

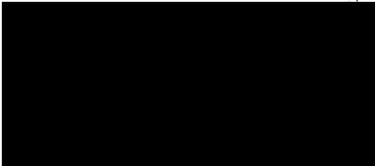


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: WAC-01-233-54525

Office: California Service Center

Date: SEP 24 2002

IN RE: Petitioner:
Beneficiary:



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: SELF-REPRESENTED

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 denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

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. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, the petitioner argues that the case was mistakenly forwarded to the consulate without an approval stamp and that the subsequent denial was in error.

In March 1999, the petitioner submitted his petition to the California Service Center. At the time, the petitioner resided in Turkey. The petitioner did not indicate any information about his future employment on Part 6 of the petition, but did indicate in a cover letter that he intended to start up a business in San Diego. 8 C.F.R. 103.2(a)(6) provides:

Where to file. Except as otherwise provided in this chapter, an application or petition should be filed with the INS office or Service Center with jurisdiction over the application or petition and the place of residence of the applicant or petitioner as indicated in the instructions with the respective form.

8 C.F.R. 204.5(b) provides:

Jurisdiction. Form I-140 or I-360 must be filed with the Service Center having jurisdiction over the intended place of employment, unless specifically designated for local filing by the Associate Commissioner for Examinations.

Despite the indication in the cover letter that the petitioner intended to start a business in San Diego, the Service Center returned the petition with the following instructions:

Petitioner resides outside of the United States. Please submit your application/petition to the nearest American Embassy/Consulate.

On December 1, 2000, the American Embassy, Ankara, Turkey officially received the petition. As that post does not have jurisdiction to adjudicate such petitions, the post forwarded the petition to the Service office in Athens, Greece. On January 3, 2001, Athens forwarded the petition to the Service Center. On January 29, 2001, the Service Center appears to have forwarded the petition to the National Visa Center without adjudication, apparently thinking the petition was actually a copy of a previously approved petition being returned for an unknown reason. On February 20, 2001, the National Visa Center forwarded the petition back to Ankara and so advised the petitioner in a boiler plate letter used for approved petitions. On June 18, 2001, apparently believing that the Service Center had adjudicated the petition but had failed to stamp it as approved, Ankara forwarded the

petition back to the Service Center noting the lack of an approval stamp. At this point in time, however, the Service Center had yet to review the petition. On July 13, 2001, the Service Center officially received the petition and issued a fee receipt. Only at that time did the Service Center actually begin to review the petition on its merits.

The procedural history of this case is admittedly very unfortunate and regrettable. It remains, however, that the director had not yet reviewed the petition when she forwarded it to the National Visa Center in January 2001. As such, the director did not simply fail to place an approval stamp on the petition. Further, the director's final determination is not contrary to previous action by the director and she did not need to follow the regulatory procedures for a formal revocation of a previously approved petition.

We will discuss the petitioner's arguments on the merits of his case below.

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.

As used in this section, the term 'extraordinary ability' means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Service regulation at 8 C.F.R. 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as an owner of a diving business. The regulation at 8 C.F.R. 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a

major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence that, he claims, meets the following criteria.

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

On February 19, 1998, the Professional Association of Diving Instructors (PADI) issued a 5 Star certificate to the petitioner's business, New Bodrum Diving Centre, designating the business as a "Gold Palm - A 5 Star PADI - Resort." The certificate indicates that it is in "recognition for achievement of professional excellence in serving the public in accordance with the Gold Palm Resort Standards as established by PADI International Resort Association."

On appeal, the petitioner submits a PADI "Certificate of Recognition for Excellence" issued November 26, 2000. These awards were issued to the petitioner's business, not to the petitioner himself. While we acknowledge that the petitioner and his partner run New Bodrum Diving Centre, the award was not issued to the petitioner personally. Moreover, while five-star ratings are extremely competitive in the resort community, we cannot conclude that every owner of a five-star resort has demonstrated national or international acclaim. The petitioner did not submit any information from PADI regarding the requirements for designation as a Gold Palm 5 Star Resort.¹

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.

Initially, the petitioner submitted a 1998 certificate from the BSAC International School certifying New Bodrum Diving Centre as an authorized underwater swimming and diving instructor. The petitioner asserted, and one of the magazine articles confirms, that the new Bodrum Diving Centre was the only BSAC certified school in Turkey. On appeal, the petitioner submits a 1997 certificate certifying New Bodrum Diving Centre as a BSAC Premier School. Once again, this certification is of the petitioner's business, not of the petitioner himself. Moreover, meeting the standards for certification in one's field, even if competitive, is not an outstanding achievement.² Even assuming

¹ A review of PADI's website, www.padi.com, reveals that Turkey currently has 30 PADI certified diving schools and resorts including five Gold Palm Resorts and six Five Star Dive Centers. It is noted that this list no longer includes New Bodrum Diving Centre.

² A review of the website www.oceandiver.com reveals that the requirements for BSAC recognition include BSAC qualified instructors, instructors must be certified in certain lifesaving techniques, classes must have an instructor:student ratio of 1:4, training facilities must meet certain conditions, the school must have available certain equipment and be insured, and the courses must meet certain requirements and be offered on a regular basis. These are not outstanding achievements. Premier schools must demonstrate a certain volume of sales, have a faculty that reflects a commitment to the industry, a consistent record of settling accounts, and a

New Bodrum Diving Centre was the only BSAC recognized school in Turkey, the petitioner has not established that this reflects the petitioner's personal acclaim.

The petitioner has also obtained evidence of personal certification by BSAC. Certification represents the petitioner's competence in several areas. Certification is not "membership" in BSAC. In addition, meeting certain standards of competence, even if challenging, is not an outstanding achievement in the field.

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The petitioner submits several articles published in diving magazines that chronicle diving experiences at the petitioner's school. Some of the articles mention the petitioner by name. Even if we concluded that the petitioner met this criterion, it is only one criterion.

Comparable evidence

8 C.F.R. 204.5(h)(4) provides:

If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

The plain language of 8 C.F.R. 204.5(h)(4) limits consideration of comparable evidence to instances wherein the regulatory criteria at 8 C.F.R. 204.5(h)(3) "do not readily apply to the beneficiary's occupation." In cases where the original criteria do, in fact, readily apply to the beneficiary's occupation, the beneficiary's own inability to meet those criteria does not trigger the "comparable evidence" clause.

The petitioner argues that "operating a diving business is a field that is not readily amenable to 'celebrity' status; the top diving businessman does not have the same 'household name' recognition as the top actors, musicians, or basketball players." The regulations require national or international acclaim. This requirement cannot be waived simply because the petitioner asserts that acclaim is not common in his field.

Moreover, as "comparable evidence," the petitioner submits several letters from satisfied customers. The ten regulatory criteria at 8 C.F.R. 204.5(h)(3) reflect the statutory demand for "extensive documentation" in section 203(b)(1)(A)(i) of the Act. That the petitioner's business has produced satisfied customers is not extensive documentation of national or international acclaim. Further, it is not clear to which of the regulatory criteria this evidence is comparable.

proven record of support for BSAC. These requirements are also not outstanding achievements.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a businessman to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner shows talent as a businessman, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.