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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

FILE: WAC 01 230 50932 Office: CALIFORNIA SERVICE CENTER Date: **NOV 03 2004**

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)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner<sup>1</sup> 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 had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On August 29, 2003, the AAO dismissed the petitioner's appeal. In that decision, the AAO acknowledged that the petitioner had submitted evidence that he would appear on *Ripley's Believe It or Not*. The AAO concluded:

New evidence that did not exist as of the petition's filing date cannot retroactively establish his eligibility as of that date. *See Matter of Katigbak*, [14 I&N Dec. 45, 49 (Reg. Comm. 1971)]. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts.

Counsel asserts that the current motion is a "motion for reconsideration." According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Service (CIS) policy. Counsel, however, asserts that the basis for the motion is that the petitioner "has presented you with more supporting evidence." The petitioner submits a videotape with his appearance on *Ripley's Believe It or Not* and other television shows, asserting that this evidence "was not ready when we submitted the appeal." The petitioner asserts that this appearance meets two of the regulatory criteria for the classification sought. Neither the petitioner nor counsel alleged any error in the AAO's application of law or policy. Thus, the motion does not constitute a proper motion to reconsider. According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. Based on the content of the motion, it will be considered a motion to reopen.

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

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<sup>1</sup> The petitioner provides his last name on the Form I-140 petition as "██████████" All of the documentation in the record relates to the achievements of an individual with the last name "██████████" Two documents include the middle name "Ochieng." These two documents are minimal evidence that the petitioner and Mr. ██████████ are one and the same.

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).

This petition seeks to classify the beneficiary as an alien with extraordinary ability as a basketball handler. 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, quoted in the AAO's previous decision, 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. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

The AAO concluded that the petitioner met only one criterion, 8 C.F.R. § 204.5(h)(3)(v), relating to contributions to the field. On motion, the petitioner asserts that his appearance on *Ripley's Believe It or Not* serves to meet another two criteria, 8 C.F.R. § 204.5(h)(iii), relating to published material about the petitioner, and 8 C.F.R. § 204.5(h)(viii), relating to a leading role for an organization or establishment with a distinguished reputation.

First, as stated above, the director already considered the petitioner's pending appearance on this program and concluded that it could not establish the petitioner's eligibility as of the date of filing. It is settled that a petitioner must establish his eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. at 49. Even when responding to a request for additional evidence prior to the issuance of a final denial, the response must establish eligibility as of the date the petition was filed. 8 C.F.R. § 103.2(b)(12). Thus, we concur with the AAO's refusal to consider the petitioner's pending appearance on national television. The videotape submitted on motion does not overcome the AAO's determination that the petitioner's appearance would be after the date of filing and could not be considered evidence of his eligibility as of that date. Moreover, a single appearance on a television show cannot be considered a leading or critical role for the show as a whole.

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 basketball handler 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. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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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. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

**ORDER:** The AAO's decision of August 29, 2003 is affirmed. The petition is denied.