U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: OCT 0 8 2014 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to 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:

[redacted]

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

The petitioner seeks to classify the beneficiary as an O-1B nonimmigrant 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 of extraordinary ability in the arts. The petitioner seeks an extension of the beneficiary's O-1 status to continue to employ him as an assistant horse trainer.

After issuing a request for evidence and then considering the evidence of record, the acting director denied the petition, finding that the petitioner did not establish that the beneficiary qualifies as an alien of extraordinary ability in the arts. The acting director determined that the petitioner did not establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), and that the submitted evidence did not satisfy any of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which the petitioner must meet three to establish the beneficiary's eligibility.

On appeal, the petitioner submits a brief which generally asserts that the petition should be approved because U.S. Citizenship and Immigration Services (USCIS) approved two previous petitions for the same position.

For the reasons discussed below, we will uphold the acting director's decision and dismiss the appeal.

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.

In the case of the arts, the term "extraordinary ability" means "distinction" or "a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts." Section 101(a)(46) of the Act; 8 C.F.R. § 214.2(o)(3)(ii).

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

> *Evidentiary criteria for an O-1 alien of extraordinary ability in the arts.* To qualify as an alien of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:
>
> (A) Evidence that the alien has been nominated for, or the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or
>
> (B) At least three of the following forms of documentation:

(1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;

(2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;

(3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or

(C) If the criteria in paragraph (o)(3)(iv) 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.

II. Discussion

A. Prior O-1B Approvals

On appeal, the petitioner relies on an April 23, 2004 memorandum from William R. Yates to assert that the petitioner "had a solid basis for reasonable reliance" that the current petition would be approved based upon the previous O-1B approvals. The acting director acknowledged in both her request for evidence and her decision, that in matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give some deference to a prior determination of eligibility. As acknowledged by the petitioner and stated by the acting director in the request for evidence and final decision, however, deference need not be given if "it is determined that there was a material error with regard to the previous petition approval." The petitioner further asserts that "[t]he Yates Memo specifically cautioned against reversing subjective determinations to avoid inconsistency." The petitioner does not, however, explain how the director's decision and request for evidence, which discussed the objective regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B) in detail, were subjective. Further, as will be discussed in more detail below, the beneficiary's occupation does not fall within the O-1B classification requested on the petition, thus, any approval in the arts would involve a material error.

The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

In the present matter, the director reviewed the record of proceeding and, based upon the plain language of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), concluded that the petitioner did not establish the beneficiary's eligibility for the requested classification. In both the request for evidence and the final denial, the acting director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous petition was approved in the arts based on the same minimal evidence of the beneficiary's eligibility, the approval would constitute a material error on the part of the director.

In addition, even if a service center director has approved a nonimmigrant petition on behalf of the alien, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

B. The Beneficiary's Field

The petitioner claimed eligibility under the evidentiary criteria for aliens of extraordinary ability in the arts at 8 C.F.R. § 214.2(o)(3)(iv)(B). The acting director reviewed the petition under these criteria and determined that the petitioner did not establish the beneficiary's eligibility as an alien of extraordinary ability in the arts. Upon review of the record, we find that the petitioner also did not establish that the beneficiary is primarily involved in a creative activity or endeavor, such that he can be classified as an alien of extraordinary ability in the arts.

For purposes of the O-1 classification, the applicable definition of "arts" at 8 C.F.R. § 214.2(o)(3)(ii) is as follows:

> *Arts* includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts. Aliens engaged in the field of arts include not only the principal creators and performers but other essential persons such as, but not limited to, directors, set designers, lighting designers, sound designers, choreographers, choreologists, conductors, orchestrators, coaches, arrangers, musical supervisors, costume designers, makeup artists, flight masters, stage technicians and animal trainers.

While the regulation at 8 C.F.R. § 214.2(o)(3)(ii) specifically includes animal trainers as an example within the field of the arts, not all types of animal trainers can properly be classified as within the field of the arts. As noted in 8 C.F.R. § 214.2(o)(3)(ii), the definition of "arts" focuses on "any field of creative activity or endeavor." Thus, certain types of animal training, such as animal acts and circuses, would reasonably be among this group of creative workers in the performing arts. Other types of animal training, however, such as training racehorses for competitions, would not be among this group.

The nature of the intended events or activities in the United States is critical in determining whether the beneficiary is entering the United States to provide services in the arts. Here, according to the petitioner's initial letter, the beneficiary "has full and complete responsibility for the hands-on training of 20-30 horses at a time." His duties include:

- tailoring an individual training program for each horse that encompasses its racing plan, health, nutrition and fitness;
- closely monitoring each of the horses in training;
- practicing starts, doing interval training, breezing and speed exercises; and

- developing racing strategies for race day.

Based on the nature of the beneficiary's intended employment in the United States, the petitioner has not established that the beneficiary should be included among individuals engaged in the arts or a field of "creative activity or endeavor." While animal trainers for stage, film, and television productions may be considered to be engaged in the field of the arts for the purposes of the O-1 classification, in the instant petition, the beneficiary's specific duties show that he will not create, perform, or serve as essential personnel to a "creative activity," but instead will train racehorses, which according to the petitioner, "are high performance athletes." The beneficiary "is a lifelong horseman, former winning jockey and winning trainer." The petitioner failed to demonstrate how the beneficiary's duties could be considered a "creative activity or endeavor" in the arts. The petitioner's request to classify the beneficiary as an alien of extraordinary ability in the arts is therefore improper.

The petitioner cannot seek consideration of the petition under the lower standard of "distinction," as the beneficiary's field is not in the arts. The petitioner has not sought the correct O-1 visa classification for the beneficiary. As the beneficiary's occupation does not fall within the O-1 classification requested on the petition, the petition must be denied. We may deny a petition that fails to comply with the technical requirements of the law 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), *aff'd*. 345 F.3d 683 (9th Cir. 2003). We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The regulations clearly prescribe different evidentiary criteria and standards of review for aliens of extraordinary ability in the arts, as opposed to aliens of extraordinary ability in the sciences, education, business or athletics. The regulation at 8 C.F.R. § 214.2(o)(3)(ii) provides, 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 (Aug. 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts).

The petitioner also asserts that "the Vermont Service Center has made it a policy to deny almost all requests for foreign workers – either through the H-2B program or through P-1A jockeys or [the] P-1S essential support program." The instant petition does not involve either of the two classifications the petitioner identifies. At issue is solely whether the director appropriately denied this O-1B petition. We cannot address broader issues not directly involved in the adjudication of the matter before us, in part because the record does not contain information pertaining to those issues. *See Precedent and Non-Precedent Decisions of the Administrative Office (AAO) PM-602-0086,* (July 2, 2013) (stating that non-precedent decisions apply existing law and policy to a unique factual record in an individual case and do not establish agency policy).

In the instant petition, the acting director appropriately reviewed the petition according to the classification requested on the Form I-129. USCIS will only consider the visa classifications that the petitioner annotates on the petition. The Ninth Circuit has determined that once USCIS concludes

that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

C. Consideration of the Evidentiary Criteria

If the petitioner establishes through the submission of documentary evidence that the beneficiary has been nominated for or has been the recipient of, significant national or international awards or prizes in the particular field pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(A), then it will have submitted the requisite initial evidence for O-1 classification. The regulation lists an Academy Award, an Emmy, a Grammy, or a Director's Guild award as examples of qualifying significant awards or prizes. In denying the petition, the director determined that the petitioner did not claim to meet the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iv)(A) and did not meet any of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). Regarding the criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1), (2), (3), (5) and (6), the director thoroughly discussed the submitted evidence and found that the petitioner did not establish that the beneficiary met these criterion. The director also concluded that the petitioner had not claimed that the beneficiary meets the criterion at 8 C.F.R § 214.2(o)(3)(iv)(B)(4). On appeal, the petitioner did not contest the findings of the director for these criteria or offer additional arguments. We, therefore, consider these issues to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). After careful review of the record, the record supports the director's ultimate finding that the petitioner did not establish that the beneficiary meets at least three of the criteria at 8 C.F.R § 214.2(o)(3)(iv)(B).

Based on the foregoing, the petitioner has not submitted qualifying evidence under 8 C.F.R. § 214.2(o)(3)(iv)(A) or at least three criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). Consequently, the petitioner has not established that the beneficiary is eligible for classification as an alien with extraordinary ability in the arts. For this reason alone, the petition may not be approved.

D. Comparable Evidence

As previously stated, the regulation at 8 C.F.R. § 214.2(o)(3)(iv) provides that an alien of extraordinary ability in the arts must be recognized as being prominent in his or her field of endeavor and must submit evidence to establish that the beneficiary satisfies the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iv)(A), or at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). The regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C) provides "[i]f the criteria in paragraph (o)(3)(iv) 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." It is clear from the use of the word "must" in 8 C.F.R. § 214.2(o)(3)(iv) 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)(iv)(B)(1) through (6).

The petitioner asserts that comparable evidence is appropriate because the regulatory criteria for the O-1B classification in "the performing arts…do not readily apply to the [b]eneficiary's field of

endeavor." As discussed above, the petitioner's attempt to classify the beneficiary's field as in the arts is improper. The comparable evidence provision pertains to situations where the criteria relating to the beneficiary's field do not readily apply to the beneficiary's occupation, and not where criteria for the beneficiary's field exist, but the petitioner instead chooses to file under the provisions relating to a different field than the one in which the beneficiary works.

III. Conclusion

The petitioner has not established that the beneficiary's duties, which consist primarily of training horses, or the beneficiary's field of endeavor, competitive horse racing, can properly be considered as a creative activity or endeavor falling within the field of the arts. The petitioner also did not establish the beneficiary's eligibility under any of the regulatory criteria under 8 C.F.R. § 214.2(o)(3)(iv)(B) or the comparable evidence provision at 8 C.F.R. § 214.2(o)(3)(iv)(C).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. When we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he shows that we abused our discretion with respect to all of our enumerated grounds. *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).

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; *Matter of Otiende,* 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.