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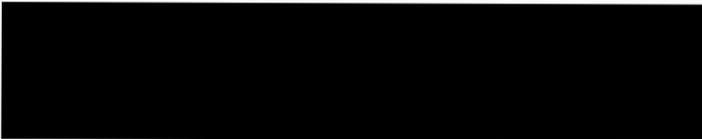


FILE: WAC 99 068 52283 Office: CALIFORNIA SERVICE CENTER Date: APR 10 2006

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

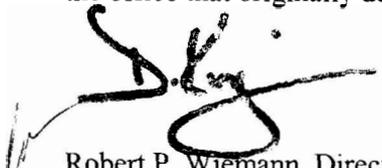
PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

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 Director, California Service Center, approved the employment-based immigrant visa petition. On October 16, 2003, the U.S. Consulate, Guangzhou, returned the approved petition with the recommendation that it be revoked. The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

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 international acclaim or that he would substantially benefit prospectively the United States.

On appeal, counsel asserts that the director did not have good and sufficient cause to revoke the approval of the petition. Counsel notes that the Foreign Affairs Manual indicates that consular officers should not readjudicate the petition, but should only question the approval of a visa petition by Citizenship and Immigration Services (CIS) where the consular officer has specific evidence generally unavailable to CIS suggesting that the beneficiary may not be entitled to status. Counsel further notes that the consular notice relies on an incorrect standard, international acclaim, while the statute requires only national *or* international acclaim.

Section 205 of the Act, 8 U.S.C. § 1155, states: “The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” By itself, the director’s realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for “good and sufficient cause” where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. at 590 (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

In order to properly revoke a petition on the basis of a consular report, however, the report must have some material bearing on the grounds for eligibility for the visa classification. The consular report

must establish that the petitioner failed to meet the burden of proof on an essential element that would warrant the denial of the visa petition. Observations contained in a consular report that are conclusory, speculative, equivocal, or irrelevant do not provide good and sufficient cause for the issuance of a notice of intent to revoke the approval of a visa petition and cannot serve as the basis for revocation. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988).

As quoted by the director, the consular report states:

Review of [the petitioner's] case has been complicated by information received against [the petitioner's] petition and also by the fact that [the petitioner] had a previous CLASS hit for possible misrepresentation.

\* \* \*

[The petitioner's] background and current situation, in addition to sworn statements made during the interview and evidence presented in the petition, compel the U.S. Consulate General Guangzhou to conclude that [the petitioner] does not qualify for an E1 visa.

The record does not include the "information received against" the petitioner, the "CLASS hit," any explanation of what such a "hit" entails or an explanation of the petitioner's "background and current situation" or copies of the "sworn statements made during the interview." As such, the consular report is entirely conclusory and cannot serve as a good and sufficient basis for revocation.

In addition to relying on the consular report, the director also raised issues as to the sufficiency of the evidence. Typically, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Where the petitioner is unaware and has not been advised of derogatory evidence, however, revocation of the visa petition cannot be sustained. *Matter of Arias*, 19 I&N Dec. at 570. Thus, in revocation proceedings, we are limited to reviewing the director's bases for revocation.

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.

(Emphasis added.) As noted by counsel, the statute requires national *or* international acclaim. As such, the consular report errs in concluding that the petitioner cannot qualify for this classification without international acclaim. Moreover, the consular report acknowledges that the petitioner has an "international honor" but discounts it because the honor was limited to "Asia." The consular report does not explain why acclaim in "Asia" is not international. Certainly nothing in the statute requires worldwide acclaim. Thus, the concern in the consular report that the petitioner has never "competed outside of Asia" is not material to his eligibility.

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).

An alien, or any person on behalf of the alien, may file for classification under section 203(b)(1)(A) of the Act as an alien of extraordinary ability in science, the arts, education, business, or athletics. Neither an offer of employment nor a labor certification is required for this classification.

The specific requirements for supporting documents to establish that an alien has achieved sustained national or international acclaim are set forth in regulations at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be discussed below. It should be reiterated, however, that the petitioner must show that the beneficiary 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 a swimming coach. The regulation at 8 C.F.R. § 204.5(h)(3) presents ten criteria for establishing sustained national or international acclaim, and requires that an alien must meet at least three of those criteria unless the alien has received a major, internationally recognized award. Review of the evidence of record establishes that the petitioner has in fact met three of the necessary criteria.

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

The director rejected the petitioner's awards as "local in nature" and, based on the petitioner's age at the time, "academic" awards whose significance is "limited to the individual school making the awards."

We acknowledge that some of the competitions are "regional" or are specifically designated as "teenager" competitions. None of the competitions, however, are limited to a single school. As such, the director's comment that the awards are "academic" and limited in scope to a single school is not consistent with the record. Moreover, the petitioner was 17 in 1985 when he won a gold medal at the Asia Pacific Area Swimming Tournament. The competition is not designated as a "junior" or "youth" competition and included 380 athletes from 21 countries and districts. Seventeen does not appear an unreasonable age to compete at the highest level in the petitioner's sport. Moreover, in 1986, at age 18, the petitioner won two gold medals and a bronze medal at the Seventh Beijing Games, which included 500 athletes from 31 provinces. As such, the award does not appear to be a local Beijing award. Further, in 1992, at age 24, the petitioner won a gold medal and a silver medal at the Eighth Beijing Games against 480 athletes from 28 provinces. Finally, in 1995, at age 27, the petitioner won a silver medal and a bronze medal at the Ninth Beijing Games against 330 athletes from 23 provinces.

Thus, the director's characterizations of the petitioner's awards as "local" and "academic" are inaccurate and, as such, cannot be considered "good and sufficient cause" to support the revocation.

In addition, the petitioner seeks to enter the United States as a coach. The director, however, failed to consider the awards won by the petitioner's students. As this criterion is not readily applicable to coaches, we will accept evidence of awards won by a coach's students while under his tutelage to constitute "comparable evidence" pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). The petitioner submitted certification from the Qian Hong Swimming School that two of the petitioner's students have won first, second and third prizes at national and international swimming championships.

*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 specification for which classification is sought.*

The director concluded that without "the actual evaluation sheets with the self-petitioner's personal comments," the petitioner could not establish that he had actually judged a competition. The director provides no explanation for why the evaluation sheets are the only evidence that can serve to meet this criterion. The director cites no basis for concluding that athletic judges and referees use evaluation sheets and have access to their evaluation sheets once the competition is completed. Thus, we find no reason to draw a negative inference from the lack of evaluation sheets.

Finally, the director concludes that the petitioner has not established the significance of the work judged and the criteria used to choose the self-petitioner as a "judge." The director continues:

Thus, it is questionable as to whether there is a formal selection process and the jurors are truly qualified to judge. Normally, jurors or reviewers have distinguished

themselves in their professions to qualify as jurors or reviewers. Thus, the evidence does not support the claim that the self-petitioner served, either individually or on a panel, as a judge of the works of others in the field(s) of Swimming.

Some inquiry as to whether the type of judging performed is inherent to the petitioner's occupation is reasonable. For example, the petitioner could not meet this criterion simply by observing that as a coach, he "judges" the work of his students. The petitioner, however, is relying on evidence that he has refereed competitions. The first two sentences of the director's reasoning, quoted above, are inherently contradictory. If jurors or reviewers normally have distinguished themselves in order to qualify as judges or reviewers, it is not clear why it is the petitioner's burden to demonstrate not only that he judged, but also that he was qualified to do so.

In light of the above, the director's analysis under this criterion cannot serve as a good and sufficient basis for revoking the approval of the petition.

*Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.*

The petitioner has authored articles in the *Journal of Beijing Institute of Physical Education* and in *Swimming Quarterly*. The consular report states that the petitioner's articles all appeared in "small local magazines." The report provides no source for this statement and the record includes no corroboration of the report's conclusion.

Despite the lack of corroboration, the director relied on the consular report to reject the evidence submitted to meet this criterion. In response to the director's NOIR, the petitioner submits Internet materials regarding both journals. The materials reveal that the *Journal of Beijing University of Physical Education* is distributed internationally and that *Swimming Quarterly* is jointly sponsored by the Scientific Research Committee of the China Swimming Association and the Guangzhou Sports and Physical Education College. It is the petitioner's burden to establish not only his authorship, but that the articles appeared in professional or major trade publications. While the petitioner's claim would have been bolstered by circulation data for the publications, we are satisfied that the petitioner has overcome the unsubstantiated conclusion by the consulate that both journals are "local."

In light of the above, the director's analysis under at least three criteria does not rise to the level of good and sufficient cause to revoke the approval of the petition. As only three criteria are necessary to establish eligibility, the director's analyses under the remaining criteria are no longer material to this proceeding.

Finally, the consular report acknowledges that the petitioner has worked as a swimming coach and concludes that his stated ambition to continue in this occupation "does not meet the requirement in INA 203(b)(1)(A)(iii) that his entry into the United States will substantially benefit prospectively the United

States.” The basis of the consular report’s conclusion appears to be that the petitioner lacks a job offer. The director repeats this concern in the NOR.

The consulate appears to be confusing section 203(b)(1)(A)(iii) of the Act with section 203(b)(1)(A)(ii) of the Act. Section 203(b)(1)(A)(iii), raised by the consulate, has no regulatory evidentiary requirements and, while not beyond inquiry, is generally presumed where an alien demonstrates extraordinary ability. The consulate provides no basis for singling out the occupation of swimming coach as not being beneficial to the United States.

Given the consulate’s concern over the lack of a job offer, the section of law more appropriate for consideration is section 203(b)(1)(A)(ii), which requires that the alien seek to continue working in his area of expertise. The regulation at 8 C.F.R. § 204.5(h)(5), however, makes very clear that this classification does not require a job offer. That regulation states:

*No offer of employment required.* Neither an offer for employment in the United States nor a labor certification is required for this classification; however, 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. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

Neither the consulate nor the director explain why the petitioner’s stated intention to work as a coach in the United States does not constitute evidence to satisfy this regulation.

In revocation proceedings before Citizenship and Immigration Services (CIS), the burden shifts to the petitioner “once [CIS] has produced some evidence to show cause for revoking the petition.” *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984). The court continued that it was clear “that [CIS] retains at least the burden of producing substantial evidence supporting its determination.” In this matter, the director never produced substantial evidence supporting its determination.

**ORDER:** The decision of the director is withdrawn. The appeal is sustained and the petition is approved.