



U.S. Citizenship  
and Immigration  
Services

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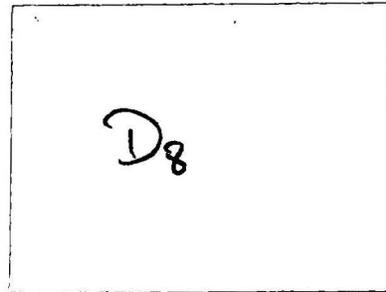
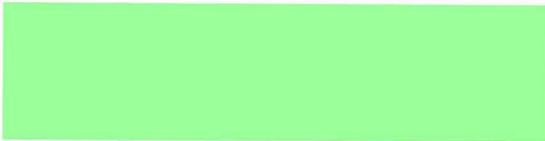
Date: **FEB 28 2013** Office: CALIFORNIA SERVICE CENTER

FILE:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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**DISCUSSION:** The Director, California 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 alien with extraordinary ability in athletics under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i). The petitioner breeds, purchases and trains Arabian horses. It seeks to employ the beneficiary as an Arabian horse trainer for a period of eighteen months.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary has received sustained national or international acclaim and is one of the small percentage who has risen to the very top of his field of endeavor. The director observed that the petitioner had failed to establish that the beneficiary meets the criteria for an alien of extraordinary ability in athletics set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A) and (B).

On appeal, counsel for the petitioner asserts that the petitioner submitted evidence to satisfy three of the eight evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). Counsel submits a brief. Counsel has not submitted any further evidence on appeal.<sup>1</sup>

## 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). In order to establish eligibility for O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of his or her field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii).

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:

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<sup>1</sup> The evidence which the petitioner submits on appeal has previously been submitted into the record.

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- (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.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(iii) provides:

The evidence submitted with an O petition shall conform to the following:

- (A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person

employed by the institution, firm, establishment, or organization where the work was performed.

- (B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

The decision of U.S. Citizenship and Immigration Services (USCIS) in a particular case is dependent upon the quality of the evidence submitted by the petitioner, not just the quantity of the evidence. 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. *See* Fed Reg. 41820.

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 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. *Cf.* 8 C.F.R. § 204.5(h)(3). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion. The court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet two of the criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a merits determination.

The AAO finds the *Kazarian* court's two-part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). 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 this matter, the AAO has reviewed the evidence under the plain language requirements of each criterion claimed. As the petitioner has failed to submit evidence that satisfies three of the evidentiary criteria at

8 C.F.R. § 214.2(o)(3)(iv)(B), the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence.

## II. Discussion

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 a brief. The beneficiary in this case is a native and citizen of Brazil. The record shows that the beneficiary has trained, managed and shown horses in competitions in the United States from 2005 through 2010. The record also indicates that from 1991 to 1997 the beneficiary was involved in training and/or showing horses in Europe. The petitioner seeks to classify the beneficiary as an alien with extraordinary ability as a horse trainer.

In denying the petition, the director found that the petitioner had not established that the beneficiary met at least three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). The director also observed that there was no evidence that the beneficiary has received a major, internationally recognized award equivalent to that listed at 8 C.F.R. § 214.2(o)(3)(iii)(A).

Upon review and for the reasons discussed herein, the petitioner has not established that the beneficiary is fully qualified as an alien with extraordinary ability in athletics.

### A. Evidentiary Criteria

At the outset, it must be noted that Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 101(a)(15)(O)(i) of the Act.

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 regulations cite to the Nobel Prize as an example of a major award. *Id.* Given that the regulations specifically cite to the Nobel Prize as an example of a one-time achievement, examples of one-time awards which enjoy major, international recognition may include the Pulitzer Prize, the Academy Award, and (most relevant for athletics) an Olympic Medal. The director determined that the petitioner submitted no evidence to meet this criterion, and the petitioner has raised no objection to this finding.

As there is no evidence that the beneficiary has received a major, internationally recognized award, 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 has submitted evidence pertaining to the following criteria:

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

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To meet the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1), the petitioner must submit evidence that the beneficiary has received nationally or internationally recognized prizes or awards for excellence in the field.

The petitioner asserts that it cannot submit evidence that the *beneficiary* has received nationally or internationally recognized prizes or awards for excellence in the field, since counsel asserts that in equestrian competitions only the names of the winning horses are printed on awards instead of the rider or trainer. Instead, the petitioner has submitted testimonials from various individuals who specialize in Arabian horses who state that from 2005 through 2010, horses the beneficiary has “trained and/or managed” or shown have won numerous awards in the United States, including awards at the [REDACTED] annual show (also referred to as the [REDACTED]), the [REDACTED] and regional competitions. The letters also indicate that from 1991 to 1997 the beneficiary trained and/or showed horses in Europe that won several awards.

However, the AAO notes the petitioner has not submitted documentary evidence to establish that horses the beneficiary has trained have won awards, or other independent corroboration of the awards. While the AAO does not question the credibility of the testimonial letters that list awards won by horses the beneficiary has trained, the petitioner has not explained why the AAO should accept the letters’ assertions of the fact of the awards in lieu of the awards themselves, as required by the plain language of the criterion. Nor has the petitioner asserted that documentary evidence of such awards is not available. The third-party statements of witnesses regarding such awards are insufficient to meet this criterion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)). In addition, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, the petitioner has not submitted evidence to establish that the beneficiary has trained the individual horses listed as having won the awards.

Further, the petitioner asserts that a student handler and horse, both trained by the beneficiary at the petitioning entity, won the [REDACTED].<sup>2</sup> In a case where an alien has achieved recent national or international acclaim as an athlete and has sustained that acclaim in the field of coaching at a national level, we can consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability such that we can conclude that coaching is within the petitioner’s area of expertise. Upon review the AAO finds insufficient evidence to establish that the beneficiary has won nationally or internationally recognized awards or prizes as a horse trainer, or that he has students that have won nationally or internationally recognized prizes or awards. The evidence shows that the beneficiary has been *regionally* recognized as a horse trainer, but, overall, the record demonstrates that the beneficiary does not train or show horses competing at the highest level. For example, there is no evidence of

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<sup>2</sup>It appears that the student was the son of the owner of the petitioning entity.

any national or international prize or award issued to him based on his accomplishments as a horse trainer or instructor.

While the evidence indicates that the beneficiary has trained a student competing successfully at the junior level, even had the petitioner submitted copies of the award, a national award received by a student competing at the junior level would not carry the same evidentiary weight as an international award received by a competitor at the adult, professional level, without some additional explanation as to how the sport is governed at the junior level.

In order to establish that the beneficiary qualifies as an alien of extraordinary ability in athletics, the petitioner must show evidence of *sustained* national or international acclaim and recognition that places him among the small percentage at the very top of the profession. The petitioner has not established that awards and prizes received by horses the beneficiary has trained to date place him among that small percentage of the sport's most established and successful trainers. The petitioner has not established that the beneficiary meets this criterion.

In light of the above, the petitioner has not established that the beneficiary satisfies this criterion.

*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.*

In order to establish that the beneficiary meets the second criterion, at 8 C.F.R. § 214.2(o)(3)(iii)(B)(ii), 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 does not claim that the beneficiary can satisfy this criterion.

*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*

The director determined that the beneficiary meets this criterion as an athletic competitor. The AAO disagrees and withdraws the director's finding.

The petitioner submitted one article specifically about the beneficiary, contained in the August 1995 issue of [REDACTED] summarizing the beneficiary's horse training career. However, the plain language of the regulation requires that the published material shall include the title, date, and author of the material. However, this article is in the nature of a press release that, while including a general date the article was written, does not include the author of the material. As a result, this article cannot be considered as qualifying evidence that meets the plain language requirements of the criterion.<sup>3</sup>

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<sup>3</sup>Even if the author of that article had been included, a single article published 15 years prior to filing does not establish that the beneficiary has achieved *sustained acclaim* and is insufficient to satisfy this criterion.

The petitioner also submitted news items and captioned photographs briefly mentioning the beneficiary in the following publications: the August 2008 issue of [REDACTED] a post on [REDACTED] accessed November 27, 2010; the [REDACTED] of a publication of the [REDACTED] the beneficiary's previous employer; the August 2009 issue of [REDACTED] the August 2010 issue of [REDACTED] the August 2005 issue of [REDACTED] and, the April 23, 2003 issue of the [REDACTED]. As stated preciously, the plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(C) requires that the published material shall include the title, date, and author of the material. However, except for the article in the [REDACTED] all these items are also in the nature of press releases that, while including a general date the article was written, do not include the author of the material. As a result, these published materials cannot be considered as qualifying evidence that meets the plain language requirements of the criterion.

Regarding the article mentioning the beneficiary in the April 23, 2003 issue of the [REDACTED] although the article notes that at that time the beneficiary was the manager and head trainer for his previous employer, [REDACTED] the article is about [REDACTED] involvement in Arabian horse breeding. The article is not specifically "about" the beneficiary, as required by the plain language of the criterion.

The petitioner submitted evidence that the beneficiary's picture, along with a horse named [REDACTED] appeared on a pop-up for the website [REDACTED] accessed on November 27, 2010. The pop-up reported that the beneficiary was the handler for the Egyptian-Arabian show horse named [REDACTED] which won the [REDACTED]. The regulation clearly requires a written article about the beneficiary, in light of the petitioner's burden to submit the title, date, and author of such published material.

In light of the above, the petitioner has not established that the beneficiary satisfies this criterion.

*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*

To meet the fourth criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(4), the petitioner must submit 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. The petitioner does not claim that the beneficiary can satisfy this criterion.

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

The fifth criterion, at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5), requires the petitioner to submit evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field.

Whereas other regulatory passages refer to "extraordinary ability in the fields of science, education, business, or athletics," 8 C.F.R. § 214.2(o)(3)(iii)(B)(5) refers to "the alien's original scientific, scholarly, or business-related contributions." The omission of "athletic contributions" is a realistic reflection of the nature of athletic competition. Winning a competition is not an "original

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contribution;" it is expected that any given athletic event will have a winning athlete or team that outscores or outperforms rival competitors. Similarly, possessing a high level of the skills needed to succeed in a particular sport is generally a matter of degree, rather than an "original contribution" to the sport. Therefore, attestations regarding the beneficiary's talent, skills and success will not satisfy 8 C.F.R. § 214.2(o)(3)(iii)(B)(5) as evidence of the beneficiary's original contributions. Competitive success is already taken into account by 8 C.F.R. § 214.2(o)(3)(iii)(B)(1), pertaining to prizes and awards, and 8 C.F.R. § 214.2(o)(3)(iii)(B)(3) instructs USCIS to take into account any major media attention that an athlete may earn by standing out from others in a particular sport.

The director concluded that, while some of the submitted testimonial letters indicate that the beneficiary is an asset to the industry, there is no specific claim that he has made a significant, original contribution. Neither counsel nor the petitioner challenges that conclusion on appeal. Accordingly, the petitioner has abandoned that claim. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at \*9 (E.D. N.Y. Sept. 30, 2011).

Nevertheless, upon review, the AAO concurs with the director's conclusion. While the respect the beneficiary has received from people he knows in the industry is commendable, and he is clearly highly regarded as a person and as a trainer, the testimonials do not establish that the beneficiary has made a significant contribution to the field.

The petitioner did not submit qualifying evidence that meets the plain language requirements of this criterion, set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5).

*Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media*

The petitioner has not submitted evidence to meet the sixth criterion at 8 C.F.R. 214.2(o)(3)(iii)(B)(6).

*Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation*

The petitioner claims that the beneficiary can meet the seventh criterion, which requires the petitioner to submit evidence that the beneficiary has been employed in a critical or essential capacity for organizations and establishments that have distinguished reputations. 8 C.F.R. 214.2(o)(3)(iii)(B)(7).

The director determined that the petitioner submitted evidence to satisfy this criterion, but did not discuss the basis of this finding. Considering the evidence and explanation provided in response to the RFE, it appears that the director determined that the beneficiary was employed in a critical or essential capacity for [REDACTED] based on his leadership roles as "head trainer" and "manager." The AAO agrees that the petitioner has submitted evidence to meet the plain language of this criterion.

The petitioner documented some of the beneficiary's prior employment. The petitioner submitted a letter from [REDACTED] the owner of [REDACTED] in [REDACTED] from January 1995 to

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December 1997 as a horse trainer. The petitioner has not submitted evidence to establish that [REDACTED] or her organization enjoys a distinguished reputation as a horse breeder or trainer.<sup>4</sup>

The petitioner also submitted two letters from [REDACTED] stating the beneficiary worked for his [REDACTED] in [REDACTED] as manager and head trainer beginning in December 2000. Although Mr. [REDACTED] does not state for how long the beneficiary was employed by him, it appears the beneficiary worked for Mr. [REDACTED] until at least April 23, 2003, the date of an article in the [REDACTED], referred to above, which mentions the beneficiary's employment with Mr. [REDACTED].

Regarding the reputation of [REDACTED] the petitioner submitted owner/breeder reports from the [REDACTED] showing he has bred 648 horses as of January 2011. The petitioner has also submitted the purebred horse display records for several horses owned and/or bred by [REDACTED] showing that two of his horses have won national and/or international awards. Further, the petitioner submitted an article from [REDACTED] stating that at the [REDACTED] in [REDACTED] was awarded a lifetime achievement award for his service as a breeder of Arabian horses. The AAO acknowledges that Mr. [REDACTED] enjoys a distinguished reputation in the horse breeding industry.

The AAO finds the petitioner has established the beneficiary's prior essentiality to and employment with [REDACTED] at his [REDACTED] an organization that enjoys a distinguished reputation. Therefore, the AAO agrees with the director that the petitioner has established that the beneficiary meets 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.*

In order to satisfy the eighth and final criterion, the petitioner is required to submit evidence that the 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. 8 C.F.R. 214.2(o)(3)(iii)(B)(8).

The director concluded that the petitioner did not submit evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services. Neither counsel nor the petitioner challenges that conclusion on appeal. Accordingly, the petitioner has abandoned that claim. See *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at \*9 (E.D. N.Y. Sept. 30, 2011).

Nevertheless, upon review, the AAO concurs with the director's conclusion. The petitioner did not provide evidence of the beneficiary's prior earnings. The petition indicates that the beneficiary would receive annual compensation of \$36,000, which includes room and board. The petitioner's December 1, 2010 letter addressed to USCIS indicates the beneficiary will also receive "sale commission fees on horses [the beneficiary] directly markets and sales (sic) on behalf of [the petitioner.] The petitioner did not provide a contract stipulating the percentage of sales commission fees that would go to the beneficiary, nor did it provide any evidence that would assist USCIS in

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<sup>4</sup> The AAO notes that [REDACTED]'s December 1, 2010 letter and that of Ms. [REDACTED] use almost identical language in describing the beneficiary's employment duties as their respective organizations.

comparing the proffered salary to that offered to other trainers/riders in the United States. Therefore, the AAO cannot conclude that the beneficiary would command a high salary or other remuneration in the United States.

The petitioner did not submit qualifying evidence that meets the plain language requirements of this criterion, set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B)(8).

## **B. Comparable Evidence**

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) provides that 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 receipt of a major internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), or by submitting evidence to satisfy at least three of the eight forms of documentation set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). We further acknowledge that the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C) provides “[i]f the criteria in paragraph (o)(3)(iii) of the section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.” It is clear from the use of the word “must” in 8 C.F.R. § 214.2(o)(3)(iii) that the rule, not the exception, is that the petitioner is required to submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to the beneficiary's occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1) through (8).

At the time of filing, the petitioner claimed eligibility under the “comparable evidence” regulation, in addition to claiming eligibility under the criteria at 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(1), (3), (5), (7) and (8). The director did not specifically address the beneficiary's eligibility under the “comparable evidence” regulation. The director considered the petitioner's testimonial evidence with respect to the beneficiary's athletic contributions to his field under the eligibility criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5). Counsel did not address the issue of comparable evidence on appeal.

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for O-1 classification in the beneficiary's occupation as a horse trainer cannot be established by submitting documentation relevant to at least three of the eight criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). In fact, as previously indicated, at filing counsel mentioned evidence that specifically addresses five of the eight criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the beneficiary's occupation. Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C) does not allow for the submission of comparable evidence.

## **C. Summary**

The record does not establish that the beneficiary is an alien of extraordinary ability in athletics. The petitioner failed to establish that the beneficiary has received a major, internationally recognized award or that he satisfies at least three of the evidentiary criteria specified in the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B). The petitioner failed to explain why the regulatory criteria are not readily

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applicable to the beneficiary's occupation, such that the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility under 8 C.F.R. § 214.2(o)(3)(iii)(C).

### III. Conclusion

The record does not establish that the beneficiary is an alien of extraordinary ability in athletics whose achievements have been recognized in the field through extensive documentation, as required by section 101(a)(15)(O)(i) of the Act.

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 consideration of the evidence in the context of a final merits determination. However, as discussed above, the petitioner failed to establish eligibility under at least three of the evidentiary criteria specified in the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B). The AAO will not conduct a final merits determination.

For the above-stated reasons, the petitioner has not established the beneficiary's eligibility pursuant to the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B), and the petition may not be approved.<sup>5</sup>

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.

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<sup>5</sup>The AAO maintains *de novo* review. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding on motion or as a result of litigation, the AAO maintains the jurisdiction to conduct a final merits determination as the official who made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). See also Section 103(a)(1) of the Act; Section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii)(2003); *Matter of Aurelio*, 19 I & N Dec. 458, 460 (BIA 1987)(holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).