result, it does not meet the regulatory requirements outlined in 8 CFR §§ 103.2(b)(4) & 204.5(g)(1) and cannot be considered.

The record does not contain prearranged commitments, or a statement from the Petitioner detailing plans on how she intends to continue her work in dance in the United States. The Petitioner has not shown that the other documents provided are in fact letters from prospective employers. As a result, she has not submitted the initial evidence required by 8 C.F.R. § 204.5(h)(5). However, even if we were to consider the letter from [REDACTED] or the email reproductions as letters from prospective employers, the Petitioner has still not demonstrated she seeks to enter the United States to work in the field of her extraordinary ability.

As explained above, the relevance, probative value, and credibility of all evidence is part of our analysis. *Chawathe*, 25 I&N at 376, citing *Matter of E-M-*, 20 I&N Dec. at 79-80. The totality of the record indicates that the Petitioner has transitioned away from the world of dance and now focuses on Pilates and fitness. This conclusion is corroborated by the [REDACTED] article that states:

After much practice [the Petitioner] learnt to slow down. She now works mornings as a Pilates teacher and spends her afternoons painting and reading. Although she feared her income would drop, she has become [REDACTED] favourite Pilates instructor, with clients that will pay any amount of money for a slot.

She has not provided any personal statement attesting to her desire to return to dance. Instead, she included articles explaining how she purposefully left dance to embark on a new career with Pilates. Although the Petitioner's work in Pilates no doubt benefits from her background in dance, Pilates and dance are two different disciplines, a determination the Petitioner does not contest. In addition, although working in Pilates does not preclude working in dance, the Petitioner has not shown that she intends to do both. Given that the Petitioner's recent experience over the past several years has been as a Pilates instructor, [REDACTED] reference to the possibility of her visiting as a guest teacher of an unspecified skill is insufficient. For these reasons, the record does not confirm that it is more likely than not that she seeks to enter the United States to work in the field of her extraordinary ability.

C. Prospective Benefit to the United States

The third statutory requirement for the extraordinary ability visa classification is that the United States would prospectively benefit from the Petitioner's entry into the United States. Section 203(b)(1)(A)(iii) of the Act. As discussed above, the Petitioner has not demonstrated sustained acclaim or her intention to seek work in the United States in the area of her ability. *See* sections 203(b)(1)(A)(i) & (ii) of the Act. As a result, she has not shown that her entry would more likely than not prospectively benefit the United States.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must demonstrate that the Petitioner has achieved sustained national or international acclaim. The record in the aggregate, however, does not reflect that the Petitioner continues to enjoy the acclaim she once did. As a result, the Petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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.

Cite as *Matter of A-C-D-M-*, ID# 14220 (AAO Nov. 4, 2015)