

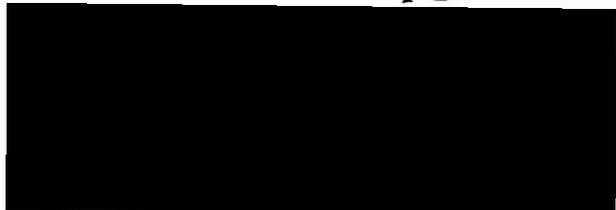
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

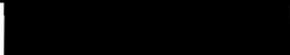
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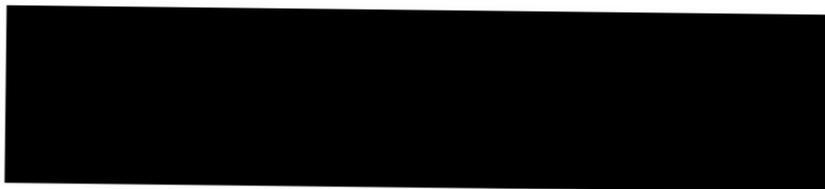
Petitioner:

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.

Maura Deadrick
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office 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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.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 “alien of extraordinary ability” in athletics, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established “that he is an alien of extraordinary ability who is self-employed AND who has been receiving significantly high remuneration for his services in relation to others” and had not submitted “convincing evidence that he will be working in a position on a full-time basis.” (Emphasis in original.) The director further stated that the petitioner had not established “the sustained acclaim necessary to qualify as an alien of extraordinary ability.” (Emphasis in original.) The director, however, provides no analysis of the evidence submitted to show sustained acclaim under the regulatory criteria.

On appeal, counsel asserts that the petitioner is not required to demonstrate full-time employment or high remuneration provided he meets three additional criteria. Counsel further asserts that the director failed to consider the evidence regarding the petitioner’s intent to open and operate his own training facility. We concur with counsel that the director misapplied the regulation at 8 C.F.R. § 204.5(h)(5) relating to the petitioner’s future employment in the United States. Moreover, the director failed to include any analysis or explanation for his conclusion that the petitioner has not demonstrated sustained acclaim, precluding a meaningful appeal on that issue. Moreover, if it is the director’s position that an alien cannot qualify for the classification sought without meeting the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ix), that position is not justified by the pertinent regulation in this matter.

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.

Job Offer

The regulation at 8 C.F.R. § 204.5(h)(5) provides:

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.

In response to the director's first request for additional evidence, the petitioner submitted a letter from [REDACTED] Manager of Mountain Adventure Seminars asserting that the company would like to hire the petitioner to train their current backcountry snow instructors on the specific techniques of traveling with clients on snowboards in the backcountry and as a backcountry instructor for snowboarding courses. [REDACTED] indicates that their season typically runs from December through April.

On November 29, 2005, the director requested additional evidence stating that the petitioner had not demonstrated that his entry into the United States would benefit the United States prospectively because he has not submitted evidence that he is coming to the United States to continue working in his area of expertise or evidence of "past, present, or future remuneration." The director then requested evidence "in the form of statements and contracts from current and/or prospective employer AND a statement from the petitioner detailing plans on how he intends to continue work in the United States." (Emphasis in original.) This request exceeds the requirements set forth in the regulation at 8 C.F.R. § 204.5(h)(5), which uses the disjunctive "or."

In response, the petitioner submitted a new letter from [REDACTED] asserting that in 2004, the company had extended to the petitioner an offer to head their snowboarding classes and expeditions but that the petitioner was not authorized to work. More recently, however, the petitioner accepted a contract to train the backcountry snowboarding instructors and coach advanced clients. The terms would have the petitioner working December through April at \$15 per hour. The petitioner also submitted his own statement indicating that he eventually intended to open his own school and establish a training base for elite level competitors who compete on an international level.

On March 23, 2006, the director issued a third request for additional evidence, noting the petitioner's failure to submit an actual contract. The director also stated that employment from December through April is not "full-time." The director questioned why Mountain Adventure Seminars' website does not list the petitioner as an instructor. The director also requested statements from the athletes the petitioner proposes to train at his own facility, once opened.

In response, counsel asserts that the statute and regulations do not require evidence of future full-time employment but an intent to “work.” The petitioner submitted a third letter from [REDACTED] reiterating their intent to employ the petitioner December through April or November through May if the weather permits. [REDACTED] further asserts that she anticipates that the petitioner “will be able to conduct training and safety seminars in the off-season of June thru October.” Finally, [REDACTED] asserts that they have not listed the petitioner as an instructor on their website due to the temporary nature of his immigration status. The petitioner also submits letters from Bulgarian snowboarders [REDACTED] and [REDACTED] asserting that they were previously coached by the petitioner until he moved to the United States in 2000 and would “seek the necessary temporary visa” to train with the petitioner if he opened his own facility.

The director then denied the petition, asserting that the “highly restrictive” nature of the classification sought implies that an alien who is not self employed and earning significantly high remuneration should be required to submit evidence of full-time employment. The director concluded that the petitioner had not demonstrated that his employment would be full-time or year round. Finally, the director concludes that counsel’s assertion that documentation of full-time employment is not necessary indicates that such evidence cannot be produced in this matter.

On appeal, counsel asserts that the statute and regulations do not require evidence of full-time employment and that the director failed to consider the evidence submitted.

We concur with counsel that the statute and regulations do not expressly require full-time year round employment. Clearly, we would not reject an extraordinary baseball, hockey or football player solely because the teams do not compete year round. That said, the visa classification is an employment-based visa classification and the alien is expected to continue working in his area of expertise. Thus, we would expect that the alien would be able to support himself within his area of expertise.

The director’s concerns are understandable, especially as the petitioner provides very little explanation as to how creating a training facility in the United States for Bulgarian snowboarders to attend on nonimmigrant visas will prospectively benefit the United States. That said, we cannot ignore the plain language of the regulation at 8 C.F.R. § 204.5(h)(5), which only requires the submission of one of several types of evidence. Counsel’s correct observation that the language in 8 C.F.R. § 204.5(h)(5) does not require the evidence requested by the director should not be considered an admission of ineligibility, as the director implies. The petitioner has submitted the evidence required under that regulation, letters from prospective employers and his own statement. The petitioner even complied with the director’s request for letters from snowboarders willing to train with the petitioner. We are satisfied, for the reasons discussed above, that the petitioner has met his burden under 8 C.F.R. § 204.5(h)(5).

Extraordinary Ability

Citizenship and Immigration Services (CIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (November 29, 1991). 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 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 a snowboarding coach. 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. Nothing in the regulation at 8 C.F.R. § 204.5(h)(3) suggests that any one particular criterion must be met provided an alien meets at least three of the ten criteria.

The petitioner has submitted evidence that, he claims, demonstrates his receipt of awards pursuant to 8 C.F.R. § 204.5(h)(3)(i),¹ his memberships pursuant to 8 C.F.R. § 204.5(h)(3)(ii), that he has judged the work others in the same or allied field pursuant to 8 C.F.R. § 204.5(h)(3)(iv), that he has made contributions of major significance pursuant to 8 C.F.R. § 204.5(h)(3)(v) and that he has performed in a leading or critical role pursuant to 8 C.F.R. § 204.5(h)(3)(viii). The only criterion discussed by the director, however, is high remuneration pursuant to 8 C.F.R. § 204.5(h)(3)(ix), a criterion the petitioner does not claim to meet.

The director emphasized that the petitioner had not demonstrated *sustained* acclaim but failed to provide a basis for that statement. We acknowledge that the petitioner entered the United States in 2000, five years prior to filing the petition. The petitioner must demonstrate that he continued to enjoy sustained acclaim as of the date of filing. The director, however, did not clearly explain this concern in the final decision. If the sustained nature of the petitioner’s acclaim is to be a basis of denial, the director must elaborate on why the petitioner has not sustained any acclaim he may have enjoyed in Bulgaria during his five years in the United States.

Finally, the director must evaluate the evidence under the regulatory criteria claimed. The director shall advise the petitioner that the evidence relating to one criterion does not appear consistent with evidence

¹ The petitioner seeks classification as a snowboarding coach with extraordinary ability. The petitioner has been coaching for many years; thus, he must meet the criteria as a coach not as an athlete. *See generally Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002). A coach, however, can meet this criterion through comparable evidence pursuant to 8 C.F.R. § 204.5(h)(4) by demonstrating that athletes under his tutelage have won nationally or internationally recognized prizes or awards while under the alien’s tutelage.

relating to another. Specifically, four award-winning snowboarders assert that the petitioner coached them “until he moved to the U.S.” in 2000. In a joint letter, [REDACTED] and [REDACTED], directors of the Bulgarian Snowboarding Federation, assert that “athletes coached by [the petitioner] have participated and/or won titles at the Balkan Cups, the European Cups, and the Olympics games in Nagano, Japan and many other outstanding talents.” They continue: “Between 1994 and 1998, under [the petitioner’s] tutelage members of the national team established themselves as elite competitors with national and international acclaim.” [REDACTED], Director of the Snowboard Section of the Bulgarian Ski Federation, confirms that the petitioner served as a judge in the national championships during 1993 through 1998 and as a head judge during the championships’ finals where specific athletes won, many of whom the petitioner is alleged to have coached during this period. The petitioner has never explained how he was permitted to judge athletes in national competitions that he was currently coaching. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore, this matter will be remanded for consideration of the petitioner’s eligibility under the regulatory criteria, including an analysis of whether the petitioner enjoyed sustained acclaim as of the date of filing. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s decision is withdrawn. The petition is 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 Administrative Appeals Office for review.