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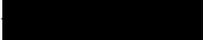


U.S. Citizenship
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Office: VERMONT SERVICE CENTER

Date: **DEC 16 2005**

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Beneficiary:

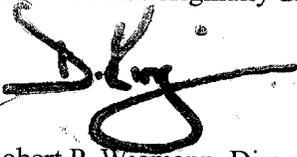
PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

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, Vermont Service Center, and is now before the Administrative Appeals Office 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 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. The director specified that this determination was limited to the petitioner's ability as an instructor.

On appeal, the petitioner asserts that he continues to compete. We note that the Form I-290B Notice of Appeal allows an appellant to state that he will submit a brief and/or additional evidence within 30 days or request an extension that may be granted for good cause pursuant to the regulation at 8 C.F.R. § 103.3(2)(vii). The petitioner did not indicate further materials would be submitted in 30 days or request an extension beyond 30 days in which to submit additional materials. The directions on the Form I-290B provide that additional materials should be submitted *directly to this office*. The director received the appeal on November 17, 2003. On February 23, 2004, more than 30 days after the initial appeal was filed, counsel submitted a brief and additional evidence *to the director*. Counsel's brief requests a lesser classification than the one originally sought. The Notice of Action attached to counsel's cover letter, however, references the instant appeal. The petitioner's alien file contains no evidence that the petitioner has ever filed a petition seeking the lesser classification referenced by counsel. Thus, counsel's brief appears to relate to the matter before us. Counsel, however, provides no legal basis for requesting a lesser classification once the petition has been denied.

For the reasons discussed below, we find that the director did not err in noting the petitioner's failure to document specific achievements as an instructor. Further, we find that the petitioner has not established eligibility as an athlete. Thus, the director's failure to consider the petitioner's athletic achievements did not prejudice the petitioner.

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). This petition seeks to classify the beneficiary as an alien with extraordinary ability as a taekwondo instructor. 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 the following 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.

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) 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;
- (iii) Published material 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;
- (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
- (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

On Parts 5 and 6 of the Form I-140 petition, filed on December 23, 2002, the petitioner indicated that the proposed employment was as an instructor. The petitioner submitted a 1999 employment contract that includes services as a competitor for 1999, 2000 and 2001, but no evidence that he continued to compete in 2002 or that he intended to compete in the future. The director concluded that while the evidence established that the petitioner was a qualified taekwondo instructor, the petitioner had not established that he had risen to the top of his field as an instructor.

On appeal, the petitioner asserts that the top taekwondo athletes are also instructors and that he and his students continue to compete nationally and internationally. Contrary to the petitioner's assertion, however, evidence that the petitioner continues to compete is not a part of the record. Photographs from competitions that took place in unknown years cannot serve as evidence of the petitioner's current status as a competitor. The record contains no recent employment contract, certificates of competition participation or media reports listing the petitioner as a competitor in recent national competitions. In fact, the record lacks any evidence of the petitioner's employment other than his 1999 contract that, by its terms, expired in 2001.

The regulation at 8 C.F.R. § 204.5(h) requires the beneficiary to "continue work in the area of expertise." The petitioner, however, indicated on the Form I-140 petition only that he intends to work as an instructor in the United States. While a taekwondo competitor and instructor certainly share knowledge of taekwondo, the two rely on very different sets of basic skills. Thus, competitive athletics and coaching 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 court noted a consistent history in this area. Nevertheless, recently this office has recognized that there exists a nexus between playing and coaching a given sport. To assume that every extraordinary athlete's area of expertise includes coaching, however, would be too speculative. To resolve this issue, the following balance is appropriate. 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 level, we can consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability such that we can conclude that coaching is within the petitioner's area of expertise. Specifically, in such a case we will consider the level at which the alien acts as coach. A coach who has an established successful history of coaching athletes who compete regularly at the national level has a credible claim; a coach of novices does not. Thus, the director did not err in requiring evidence of the petitioner's achievements as an instructor beyond his athletic achievements and certification to work as an instructor. For the reasons discussed below, we not only concur with the director that the petitioner has not demonstrated his extraordinary ability as an instructor, we find that the evidence falls far short of demonstrating his extraordinary ability as an athlete.

Initially, the petitioner asserted that he met the awards, membership and judging criteria set forth at 8 C.F.R. § 204.5(h)(3)(i),(ii) and (iv), quoted above. The petitioner submitted instructor credentials from the World Hanol Kuk Moo Ye Federation in Canada, certification as a pressure point control tactics instructor from PPCT Management Systems, Inc., a certificate of completion of the instructor certification program, Phase A, from Krav Maga Worldwide, an appointment as Master Instructor for the [REDACTED] Taekwondo Academy in 1988 and certification from the American Taekwondo Association as a Songham Taekwondo instructor. Master [REDACTED] Vice Chairman of the North Kyungsang Province Taekwondo Association asserts that the petitioner coached the Australian Ambassador Cup National Team, two Korean Air Force teams, various youth teams in Kyungsang Province and various provincial, national and international teams in Daegu City. The

petitioner submitted a certificate of appreciation from the Chairman of the Ambassadors' Cup Taekwondo Competition, the Australian Ambassador. The certificate lists the petitioner's position as "coach," but does not indicate that the petitioner personally coached a national or international team from Australia. Master [REDACTED] further asserts that the petitioner received the Most Valuable Instructor Award from the Korean Industry & Management Institute. The certificate itself indicates that it is in recognition for "outstanding leadership and exemplary fellowship throughout the training course." Master [REDACTED] Taekwondo Examiner for the Korea Ministry of Defence, asserts that the petitioner "has instructed, trained, and coached students in provincial, national [and] international competitions and tournaments." He further asserts that the petitioner trained and coached "countless" Korean Air Force soldiers and led "them to numerous championship victories." The petitioner submitted photographs of himself with students. These photographs, however, do not establish the level of the competition, when they took place or how the petitioner's students were ranked.

Regarding his athletic achievements, the petitioner submitted evidence of his certification at the 6th Dan grade level from the World Hanol Kuk Moo Ye Federation and the Pan Am Tang Soo Do Federation, as well as his previous grade certifications. The petitioner also submitted 1991 and 1996 Letters of Commendation from the Chang Young Taekwondo Academy and the Jungdokwan Central Academy. The petitioner also submitted 1980, 1981, 1990, 1992 and 1995 Certificates of Merit for from the [REDACTED] Taekwondo Academy, the [REDACTED] Taekwondo Academy and the [REDACTED] Taekwondo Academy. Master Jung asserts that the petitioner "participated in numerous regional, provincial, national and international tournaments at which he placed 1st, 2nd, or 3rd." Similarly, Senior Master [REDACTED] asserts that the petitioner "won numerous championship competitions," but fails to name a single such competition. The petitioner submitted an unverified statement asserting that "no records, except trophies and medals are available" to document the petitioner's first and second place finishes in various competitions. The petitioner submitted photographs of himself, including one of himself with a trophy. The photographs, however, do not establish the level of competition or when the competitions took place.

Finally, the petitioner submitted his 1999 employment contract and a schedule of competitions. The petitioner did not submit any evidence of how he or his students finished at these competitions. The petitioner also failed to submit evidence regarding the prestige of these competitions, such as whether they generate media coverage.

On March 25, 2003, the director advised the petitioner of the ten criteria and requested evidence that the beneficiary meets at least three of those criteria. In response, the petitioner resubmitted the initial cover letter and a separate letter asserting that the initial evidence submitted was sufficient. The director concluded that the petitioner had failed to submit evidence of his sustained national or international acclaim.

On appeal, the petitioner submitted brief biographies of other instructors. This evidence is not relevant to whether the petitioner has provided evidence to meet the regulatory criteria discussed above. The fact that top taekwondo athletes typically serve as instructors does not imply or suggest that all instructors who have attained the 6th Dan grade as athletes are nationally or internationally acclaimed as either athletes or instructors.

Subsequently, counsel resubmits evidence already in the record of proceeding and copies of Martial Arts trade journals. None of these journals feature the petitioner and do not appear to relate to his claims of personal acclaim in the field.

The regulation at 8 C.F.R. § 103.2(b)(2) provides:

Submitting secondary evidence and affidavits. (i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

We find that where the regulations require specific, objective evidence of achievements, such as awards, the primary evidence of such awards would be copies of the awards themselves. Secondary evidence might be newspaper reports of the competition results. Affidavits attesting to awards, therefore, would need to “overcome the unavailability of both primary and secondary evidence.” A simple statement that only the trophies and medals exist, unsigned by any official, is insufficient evidence that award certificates for nationally or internationally recognized taekwondo competitions do not exist. Moreover, any affidavit would need to explain how the author has first hand knowledge of the award and provide the specific names of competitions and the alien’s exact results. In addition, the affidavits would need to be supported by evidence of the significance of the specific competitions. Not every competition that happens to be open to individuals nationally or internationally is necessarily nationally or internationally recognized. Further, the certificates of commendation and merit appear to be from individual academies, and do not represent nationally or internationally recognized awards. Finally, the petitioner’s 6th Dan grade appears to be the result of examination after a certain number of years of experience. Such certification is not akin to the type of award or prize for excellence contemplated by the regulation at 8 C.F.R. § 204.5(h)(3)(i). In light of the above, we find that the petitioner has not established that he meets the awards criterion set forth in that regulation as an athlete. Moreover, the record contains no evidence that the petitioner’s students have won nationally or internationally recognized prizes or awards while under his tutelage. Once again, vague attestations without primary evidence of the awards themselves in addition to evidence that the petitioner was the awardee’s instructor at the time are insufficient. Thus, the petitioner has not submitted comparable evidence to meet the awards criterion as an instructor, pursuant to the regulation at 8 C.F.R. § 204.5(h)(4), which allows comparable evidence to meet a criterion where the criterion does not “readily apply.”

The petitioner also relies on his Dan grade to meet the membership criterion. The record, however, lacks evidence correlating higher Dan levels with notoriety in the field as opposed to correlating with age or number of years competing. For example, while taekwondo is an Olympic event, the petitioner has not provided any evidence for the Dan levels for Olympic athletes. In light of the above, the petitioner’s promotion to 6th level Dan cannot serve to meet the membership criterion set forth at 8 C.F.R. § 204.5(h)(3)(ii).

Finally, the petitioner relies on his instructor duties to meet the judging criterion. The inherent supervision, evaluation and training of one’s own students as an instructor are not indicative or consistent with national or international acclaim. The record lacks evidence that the petitioner has served as a competition judge or has presided over Dan level examinations. As such, the petitioner has not established that he meets this criterion, set forth at 8 C.F.R. § 204.5(h)(3)(iv).

The petitioner does not claim to meet any criterion not already addressed. 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 in taekwondo 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 and experience in the field of taekwondo, 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.

Finally, the AAO notes that the petitioner is currently in the United States as a P-1 nonimmigrant, a visa classification that requires the alien to perform as an athlete, either individually or as part of a team, at an internationally recognized level of performance, and that the alien seek to enter the United States "temporarily and solely for the purpose of performing as such an athlete." See section 214(c)(4)(A) of the Act, 8 U.S.C. § 1184(c)(4)(A). The current record is devoid of any evidence to indicate that the petitioner is performing as an athlete at an internationally recognized level or that he is in the United States "temporarily and solely" for the purpose of performing as such an athlete.

While Citizenship and Immigration Services (CIS) approved at least one P-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude CIS from denying an immigrant visa petition based on a different, if similarly phrased standard. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant petitions. See e.g. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

Moreover, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. Due to the lack of required initial evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant visa petition.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO 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).

The director is instructed to review the previous nonimmigrant approval for possible revocation, pursuant to 8 C.F.R. § 214.2(p)(10)(iii).

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.