



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **OCT 25 2013** Office: VERMONT 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: United States Citizenship and Immigration Services (USCIS) initially approved the nonimmigrant visa petition. The Director, Vermont Service Center, subsequently issued a notice of intent to revoke, and upon review of the petitioner's response revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a tennis club, filed this nonimmigrant petition seeking to classify the beneficiary pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in athletics. It seeks to employ the beneficiary, a native and citizen of Sri Lanka, as a tennis coach for a period of three years.

USCIS approved the petition on March 27, 2012, granting the beneficiary O-1 classification for a period of three years. On February 6, 2013, the director issued a notice of intent to revoke the approval, advising the petitioner that, upon further review of the beneficiary's credentials, it does not appear that he is qualified for the benefit sought. The director revoked the approval of the petition on April 12, 2013, after reviewing the petitioner's response to the notice of intent to revoke. In revoking the approval, the director determined that the evidence submitted satisfied only one of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B), of which three are required to establish eligibility.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that the beneficiary qualifies for O-1 classification pursuant to the standards set forth at 8 C.F.R. § 214.2(o)(3)(iii). Counsel submits a brief and evidence which has already been submitted into the record.

I. The Law

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), provides for the classification of 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 . . . and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability

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 extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 FR 41818, 41819 (August 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts).

In a policy memorandum, the legacy Immigration and Naturalization Service (INS) emphasized:

It must be remembered that the standards for O-1 aliens in the fields of business, education, athletics, and the sciences are extremely high. The O-1 classification should be reserved only for those aliens who have reached the very top of their occupation or profession. The O-1 classification is substantially higher than the old H-1B prominent standard. Officers involved in the adjudication of these petitions should not "water down" the classification by approving O-1 petitions for prominent aliens.

Memorandum, Lawrence Weinig, Acting Asst. Comm'r., INS, "Policy Guidelines for the Adjudication of O and P Petitions" (June 25, 1992).

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.

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. 59 Fed Reg at 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 final 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*. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review 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)(iii)(B), the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence.

The regulation at 8 C.F.R. § 214.2(o)(8)(i)(B) provides that the director may revoke a petition approval at any time, even after the validity of the petition has expired. The regulation at 8 C.F.R. § 214.2(o)(8)(iii) sets forth the grounds for revocation on notice:

- (A) *Grounds for revocation.* The Director shall send to the petitioner a notice of intent to revoke the petition in relevant part if it is determined that:
 - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;
 - (2) The statement of facts contained in the petition was not true and correct;
 - (3) The petitioner violated the terms or conditions of the approved petition;
 - (4) The petitioner violated the requirements of section 101(a)(15)(O) of the Act or paragraph (o) of this section; or
 - (5) The approval of the petition violated paragraph (o) of this section or involved gross error.

- (B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of the date of the notice. The Director shall consider all relevant evidence presented in deciding whether to revoke the petition.

In the present matter, the director provided a detailed statement of the grounds for the revocation but did not cite to the specific provision of the regulations as a basis for the revocation. Referring to the eligibility criteria at 8 C.F.R. § 214.2(o)(3)(iii), the director reviewed the rebuttal evidence and concluded that the petitioner had not established the beneficiary's receipt of a major, internationally recognized award, or that he meets at least three of the eight categories of evidence that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. Upon review, the director revoked the approval on the basis of 8 C.F.R. § 214.2(o)(8)(iii)(A)(5): "The approval of the petition . . . involved gross error."

The term "gross error" is not defined by the regulations or statute. Furthermore, although the term has a juristic ring to it, "gross error" is not a commonly used legal term and has no basis in jurisprudence. *See Black's Law Dictionary* 562, 710 (7th Ed. 1999)(defining the types of legal "error" and legal terms using "gross" without citing "gross error"). The word "gross" is commonly defined first as "unmitigated in any way: UTTER," as in "gross negligence." *Webster's II New College Dictionary* 491 (2001).

As the term "gross error" was created by regulation, it is most instructive to examine the comments that accompanied the publication of the rule in the Federal Register. The term "gross error" was first used in the regulations relating to the revocation of a nonimmigrant L-1 petition. In the 1986 proposed rule, an L-1 revocation would be permitted if the approval had been "improvidently granted." 51 Fed. Reg. 18591, 18598 (May 21, 1986)(Proposed Rule). After receiving comments that expressed concern that the phrase "improvidently granted" might be given a broader interpretation than intended, the agency changed the final rule to use the phrase "gross error." 52 Fed. Reg. 5738, 5749 (Feb. 26, 1987)(Final Rule).

Accordingly, upon review of the regulatory history and the common usage of the term, the AAO interprets the term "gross error" to be an unmitigated or absolute error, such as an approval that was granted contrary to the requirements stated in the statute or regulations. Regardless of whether there can be debate as to the legal determination of eligibility, any approval that is granted contrary to law must be considered an unmitigated error, and therefore a "gross error." This view of "gross error" is consistent with the example provided in the Federal Register. *See* 52 Fed. Reg. at 5749.

Upon review, for the reasons discussed below, the present petition was properly revoked as USCIS clearly approved the petition in gross error, contrary to the eligibility requirements provided for in the regulations.

II. Discussion

A. *Intent to Continue to Work in the Area of Extraordinary Ability in the United States*

This petition, filed on March 12, 2012, seeks to classify the beneficiary as an alien with extraordinary ability as a tennis coach. The statute and regulations require that the beneficiary seek to continue work in his area of extraordinary ability in the United States. *See* section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i); 8 C.F.R. § 214.2(o)(3)(i). In denying the petition, the director found that the record was insufficient to establish that the beneficiary satisfied the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 214.2(o)(3)(iii). On appeal, counsel for the petitioner

asserts that the petitioner established that the beneficiary is qualified for the benefit sought. Counsel emphasizes the beneficiary's qualifications both as a tennis coach and as a competitive tennis player.

While a competitive tennis player and a tennis coach share knowledge of tennis, the two rely on different sets of basic skills. Thus, competitive tennis and tennis coaching/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:

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 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). 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. However, 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. Specifically, in such a case, USCIS will consider the level at which the alien acts as a coach. Accordingly, we will address the evidence regarding the beneficiary's accomplishments as both a tennis player and coach.

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.

B. The Beneficiary's Eligibility under the Regulatory Criteria

The beneficiary in this matter is a native and citizen of Sri Lanka. The record of proceeding contains the Form I-129, Petition for a Nonimmigrant Worker and supporting documentation, the director's notice of intent to revoke, the petitioner's response to the notice of intent to revoke, the director's notice of revocation, and the petitioner's appeal.

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 has received a major, internationally recognized award comparable to the Nobel prize as a competitor or coach, or that he has coached or trained athletes who have received major, internationally recognized awards or prizes.

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 decision of USCIS 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 or more of the criteria as required by the regulation does not necessarily establish that the alien satisfies the criteria and is eligible for O-1 classification. The evidence submitted must establish that the beneficiary qualifies as an alien of extraordinary ability. Here, the petitioner provided evidence related to seven of the eight criteria, set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1),(2),(3),(4),(5),(6) and (7). The director determined that the evidence establishes that the beneficiary meets one of these criteria. These seven criteria will be discussed below.¹

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

In order 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)(1). The petitioner claims that the beneficiary is able to meet this criterion as both a competitive tennis player and as a coach of athletes who have received nationally or internationally recognized prizes or awards.

With respect to the beneficiary's tennis career in [REDACTED] the petitioner submitted a list of the beneficiary's tennis tournament results and awards in [REDACTED] for the years 1992 through 1999, 2004 and 2005, for tournaments in which it appears he was a semi-finalist, finalist or champion, which included the following:

- 1992 – Runner-Up Team, [REDACTED]
Under 10
- 1993 – Runner Up, [REDACTED] Boy's Doubles
- 1994 – Runner-Up Team, [REDACTED]
Under 12
- 1994 – Runner-Up, [REDACTED] Singles 12 and Under
- 1995 – Semi-Finalist, [REDACTED] Under 14
- 1995 – Semi-Finalist, [REDACTED]
Under 14
- 1996 – Runner-Up, [REDACTED] Boy's Singles Under 14
- 1996 – Winner, [REDACTED] Doubles Under 16
- 1996 – Winner, [REDACTED] Singles 14 and Under
- 1996 – Third Place, [REDACTED] Under 19 Tennis
- 1997 – Third Place, [REDACTED] Under 19 Tennis
- 1997 – Runner-up, [REDACTED] Under 18

¹ The petitioner raises no objection to the director's determination that the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(8) has not been met. Therefore this regulatory category of evidence will not be discussed in this decision.

- 1997 – Runner-up, [REDACTED] Under 16
- 1997 – Winner, [REDACTED] Doubles Under 18
- 1997 – Winner, [REDACTED] Singles Under 18

- 1998 – Letters and Certificates from the [REDACTED] certifying the beneficiary was awarded the ranking of number 5 in Men’s Open Singles and number 1 in Boy’s 18 and under
- 1998 – Runner-up, [REDACTED] Singles
- 1998 – Runner-up, [REDACTED] Doubles
- 1998 – Runner-up, [REDACTED] Under 18
- 1998 – Runner-up, [REDACTED] Under 16
- 1998 – Winner, [REDACTED] Under 18
- 1998 – Runner-up, [REDACTED] Under 18
- 1998 – Semi Finalist, [REDACTED] Under 18
- 1998 – Winner, [REDACTED] Under 18
- 1998 – Semi-Finalist, [REDACTED] Under 18
- 1998 – [REDACTED]
- 1999 – [REDACTED] Men’s Open Singles
- 1999 – [REDACTED]
- 1999 – Certificate from [REDACTED] certifying the beneficiary was awarded the ranking of number 5 in Men’s Singles for 1999
- 1999 – Letter dated July 3, 2000 from [REDACTED] certifying the beneficiary was awarded the ranking of number 4 in Men’s Open Singles as of August 1999, and number 1 in Boy’s 18 and Under²
- 2004 – Winner, [REDACTED] Division I
- 2005 – Winner, [REDACTED] Division I

The petitioner submitted documentary evidence of the receipt of such awards and/or copies of photographs of various trophies received by the beneficiary. The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1) requires “[d]ocumentation of the alien’s receipt of lesser *nationally or internationally recognized prizes or awards for excellence* in the field of endeavor [emphasis added].” Moreover, it is the petitioner’s burden to establish eligibility for every element of this criterion. Not only must the petitioner demonstrate the beneficiary’s receipt of awards and prizes, it must also demonstrate that those awards and prizes are nationally or internationally recognized for excellence. In other words, the petitioner must establish that the beneficiary’s awards and prizes are recognized nationally or internationally beyond the awarding entities.

Overall, the evidence is insufficient to establish that the beneficiary’s tournament victories resulted in his receipt of nationally or internationally recognized prizes or awards for tennis excellence. While the petitioner submitted documentation evidencing the beneficiary’s receipt of awards, the petitioner failed to submit documentation demonstrating that the awards received from these competitions are nationally or internationally recognized prizes or awards. In addition, the AAO notes that many of the awards that the

² This letter is inconsistent with the previous [REDACTED] certificate stating the beneficiary was ranked number 5 in men’s Open Singles for 1999.

beneficiary won in junior competition, as well as the beneficiary's two most recent awards in adult competitions, were awarded in competitions which appear to be regional competitions. Further, the petitioner has not established that twice achieving an [REDACTED] ranking of four in Men's Open Singles is the equivalent of an "award or prize for excellence in the field," as required by the plain language of the regulations.

Without documentary evidence regarding the actual competitions themselves, such as the level of those who participated or evidence of the selection criteria, we cannot conclude, based on the name of the competitions alone, that the competitions or tournaments are national or international, and therefore that the results are recognized beyond the awarding entities as national or international awards. We emphasize that a competition may be open to athletes from throughout a particular country or countries, but this factor alone is not adequate to establish that an award or prize is "nationally or internationally recognized." The burden is on the petitioner to demonstrate the level of recognition and achievement associated with the beneficiary's awards. Further, none of the persons providing testimonials indicated that the beneficiary received any national or international awards. Therefore, the evidence submitted with respect to the beneficiary's national and international awards does not demonstrate the requisite sustained national or international acclaim as a competitive athlete.

With respect to the beneficiary's United States tennis career, the beneficiary does not indicate that he has won any championships nationally or internationally recognized for excellence. The record indicates that the beneficiary's accomplishments at [REDACTED] included being Team Captain during his senior year and receiving several college awards for excellence in tennis. Based on the evidence submitted, it is reasonable to conclude that the beneficiary was a successful competitor at the collegiate level, but not the recipient of any nationally or internationally recognized awards.

Overall, the evidence is insufficient to establish that the beneficiary's competitive tennis career in [REDACTED] or at the collegiate level in the United States, resulted in his receipt of nationally or internationally recognized prizes or awards for tennis excellence.

With respect to the beneficiary's experience as a tennis coach, the record contains no evidence that the beneficiary has received a nationally or internationally recognized award for excellence as a tennis coach. The beneficiary's coaching experience was documented through the testimonial evidence of several witnesses.

In a letter dated January 30, 2012, [REDACTED] the petitioner's owner, states:

[The beneficiary] came to my academy located on the petitioner's premises on several occasions for training and tournaments. He is a [REDACTED] and has been in the tennis industry for several years. He has coached many talented players and has provided his assistance to [REDACTED] professional player [REDACTED] during tournaments.

In an additional letter dated February 18, 2013, [REDACTED] states that the beneficiary was able to "mentor a lot of aspiring juniors in the right direction." He states the beneficiary is one of eight tennis professionals at the club. He also states the beneficiary is the [REDACTED] and helps to run [REDACTED] sanctioned tournaments. He further states the beneficiary "coaches 40 juniors and approximately 15 adults."

the petitioner's Tournament Director, praises the beneficiary's coaching abilities, stating the beneficiary "can make an exceptional difference to the level of the game of any player coming under his wing."

the petitioner's Tournament Training Director, states the beneficiary is able to impart techniques to his students in a very effective way, and knows the best way for players to reach their potential.

a tennis coach with the petitioner, states, in language identical to that the beneficiary "can make an exceptional difference to the level of the game of any player coming under his wing." The letters, while not identical, use very similar language consistent with a common source. We acknowledge that the authors signed their letters, affirming the contents. Nevertheless, the use of slightly modified boilerplate language somewhat reduces the evidentiary weight of these letters.

a tennis coach with the petitioner, states the beneficiary has trained high-level and aspiring players. He states that the beneficiary's knowledge of tennis and his experience "helps during tournaments."

owner of the and a tennis shop, states he employed the beneficiary. He states the beneficiary coached tennis students, managed the tennis shop and served as an Advertising and Promotions Manager to increase the inn's clientele.

president of the states the beneficiary "was a top player in his respective age groups and at the national level up to 1999." He states as follows:

At the time of leaving [in 1999] . . . [the beneficiary] was ranked as No. 1 in Boys 18 & Under and No. 4 in Men's Open Singles in ³ For the year 1998 [the beneficiary] was ranked No. 1 in Boys 18 & Under Singles and ranked No. 5 in Men's Open Singles. [The beneficiary] has represented in numerous events both in and out of the country since the age of ten.

In addition, the petitioner submitted letters pertinent to the beneficiary's coaching experience from two professional tennis players. Overall, the record does not contain sufficient evidence of the coach-athlete relationship between the beneficiary and the successful athletes he is claimed to have coached

a professional tennis player and a student and tennis coach at the petitioning company, submitted two letters, stating that the beneficiary "renders assistance to me during pro tennis events." She states that she is currently ranked 468 in the world. She states that the previous year she ranked 663 in the world. She provides her opinion that the beneficiary "is a real professional tennis coach and he can train tennis players at a very high level." She states the beneficiary "has provided me with extremely helpful coaching tips. He has helped me rise in the rankings." She states that the beneficiary helped her master

³ As noted previously, this letter is inconsistent with the certificate stating the beneficiary was ranked number 5 in Men's Open Singles for 1999.

numerous "trick shots" that helped her win a recent match, the \$10,000 ITF in [REDACTED] Mexico." She also states that she has trained with another of the petitioner's coaches, [REDACTED]

[REDACTED] a professional tennis player and student at the petitioning company, states that she is currently ranked 363 in singles and 311 in doubles in the world. She states, "I met [the beneficiary] a few years back and trained with him in several occasions. His expertise helped me compete at tournaments."

While the evidence establishes that Ms. [REDACTED] and Ms. [REDACTED] competitors at the adult, professional level, have won national or international tournaments or other nationally or internationally recognized prizes or awards for tennis excellence, Ms. [REDACTED] and Ms. [REDACTED] do not state that the beneficiary ever served as their personal coach or trainer, nor do they indicate when or for how long the beneficiary worked with them, or that the beneficiary contributed significantly to their receipt of any nationally or internationally recognized awards. Their statements are simply too vague to corroborate counsel's statement at filing that the beneficiary "has helped develop the top players in the country."

Further, the petitioner submitted letters pertinent to the beneficiary's experience teaching tennis players competing at the junior level. [REDACTED] states he is currently ranked "in the top 300 in the nation and in the top 25 in New York in the boys 16 and under age group." He states "I wouldn't hold these accomplishments without [the beneficiary's] help." [REDACTED] states the beneficiary has coached his son, Spencer, and that the beneficiary "has been instrumental in Spencer's success on the national and sectional level of tennis helping him achieve both a national ranking and a very high ranking in the [REDACTED] [REDACTED]" [REDACTED] states the beneficiary has helped improve the tennis game of his daughters [REDACTED]. He states [REDACTED] is currently ranked number 31 in [REDACTED] and number 77 in the [REDACTED]. She has competed in [REDACTED] states the beneficiary is her daughter's tennis coach. She states the beneficiary has the ability to make his lessons productive and fun for the players in his groups. [REDACTED] states she has known the beneficiary personally for many years and that the beneficiary was her son's tennis coach at [REDACTED] s [REDACTED] [REDACTED]. She states the beneficiary was "able to fine-tune" her son's tennis game.

The evidence indicates that the beneficiary has been teaching amateur athletes, mainly competing at the junior level.⁴ Even if the petitioner had submitted copies of awards received by these students, an international 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.

As stated above, the O-1 visa classification is restrictive and requires extensive documentation of extraordinary achievement. Overall, the evidence is insufficient to establish that the beneficiary's competitive tennis career at the junior or senior level in [REDACTED] or at the collegiate level in the United States, resulted in his receipt of nationally or internationally recognized prizes or awards for tennis excellence. The record also does not contain sufficient evidence of the coach-athlete relationship between the beneficiary and the successful athletes he is claimed to have coached. Accordingly, the beneficiary does not meet this criterion.

⁴ The itinerary submitted at the time of filing states that under the approved petition the beneficiary will participate in coaching amateur players for several [REDACTED] sponsored events.

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)(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.

In this regard, the petitioner submitted a copy of a certificate issued to the beneficiary by the [REDACTED] [REDACTED] dated July 8, 2008, showing that the beneficiary "completed all requirements, including an extensive examination of teaching, playing and business skills, necessary for the rating of Professional 2." The certificate was accompanied by information downloaded from the [REDACTED] website stating the requirements for obtaining [REDACTED] rating of Professional 2, as follows: must be 18 years of age or older; must pass all portions of the Certification Exam at the Pro 2 level or higher; must have an [REDACTED] [REDACTED] of 4.0 or higher; and must demonstrate teaching ability through apprenticeship or teaching experience.⁵

Upon review, the petitioner has not established that the beneficiary meets the second criterion based upon his membership in the [REDACTED]. While his achievement of Professional 2 certification, apparently the second highest certification offered by the organization, is noteworthy, the record is devoid of any evidence that "outstanding achievement" is a pre-requisite to taking the [REDACTED] certification examination, or that membership in the organization required the beneficiary to be judged by recognized national or international experts in his field.

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

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 photocopies of several articles that mention the beneficiary, although not all of the submitted evidence includes the title, date and author of such published material. All of the articles pertain to the beneficiary's junior career in [REDACTED]. The petitioner submitted articles dated 1992, 1994, 1995, 1996 and 1999,

⁵ In addition, the petitioner submitted a certificate dated 2012 from the [REDACTED] awarded for five years of service to the association. The certificate was accompanied by a letter dated October 2012, from [REDACTED] CEO of the [REDACTED]. The AAO notes that the instant petition was filed on March 12, 2012, approximately seven months before the beneficiary received this certificate. Accordingly, the AAO will not consider this evidence, as the AAO's review of the record will be limited to the entirety of the evidence relating to the beneficiary's career achievements as a tennis player and a tennis coach prior to March 12, 2012.

which reference the beneficiary, published in [REDACTED] and [REDACTED]. While the beneficiary's name appears in all of the submitted articles, many of them simply reference his results at various matches.

Furthermore, the petitioner provided no information regarding the [REDACTED] publications, and thus it is impossible to conclude that the submitted articles could be considered as "major media" coverage of the beneficiary.

Similarly, the petitioner did not provide any published materials referencing the beneficiary's work as a tennis coach or instructor. While the petitioner has provided numerous published materials relating to tennis players who the beneficiary is claimed to have coached, the articles do not specifically mention the beneficiary and, therefore, are not "about" the beneficiary, as required by the plain language of the statute. Further, there is no evidence (such as circulation statistics) showing that such publications qualify as "major media."

Accordingly, the petitioner has not satisfied this third 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, the petitioner must submit evidence of the beneficiary'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. 8 C.F.R. § 214.2(o)(3)(iii)(B)(4).

On appeal, counsel asserts that the beneficiary meets this criterion based upon evidence submitted at the time of filing that the beneficiary possesses an [REDACTED] which counsel describes as "[an] on-court assessor which enables him to assess and track the progress and development of players and compare them to (sic) on a local, national and international (sic)." The petitioner did not establish how the beneficiary's possession of an [REDACTED] constitutes judging the work of others in his field of specialization.⁶ Based on the foregoing, the petitioner has not established that the beneficiary meets the fourth criterion set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

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

⁶ The petitioner submitted a list dated January 16, 2012, published on the website [REDACTED] titled "[REDACTED]". The list identifies the beneficiary as an [REDACTED] located at the [REDACTED]. The list states, "[o]nly Tennis Coaches who are Official Assessors are eligible to enter Official Assessment details and results on the [REDACTED] website." The list also contains a photograph of a person standing on the sidelines of a tennis court and the following caption: "An eager parent watches closely and enters the score for her son into an [REDACTED]". Based upon the submitted evidence, it appears that the beneficiary's role as an [REDACTED] involves entering information obtained by others into a specialized database.

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

The petitioner submitted support letters from [REDACTED] the owner/director of the petitioning tennis club; [REDACTED] the petitioner's tournament director and tennis coach; [REDACTED] tournament director for [REDACTED] the petitioner's tennis coach; [REDACTED] a tennis coach with the petitioner; [REDACTED] a tennis coach with the petitioner; [REDACTED] owner of the [REDACTED] and a tennis shop, who previously employed the beneficiary; and [REDACTED] president of the [REDACTED]

These letters are from persons who are familiar with the beneficiary's work and accomplishments as a competitive tennis player and/or tennis coach. While the majority of these individuals praise the beneficiary's accomplishments and skills as a tennis player and abilities as a coach, none of the testimonial letters indicate that the beneficiary has made original contributions of major significance to his field.

Furthermore, when considering a petitioner's claim that the beneficiary meets this criterion, USCIS cannot ignore the wording of the regulation. 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 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 AAO would also consider any recognition the beneficiary may have received from experts in his field for an "original" contribution to the sport of tennis as an athlete or instructor. However, none of the persons who provided recommendation letters identified the beneficiary's original contribution.

Based on the foregoing, the petitioner has not established that the beneficiary meets the fifth criterion set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

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

The petitioner submitted an article dated February 12, 2013 authored by the beneficiary, titled "Playing Competitive Singles," published on the website [REDACTED]

The petitioner provided no information regarding this online publication, and thus it is impossible to conclude that the beneficiary's article received "major media" coverage.

Based on the foregoing, the petitioner has not established that the beneficiary meets the sixth criterion set forth 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 director concluded that the petitioner submitted sufficient evidence to meet this criterion.

The petitioner has claimed that the beneficiary meets the seventh criterion in that he has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation. 8 C.F.R. § 214.2(o)(3)(iii)(B)(7). The beneficiary's coaching experience as previously discussed was documented through the testimonial evidence of witnesses [REDACTED]

[REDACTED] states as follows:

He is a [REDACTED] and has been in the tennis industry for several years. He has coached many talented players and has provided his assistance to [REDACTED] professional player [REDACTED] during tournaments.

In an additional letter dated February 18, 2013, [REDACTED] states that the beneficiary was able to "mentor a lot of aspiring juniors in the right direction." He states the beneficiary is one of eight tennis professionals at the club. He also states the beneficiary is the Assistant Director of Tournaments, and helps to run [REDACTED] sanctioned tournaments. He further states the beneficiary "coaches 40 juniors and approximately 15 adults."

[REDACTED] owner of the [REDACTED] and a tennis shop, states the beneficiary coached tennis students, managed the tennis shop and served as an Advertising and Promotions Manager to increase the inn's clientele.

The petitioner has not shown that the beneficiary has been employed in a critical or essential capacity with these organizations. Nor does the submitted evidence establish that such organizations have a "distinguished reputation."

In light of the above, the AAO withdraws this portion of the director's decision, and finds that the evidence submitted does not satisfy the plain language of the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7).

Summary

The petitioner submitted no evidence that the beneficiary has received a major, internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), and the documentation submitted does not meet three of the eight other evidentiary criteria specified in the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B).

C. 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).

The petitioner has claimed eligibility under the “comparable evidence” regulation, based upon the petitioner’s testimonial evidence. On appeal, counsel emphasizes that the testimonial evidence in the record and numerous published materials relating to tennis players claimed to have been coached by the beneficiary meet the requirements of the regulation at 8 C.F.R. § 214.2(o)(2)(iii)(C). Counsel cites to no authority for consideration of such evidence under 8 C.F.R. § 214.2(o)(3)(iii)(C) as comparable evidence of the beneficiary’s eligibility. The testimonial letters have been considered above with respect to the beneficiary’s receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor and with respect to the beneficiary’s employment in a critical or essential capacity. The published materials relating to tennis players claimed to have been coached by the beneficiary have been considered above with respect to published material in professional or major trade publications or major media about the beneficiary.

While the petitioner claims eligibility under the “comparable evidence” regulation, it has also claimed eligibility under 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(1),(2),(3),(4),(5),(6) and (7). 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 tennis coach 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 indicated in this decision, the petitioner specifically indicates that it is submitting evidence relating to seven 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 meeting 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.

III. Conclusion

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 any of the criteria

found under 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.⁷

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, that burden has not been met.

ORDER: The appeal is dismissed.

⁷ 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).