

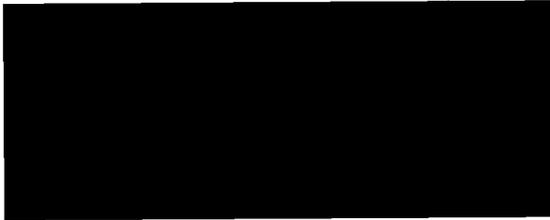
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE: EAC 09 059 50828 Office: VERMONT SERVICE CENTER Date: **MAY 14 2010**

IN RE: Petitioner:
 Beneficiary:



PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien with extraordinary ability in athletics. The petitioner states that it is a provider of professional tennis services and instruction. It seeks to employ the beneficiary as a professional tennis coach/instructor for a period of three years.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary has achieved sustained national or international acclaim in her field or that she is one of the small percentage who have risen to the very top of her field of endeavor. The director found that the evidence submitted failed to satisfy the criterion set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A) or three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director failed to consider relevant evidence submitted in response to a request for evidence, erroneously disregarded the opinion of a professional organization in the beneficiary's field, and ignored the expert opinion of a tenured professor in the beneficiary's field of endeavor. Counsel contends that the petitioner submitted evidence to satisfy the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1), (2), (3), and (8).

For the reasons discussed below, our assessment of the evidentiary criteria as well as the merits evaluation of the evidence submitted, which addresses the significance of the evidence submitted under the necessary three criteria, leads us to conclude that the petitioner has not demonstrated the necessary national or international acclaim as a tennis coach or instructor.

I. The Law

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991).

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part:

Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) states, in pertinent part:

Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business or athletics. An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

- (A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or
- (B) At least three of the following forms of documentation:
 - (1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - (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 or international experts in their disciplines or fields;
 - (3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
 - (4) Evidence of the alien's participation on a panel, or individually as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
 - (5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
 - (6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
 - (7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
 - (8) Evidence that alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

- (C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

The mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification. 59 Fed Reg 41818, 41820 (August 15, 1994). In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach recently set forth in a decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 2010). Similar to the regulations governing this nonimmigrant classification, the regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. See 8 C.F.R. § 204.5(h)(3).

Specifically, 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 *6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both 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," 8 C.F.R. § 204.5(h)(2), and "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)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at *3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination.

The AAO finds the *Kazarian* court's two part approach applicable to evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability or achievement at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v), and to other immigrant and nonimmigrant classifications based on a similar evidentiary framework.¹

¹ For example, the *Kazarian* court's two-part approach would be applicable to outstanding professors and researchers, where the petitioner must: (1) submit evidence meeting at least two out of the six criteria outlined at 8 C.F.R. § 204.5(i)(3)(i); and (2) demonstrate that the professor or researcher is recognized internationally as outstanding. This approach would also be applicable to petitions for P-1 classification athletes and entertainment groups, where the petitioner must: (1) submit evidence meeting at least two of the seven criteria at 8 C.F.R. § 214.2(p)(4)(ii)(B)(2) or three of the six criteria at 8 C.F.R. § 214.2(p)(4)(iii)(B)(3), respectively; and (2) demonstrate that the individual beneficiary has achieved international recognition in his sport based

Therefore, in reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

In the present matter, the petitioner has submitted evidence pertaining to four of the evidentiary criteria, but has not established that the beneficiary has risen to the very top of her field or that she has sustained national or international acclaim. 8 C.F.R. §§ 214.2(o)(3)(ii) and (iii).

II. Analysis

The record consists of a petition with supporting documentation, a request for additional evidence (RFE) and the petitioner's reply, the director's decision, an appeal and brief, and additional evidence supporting the appeal. The beneficiary in this case is a 25-year-old native and citizen of Lithuania. The record shows that the beneficiary competed successfully in national and international competitions as a tennis player in Lithuania between 1993 and 1996 and between 2001 and 2003. She has competed in the United States at the collegiate level between 2004 and 2007.

The petitioner seeks to classify the beneficiary as an alien with extraordinary ability as a professional tennis coach/instructor. With respect to the beneficiary's coaching career, the petitioner submitted evidence that, in 2008, the beneficiary became a member of the Professional Tennis Registry, which has granted her the rating of "Professional." The petitioner states that the beneficiary served as a tennis coach at a Lithuanian tennis school from 2001 until 2003, as an assistant coach at a tennis camp during the summers of 2004 and 2006, and, since 2007, as a professional tennis coach with the City of Pompano Beach Tennis Club.

In denying the petition, the director acknowledged that the beneficiary enjoyed a successful junior and collegiate career as a tennis player, but found that the beneficiary's achievements at those levels are insufficient to establish that the beneficiary is among the small percentage at the very top of the sport. The director concluded that the evidence failed to meet any of the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii). The director did not indicate whether he reviewed the beneficiary's eligibility for O-1 classification as an alien with extraordinary ability as a tennis coach.

The AAO notes that the evidence in the record pertains almost entirely to the beneficiary's achievements as a competitive tennis player. The statute requires that the beneficiary seek entry into the United States "to continue work in the area of extraordinary ability." Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i) (2007). While a tennis competitor and an instructor certainly share knowledge of the sport, the two rely on very different sets of basic skills. Thus, competitive athletics and tennis instruction are not the same area of expertise. This interpretation has been upheld in federal court. In *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

on his reputation or that the entertainment group has been recognized as outstanding in the discipline for a sustained and substantial period of time.

It is reasonable to interpret continuing to work in one's "area of extraordinary ability" as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee's extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

Id. at 918. The court noted a consistent history in this area. In the present matter, there is no evidence demonstrating that the beneficiary intends to continue to compete in the United States in her role as a professional tennis coach/instructor for the petitioner.

U.S. Citizenship and Immigration Services (USCIS) will not assume that an alien with extraordinary ability as an athlete has the same level of expertise as a coach or instructor of his or her sport. While the petitioner's competitive accomplishments as a tennis player are not completely irrelevant and will be given some consideration, ultimately she must satisfy the regulation at 8 C.F.R. § 214.2(o)(3)(iii) through her achievements as a coach.

Given the nexus between athletic competition and coaching or sports instruction, in a case where an alien has clearly achieved national or international acclaim as an athlete and has sustained that acclaim in the field of coaching at a national or international level, an adjudicator may consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability such that it can be concluded that coaching is within the beneficiary's area of expertise.

Upon review of the director's decision, there is no indication that he considered the beneficiary's coaching career in determining whether she is eligible for O-1 classification. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). As such, the AAO will review all evidence submitted to determine whether the petitioner has established that the beneficiary is an alien with extraordinary ability in athletics as a tennis coach/instructor.

A. Evidentiary Criteria

At the outset, it is critical to note that simply submitting evidence to satisfy the evidentiary criteria will not automatically establish eligibility for this visa classification. The mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification. 59 Fed Reg. 41818, 41820 (August 15, 1994).

If the petitioner establishes through the submission of documentary evidence that the beneficiary has received a major, internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The petitioner does not claim that the beneficiary qualifies for O-1 classification on the basis of her receipt of a major, internationally recognized award.

Accordingly, the petitioner must establish the beneficiary's eligibility under at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). The petitioner indicates that the beneficiary meets the criteria at 8 C.F.R.

§§ 214.2(o)(3)(iii)(B)(1), (2), (3), and (8), and submits documentation relevant to these criteria only. As such, the remaining four criteria will not be addressed in this decision.

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

To meet criterion number one, the petitioner must submit documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 214.2(o)(3)(iii)(B)(1).

The petitioner submitted evidence that the beneficiary has won awards as a tennis player at the national collegiate level in the United States, including: NCAA Division II Women's Tennis Championships Semifinalist (2006 and 2007); National Association of Intercollegiate Athletics (NAIA) Women's Tennis National Champion (2004 and 2005); and National Small College Championship Women's Doubles Finalist (2004).

In her home country of Lithuania, the beneficiary received a bronze medal in the 2002 Lithuanian National Olympics. Between the years 1992 and 1998, the beneficiary consistently won the Lithuanian Junior Tennis Champion titles in her age group. The beneficiary was also Baltic States Junior Champion between the years 1993 and 1997, and achieved 5th and 2nd place finishes in an Eastern European Junior National Championship.

Upon review, the AAO finds that the beneficiary's two NAIA championships, bronze medal in the Lithuanian National Olympics, and national champion titles qualify as nationally-recognized awards.

However, these achievements resulted from the beneficiary's accomplishments as a tennis player and cannot be considered evidence of her national or international acclaim as a coach. As discussed above, while recognition and achievements earned by the beneficiary as a tennis player is not completely irrelevant and will be given some consideration, ultimately she must satisfy the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iii) through her achievements as a coach. Accordingly, the petitioner's awards and competitive results demonstrating her past record of success as a tennis player alone cannot serve to meet this regulatory criterion.

There is scant evidence in the record regarding the beneficiary's coaching experience, and no evidence that she has received a nationally or internationally recognized award for her achievements as a tennis coach. The petitioner's claims regarding the beneficiary's coaching career consist of the following:

[The beneficiary] has professional experience as well, having served as Tennis Coach from 2001 through 2003 with the Siauliai Tennis School in Lithuania; Assistant Coach at Furman Tennis Camp in South Carolina during Summer of 2004 and 2006; and Professional Tennis Coach since 2007 with the City of Pompano Beach Tennis Club.

Nationally or internationally recognized prizes or awards won by tennis players coached primarily by the petitioner can be considered for this criterion. However, the petitioner has not identified any tennis players who have been coached by the beneficiary or provided evidence that such players are competitive at the

national or international levels, much less provided evidence that she has coached athletes who have achieved nationally or internationally recognized prizes or awards.

The petitioner failed to submit any documentation reflecting that the beneficiary, in her capacity as a coach, or any of her players whom she has coached, has received any nationally or internationally recognized prizes or awards for excellence. Therefore, the petitioner failed to establish that she meets this criterion as a tennis coach or instructor.

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 or international experts in their disciplines or fields

In order to establish that the beneficiary meets the second criterion, at 8 C.F.R. § 214.2(o)(3)(iii)(B)(2), the petitioner must document 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 petitioner claims that the beneficiary meets this criterion based on her membership in the Professional Tennis Registry (PTR). In this regard, the petitioner submits:

1. The beneficiary's PTR membership card;
2. A certificate from PTR reflecting that the beneficiary "has completed all tests and examinations and qualifies for PTR certification of professional" and is a member in good standing from August 2008 until August 2009;
3. The beneficiary's PTR certification test results, showing that the beneficiary tested for certification on November 3, 2008 and achieved the rating of "professional" on her written test, skills test, teaching test, error detection test and drill test, for an overall rating of "professional";
4. PTR Press Release announcing that the certification of the petitioner as a professional;
5. Letter dated November 11, 2008 from PTR's Director of Development, thanking the beneficiary for attending the PTR International Certification Workshop;
6. Consultation letter dated January 20, 2009 from [REDACTED]; and
7. Expert Opinion letter dated February 2, 2009 from [REDACTED], Central Washington University.

According to the press release, PTR is the largest global organization of tennis teaching professionals with 13,300 members worldwide. The press release describes the organization's certification requirements as follows:

A comprehensive five-part examination focusing on the fundamentals of teaching group lessons, the development of biomechanically sound strokes, error detection and corrective techniques, and the logistics of organizing group drills is used to determine each member's rating. The

written and on-court examination was administered by PTR on teaching and playing skills to determine a certification rating. [The beneficiary] received the Professional rating.

states that the beneficiary attended the PTR Tennis Teaching Essentials Course, and passed all examinations administered by PTR in order to receive her "Professional" certification. He further states that the beneficiary's "certification in this regard demonstrates that she meets the standard of distinction set forth at 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) and in our opinion is an outstanding tennis coach, teacher and player with extraordinary ability and talent who has risen to the top of her field." Also, he notes that PTR is recognized by professional athletes and organizations around the world and is recognized by the Association of Tennis Professionals (ATP), the Women's Tennis Association (WTA) and the International Tennis Federation (ITF).

[REDACTED] states the following with regard to the beneficiary's PTR membership:

To become a member of the Professional Tennis Registry, one has to pass a series of rigorous tests in order to receive membership. A candidate's membership level is decided upon on the skill level they achieve in their examinations. What is unique about the Professional Tennis Registry is that membership is based on an athletic try-out. Potential members are put through a series of examinations that test their knowledge and athletic capabilities. The Professional Tennis Registry is not only testing athleticism, but also the mental aptitude that someone possesses about tennis. This knowledge can only be obtained by someone with an illustrious career in tennis. [The beneficiary] testing into the Professional ranking scoring in the 96% percentile. This is a tremendous honor as this is the second highest level someone can obtain.

The director determined that evidence of the beneficiary's PTR certification is insufficient to meet this criterion, noting that "membership in the PTR is obtained after taking various courses and passing certain exams," and that there is no requirement for outstanding achievements by the beneficiary in the field."

On appeal, counsel contends that the director ignored the opinions of [REDACTED] and [REDACTED] in finding that the petitioner failed to establish that the beneficiary meets this criterion based on her PTR certification and membership.

Upon review, the AAO concurs with the director's determination.

In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(2) requires "[d]ocumentation 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 record does not include any independent evidence of the membership and certification requirements (such as bylaws or rules of admission) for the PTR. However, the requirements listed above for membership and certification with PRT, which includes passing qualifying exams, are not outstanding achievements. Other than meeting the minimum qualifying standards for the rating sought on the testing day, outstanding achievement is not a prerequisite for certification by and membership in PRT. Furthermore, the petitioner has failed to establish how PRT's membership requirements reflect outstanding achievement as judged by national or international experts in the field as an essential condition for admission to PRT.

Thus, while [REDACTED] and [REDACTED] statements establish that achievement of a "professional" rating is an impressive accomplishment not obtained by all who attempt the PTR's qualifying test, it appears that the rating is more an indication of athletic ability and teaching aptitude than the result of any outstanding achievement or recognition in the sport of tennis or in the field of tennis instruction.

Accordingly, the petitioner failed to submit evidence that satisfies this criterion.

3. *Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought*

To meet the third criterion, the petitioner must submit published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation. 8 C.F.R. § 214.2(o)(3)(iii)(B)(3).

The petitioner submitted many articles relating to the petitioner's participation as a player in various tournaments. Some of the submitted articles were published in the Lithuanian newspapers *Siauliu Krastas*, *Siauliu Naujenos*, *Lietuvos Rytas*, *Respublika* and accompanied by summary English translations. Many of the articles submitted do not include the title of the publication, as required by the regulation. The majority of the articles are dated between 1993 and 1996, although the beneficiary's medal at the Lithuanian National Olympics Tennis Tournament was mentioned in a 2002 article. With respect to the beneficiary's media recognition in the United States, the petitioner submitted excerpts from the web site of Lynn University's Athletics Department, which show that the beneficiary was recognized on three occasions as an "Athlete of the Week" during her final two years of college.

To qualify as major media, a publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York*

Times, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.²

The AAO acknowledges [REDACTED] statement that "the overwhelming amount of articles written about [the beneficiary] signifies her extraordinary talent and composure over the course of a career," and that the beneficiary "has proven this athletic capability by her exposure in major national media outlets." However, he refers to the publications simply as "newspapers in Lithuania," and it is unclear on what basis he determined that the articles constitute major media coverage. The AAO is unable to conclude, based on the evidence submitted, that the articles submitted were published in "major national media outlets" or that they otherwise constitute "major media," as opposed to local or regional sports media coverage. The beneficiary's recognition on her university's web site clearly does not qualify as "major media."

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 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of 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. Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of achievements that one would expect of a tennis coach who has sustained national or international acclaim. Without extensive documentation showing that the petitioner's coaching achievements have been recognized by *major* media or professional or trade publications, we cannot find that she meets this criterion.

Furthermore, the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(3) requires published material "relating to the alien's work in the field for which classification is sought." In this case, the articles submitted by the petitioner relate to her competing in tennis tournaments as a player and not her accomplishments in her current field of coaching. The petitioner has not submitted any publications or other major media about the beneficiary's accomplishments as a tennis coach, or regarding the accomplishments of the beneficiary's students.

Accordingly, the petitioner failed to submit evidence that satisfies this criterion.

4. Evidence that alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence

The petitioner states for the first time on appeal that the beneficiary meets the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B)(8), which requires the petitioner to submit evidence that the beneficiary has either

² Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

The petitioner states on Form I-129 that the beneficiary will be compensated at a wage of \$27.00 per hour. The petitioner indicated in its letter dated November 15, 2008 that the beneficiary will work on average 35 hours per week. Although the petitioner submitted a copy of its employment agreement with the beneficiary, the agreement does not clearly state the amount of compensation the beneficiary will receive. The agreement states: "During the Term of Employment, the Employee shall be entitled to an annual base salary equal to at least the annual salary of Employee on the effective date hereof, payable in equal bi-weekly installments by the Employer." Prior to the adjudication of the petition, the petitioner did not submit any documentary evidence as to what constitutes a typical or average salary for a tennis coach that could have been used by the director for comparative purposes.

On appeal, counsel contends that the director failed to address this criterion in the RFE, and states that the petitioner would have been afforded the opportunity "to provide the Director with information gleaned from the U.S. Department of Labor's findings that at the highest level (that is level 4), Coaches and Scouts in the Fort Lauderdale, Pompano Beach area, earn \$38,760 per year." Counsel states that the beneficiary would earn an annual salary of \$57,060, "a substantial amount more than even the highest paid coach in the area."

In support of these assertions, the petition submits a print out of results for the occupation of "Coaches and Scouts" in the Fort Lauderdale-Pompano Beach-Deerfield Beach area obtained from the U.S. Department of Labor's Foreign Labor Certification (FLC) Online Wage Library. The wages are for the period from July 2008 through June 2009.

The AAO notes that the director did in fact list all eight evidentiary criteria set forth at 8 C.F.R. § 214.2(l)(3)(iii)(B) in the RFE, and instructed the petitioner to submit evidence pertaining to at least three of the criteria. The petitioner had an opportunity to submit relevant evidence pertaining to this criteria prior to the adjudication of the petition.

Nevertheless, based on the evidence submitted, the AAO finds that the beneficiary's proffered annual wages would be \$49,140 based on the petitioner's statements that the beneficiary will work on average 35 hours per week. While this wage offered is higher than the Level 4 wage for experienced coaches in the geographic location of the proposed employment, the AAO is not persuaded that the offered wage is high among all tennis coaches.³ There is no evidence establishing that the beneficiary has earned or will earn a level of compensation that places her among the highest paid coaches in tennis.

³ The AAO notes that for the FLC data for the year July 2009 to June 2010 lists the Level 4 annual wage for Coaches and Scouts in the Fort Lauderdale metropolitan area as \$54,500, which exceeds the salary offered to the beneficiary.

See <http://fledatacenter.com/OesQuickResults.aspx?area=22744&code=27-2022.00&year=10&source=1> (accessed on May 5, 2010).

B. Final Merits Determination

In accordance with the *Kazarian* opinion, we must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) that the beneficiary has achieved a level of expertise indicating that she is one of that small percentage who have risen to the very top of the field of endeavor pursuant to 8 C.F.R. § 214.2(o)(3)(ii); and (2) that the beneficiary has sustained national or international acclaim and that her achievements have been recognized in the field of expertise, pursuant to 8 C.F.R. § 214.2(o)(3)(iii) and section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i). See *Kazarian*, 2010 WL 725317 at *3. In this case, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

While the petitioner submitted documentation that reflects the beneficiary's receipt of nationally recognized awards as a tennis player, the evidence submitted does not satisfy any of the evidentiary criteria with respect to the beneficiary's career as a tennis coach or instructor. Even with respect to her achievements as a competitive tennis player, while the beneficiary has had a highly successful career primarily at the junior and collegiate level, we are not persuaded that the beneficiary's achievements at these levels of competition would lead to a conclusion that the beneficiary "is one of that small percentage who have risen to the very top of the field of endeavor." See 8 C.F.R. § 214.2(o)(3)(ii). USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.⁴

Furthermore, as noted above, the majority of the evidence in the record pertains to the beneficiary's achievements as a competitive tennis player, not as a tennis coach or instructor. The statute requires that the beneficiary seek entry into the United States "to continue work in the area of extraordinary ability." Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i). The beneficiary intends to work in the area of tennis coaching/instruction; however, the petitioner has devoted exactly one brief paragraph to describing her professional coaching experience. U.S. Citizenship and Immigration Services (USCIS) will not assume that

⁴ While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 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 at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and 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.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 214.2(o)(3)(ii) is reasonable.

an alien with extraordinary ability as an athlete has the same level of expertise as a coach or instructor of his or her sport. As discussed, the petitioner's competitive accomplishments as a tennis player are not completely irrelevant and will be given some consideration, but, ultimately, she must satisfy the regulation at 8 C.F.R. § 214.2(o)(3)(iii) through her achievements as a coach. Such achievements have not been documented. The minimal evidence in the record does not establish that the beneficiary has coached students who compete successfully at the national or international level of the sport, or at any professional level, and there is no basis for the AAO to conclude that the beneficiary is one of the small percentage of individuals who are recognized as having risen to the very top of the tennis coaching field.

The AAO acknowledges [REDACTED]'s opinion that "it is immediately evident from the large number of accomplishments and her certification as a tennis 'Professional' that [the beneficiary] qualifies as an alien of extraordinary ability (O-1) as a professional tennis instructor." However, he fails to address any of the beneficiary's accomplishments as a coach or instructor beyond her recent receipt of the PTR "Professional" certification. Rather, it is evident that he considers the beneficiary's field to be "tennis" without distinguishing between her career as an athlete and her career as a coach or instructor. Again, USCIS may, in its discretion, use as advisory opinion statements as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* USCIS may evaluate the content of submitted letters as to whether they support the alien's eligibility. *See id.* at 795. The content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. [REDACTED] statements do not reflect that he is aware of any national or international recognition the beneficiary has achieved as a tennis coach or instructor beyond the PTR certification, and, for the reasons discussed, the beneficiary's ratings on the PTR certification test alone are insufficient to establish her extraordinary ability as a tennis coach. While reference letters can provide useful information about an alien's qualifications or help in assigning weight to certain evidence, such letters are not comparable to extensive evidence of the alien's achievements and recognition as required by the statute and regulations. The record is devoid of primary evidence of the beneficiary's achievements and recognition as a tennis coach or instructor. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Finally, we cannot ignore that the statute requires the petitioner to submit "extensive documentation" of sustained national or international acclaim. *See* section 101(a)(15)(O) of the Act. The petitioner failed to submit evidence pertaining to the beneficiary's coaching career demonstrating that the beneficiary "is one of that small percentage who have risen to the very top of the field."

Therefore, the conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). 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.

III. Conclusion

Review of the record does not establish that the petitioner has distinguished herself to such an extent that she may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of her field. The evidence is not persuasive that the petitioner's achievements set her significantly above almost all others in her field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 101(a)(15)(O) of the Act and the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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). The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.