

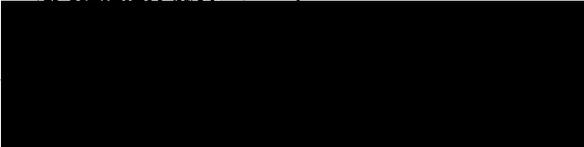


B2

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data removed to prevent clearly unwarrantable disclosure of personal data.



OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

File: EAC 97 133 51448 Office: Vermont Service Center Date: 25 FEB 2002

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF PETITIONER:  
[Redacted]

**PUBLIC COPY**

**INSTRUCTIONS:**  
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was initially approved by the Director, Vermont Service Center. On the basis of new information received and on further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately revoked the approval of the petition on March 18, 1999. The petitioner appealed this decision to the Associate Commissioner for Examinations. The Associate Commissioner determined that the appeal was untimely and remanded the matter to the center director for consideration as a motion to reconsider. Subsequently, the director has again revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability in athletics. The director determined the petitioner is employed as the manager of a delicatessen and therefore is not continuing to work in the area of claimed extraordinary ability (i.e. the martial art of karate).

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

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry to the United States will substantially benefit prospectively the United States.

Service regulations at 8 C.F.R. 204.5(h)(5) echo section 203(b)(1)(A)(ii) of the Act, stating "the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise."

The director, in the March 18, 1999 notice of revocation, did not contest the petitioner's claim of extraordinary ability, and acknowledged that the petitioner has "continued to record a high level of achievement in the field of karate in the U.S." and that the petitioner has worked as a "part-time karate instructor since September 1997." The only clearly stated ground for revocation was "you do not qualify for the classification since you are a deli manager." The director cited no specific regulation, but the ground for revocation appears to derive from 8 C.F.R. 204.5(h)(5), cited above.

The March 18, 1999 notice contains contradictory passages. The director stated that the Service issued a notice of intent to revoke on March 5, 1998, and that "[o]n April 3, 1998 your response was received." The director then described several exhibits submitted in response to that notice. Later in the decision, however, the director stated "[t]he record does not include a response" to the notice of intent.

The petitioner filed an appeal on April 16, 1999, submitting a brief in which counsel argued that the petitioner has established that he intends to continue working in the field of karate, and that he is a delicatessen manager only because karate "does not ordinarily involve high levels of compensation." Counsel further argued that, because 8 C.F.R. 204.5(h)(5) states that no specific job offer is required, there is no requirement "that a person seeking classification as an alien of extraordinary ability be employed full-time in the area of expertise." Counsel noted that amateur athletes, including many Olympic athletes, are by definition not paid for their work and therefore must sustain themselves through other means.

Without endorsing counsel's specific arguments or addressing their merits, it is clear that the petitioner's initial appeal was intended to address the specific ground for revocation stated in the director's decision.

In revoking the approval of the petition, the director had allowed the petitioner 30 days to file an appeal. 8 C.F.R. 205.2(d), however, allows only a 15 day filing period to appeal a revocation (as opposed to a denial). The Administrative Appeals Office ("AAO"), acting on behalf of the Associate Commissioner, remanded the matter for consideration as a motion, pursuant to 8 C.F.R. 103.3(a)(2)(v)(B)(2) and instructed the director, in the event that the new decision was adverse to the petitioner, to certify the new decision to the AAO for review. The AAO did not instruct the director simply to reissue the decision; rather, the AAO instructed the director to consider the petitioner's appeal as if it had been filed as a motion.

On December 3, 1999, the director sent the petitioner a notice reading:

After review we have decided to treat the appeal . . . as a motion to reopen or motion to reconsider, and have granted the motion for the purpose of approving the application or petition. You will receive an approval notice under separate cover within the next several days once all action has been completed.

There is no indication that any approval notice was ever sent. Instead, the director issued a new notice of revocation on January 24, 2000. We are unable to determine the cause of the confusion regarding the director's December 3, 1999 notice and the subsequent contradictory decision. Nevertheless, it is clear that the December 3, 1999 notice was plainly not an official notice of approval.

The director's January 24, 2000 revocation notice is virtually identical to the March 18, 1999 notice. The only differences we can determine in the new decision are (1) the relocation of a citation of case law from the second page to the first page; (2) the removal of the erroneous statement that the petitioner failed to respond to the notice of intent; and (3) the correction of the length of the appeal period, from 30 days to 15 days. Despite the AAO's instruction that the new decision was to be certified to the AAO, the new notice instructed the petitioner to file a new appeal with fee.

The director essentially reissued the earlier notice of revocation, without any indication that the director had considered the petitioner's appeal submission, even though that submission was intended to address directly the one stated ground for revocation. We find, therefore, that the director's January 24, 2000 decision is deficient. The director must issue a new decision, taking into account the petitioner's appellate submission of April 16, 1999.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time.

**ORDER:** The director's decision is withdrawn. The petition is again remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for Examinations for review.