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U.S. Department of Homeland Security

Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass., 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

File: WAC 02 078 50643 Office: California Service Center Date: DEC 19 2003

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

PUBLIC COPY

[redacted]

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 Citizenship and Immigration Services (CIS) 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.

Mari Johnson

for 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) rejected a subsequent appeal. The AAO will reopen the matter on its own motion. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary 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 petitioner seeks to employ the beneficiary as an Ice Hockey Coach/Director of Hockey Operations. The director determined the petitioner had not established that the beneficiary has earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Counsel filed an appeal of the director's decision on November 20, 2002. The Form I-290B, Notice of Appeal, clearly stated that counsel represented the beneficiary. In the notice rejecting the appeal, the AAO stated that the record contained no Form G-28, Notice of Entry of Appearance as Attorney or Representative, to establish that counsel represented the petitioner in this matter.

8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

> (B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* (in addition to CIS) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

8 C.F.R. § 103.3(a)(2)(v) states:

> *Improperly filed appeal -- (A) Appeal filed by person or entity not entitled to file it -- (1) Rejection without refund of filing fee.* An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee CIS has accepted will not be refunded.

The Notice of Appeal was unaccompanied by documentation from the petitioner. Furthermore, it did not specifically address the reasons stated in the director's denial or provide any additional evidence. Counsel dated the appeal November 12, 2002 and indicated that a brief and/or evidence would be submitted to the AAO "within thirty days."

Almost five months after filing the appeal, on April 11, 2003, counsel signed and submitted an appellate brief, which was accompanied by new evidence, to the AAO. The submission included no explanation to provide good cause for the untimely submission. Pursuant to 8 C.F.R. § 103.3(a)(2)(vii), the petitioner must explain in advance that good cause exists for such an extension. Moreover, there is no regulation that allows the petitioner an open-ended or indefinite period in which to supplement an already-submitted appeal. Any consideration at all given to such untimely submissions, which are not preceded by timely requests for an extension, is discretionary. The AAO received the untimely documentation on April 16, 2003; however, it was not immediately placed in the record of proceeding.

On July 21, 2003, without having reviewed the untimely brief and accompanying evidence, the AAO issued a notice rejecting the appeal based on a determination that it had not been filed by the petitioner, nor by any entity with legal standing in the proceeding, and that counsel had not specifically addressed the reasons stated for denial or provided additional evidence.

The AAO is now in receipt of counsel's Form G-28 indicating that she represents the petitioner. As a matter of discretion, we have reviewed the untimely brief and accompanying evidence.

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 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 the beneficiary has sustained national or international acclaim at the very top level.

This petition, filed on January 3, 2002, seeks to classify the beneficiary as an alien with extraordinary ability as an Ice Hockey Coach/Director of Hockey Operations. At the time of filing, the beneficiary was coaching for a junior hockey league in Southern California. The statute and regulations require the beneficiary's acclaim to be sustained. Documentation in the record reflects that the beneficiary has been living and working in the United States since 1995. Given the length of time between the beneficiary's arrival in the United States and the petition's filing date, it is certainly reasonable to expect him to have earned sustained national acclaim in the United States during that time. The beneficiary has had ample time to establish a reputation in this country.

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, counsel 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.*

The petitioner presented several certificates reflecting team awards received by the beneficiary as a "junior" hockey player in Ukrainian and Soviet competitions. The certificates, issued from 1977 to 1981, indicate that the beneficiary competed "among juniors born 1965-1966." The petitioner also submitted a certificate from the President of the Estonian Sports Committee naming the beneficiary "Best Forward of National Hockey Championship" (1980).[1] The petitioner has not shown through contemporaneous or other documentation that this award enjoys significant national stature or that the beneficiary has sustained his acclaim as a top hockey player in Estonia. While the "junior level" awards presented show that the beneficiary excelled within a particular age group during his early teens, they are not tantamount to recognition at the highest level of competitive hockey (such as, for example, the Olympic or professional level).

Documentation in the record indicates that the beneficiary has not actively competed as a player at the national or international level since 1986. Even if the petitioner sought to classify the beneficiary as an extraordinary hockey player, 8 C.F.R. § 204.5(h) requires the alien to "continue work in the area of expertise." The beneficiary, however, seeks employment not as an extraordinary hockey player, but, rather, as an extraordinary coach. As demonstrated by the evidence provided by the petitioner and indicated under Part 6 of the I-140 petition, playing hockey is clearly not the field in which the beneficiary seeks to continue working.

While related, coaching and playing are different areas of expertise that require somewhat overlapping but nevertheless very distinct skills. Thus, competitive athletics and coaching are not the same area of expertise. This interpretation has been upheld in federal court. In *Lee v. Ziglar,* 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.

In this case, the beneficiary's awards as hockey player cannot establish that he has sustained national or international acclaim as a hockey coach here in the United States. It is not clear that

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[1] At the time, the beneficiary was playing in a junior league limited to players within his own age group.

significant awards exist for hockey coaches. However, nationally or internationally recognized prizes or awards won by teams or individuals coached by the beneficiary can be considered as comparable evidence for this criterion under 8 C.F.R. § 204.5(h)(4).

On appeal, counsel states that the Los Angeles Junior Kings Midget AAA Hockey team has had "four winning seasons with two National Championships" during the beneficiary's tenure as head coach. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record contains evidence showing that the Los Angeles Junior Kings Midget AAA team was a bronze medal winner at the "2000 National Championship Midget Hockey Tier 1 AAA" hockey finals held in Pittsburgh, Pennsylvania. Documentation in the record indicates that the beneficiary was the team's "trainer" rather than its head coach.

A letter from Andrew Cohen (dated November 29, 2001), Tier Hockey Director, Southern California Amateur Hockey Association and Hockey Director, Los Angeles Junior Kings AAA, states:

> [The beneficiary's] assistance with our Midget AAA team two years ago helped the team gain a berth at the U.S.A. Hockey National Championships where they finished third in the nation, and he was head coach for the Jr. Kings Minor Midget team last season who won the California State Championship and finished third in the Pacific District Championships.

Andrew Cohen notes that the beneficiary provided "assistance" to the team that won a bronze at the 2000 National Midget Hockey Tier 1 AAA Championship, but he does not state that the beneficiary was the team's head coach at that time.

Team photographs and information presented from the beneficiary's website show that he coached the Junior Ice Dogs Midget Tier Minor Team to first place in the California State Championships (2001-2002) and third place in the Pacific District Championships (2001-2002). Coaching a local youth hockey team to victory at a regional or state championship, while commendable, is not evidence of recognition at the national level. Nor does it carry the same evidentiary weight as coaching hockey players at the professional, Olympic or collegiate level. In this case, the petitioner has not shown that the beneficiary has served as head coach for a team that won a nationally or internationally recognized hockey title.

> *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.*

In order to demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. In addition, memberships in associations that evaluate membership applications at the local chapter level would not qualify. It is clear from the regulatory language that members must be

selected at the national or international, rather than the local, level. Finally, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner submitted evidence of the beneficiary's membership card for USA Hockey and another card showing that he meets USA Hockey's "Advanced Level" coaching education program requirements. Information submitted from USA Hockey states: "All coaches (head and assistant) must have the USA Hockey Coaching Education Program card by December 31 of the calendar year.... Before the start of each game and in the presence of the referee, each coach must present their card to one another for verification of coaching level." According to the documentation presented on appeal, an individual who is a second year midget, high school, or girls 19 and under hockey coach qualifies at the "Advanced Level."

A review of the documentation presented does not establish that USA Hockey requires outstanding achievement of its members or that the beneficiary was evaluated by recognized national or international experts in consideration of his membership.

> *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.*

In general, in order for published material to meet this criterion, it must be primarily about the beneficiary and, as stated in the regulations, be printed in professional or major trade publications or other *major* media. To qualify as major media, the publication should have significant national distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.

The petitioner submitted three newspaper clippings from the local media in California. On appeal, counsel acknowledges that the "level of attention is not national." None of the articles devote more than a few brief sentences to the beneficiary. Moreover, the articles presented were all published subsequent to the petition's filing date. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which CIS held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. New evidence that did not exist as of the filing date cannot retroactively establish eligibility as of that date.

For the above stated reasons, we conclude that the evidence presented fails to demonstrate that the beneficiary has garnered sustained national attention from major sports media.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.*

The petitioner claims that the beneficiary's participation in various hockey competitions satisfies

this criterion. This claim is not persuasive because virtually all hockey games, regardless of the competition level, are displayed before an audience. We have consistently found that this particular criterion is more appropriate for visual artists (such as sculptors and painters) rather than for athletic competition. The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

In order to establish that the beneficiary performed in a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of the beneficiary's role within the entire organization or establishment and the reputation of the organization or establishment.

On appeal, counsel states that the beneficiary plays a critical role for USA Hockey. Counsel cites a letter from Ronald White, Pacific District Coach-in-Chief, USA Hockey, Inc. He states:

> The beneficiary speaks on the effects of European Training for the Sport of Ice Hockey at seminars held annually as part of our Coaching Education Program, as well as on ice training with the highest level non-professional teams in the United States. To gain the benefit of the European/Soviet training methods, one must use an experienced professional in this capacity.

The petitioner provides no evidence showing that the beneficiary is a regular employee of USA Hockey. Occasional participation in seminars and training sessions for USA Hockey are not sufficient to demonstrate that the beneficiary's role for that organization is "leading or critical" or that it has earned him sustained national or international acclaim.

Counsel states that "[t]hree of [the beneficiary's] players have been drafted into the National Hockey League." The record contains no evidence to support counsel's claim. *See Matter of Laureano, Matter of Obaigbena, and Matter of Ramirez-Sanchez, supra*. In his letter, Andrew Cohen states:

> Southern California is placing more athletes in Division 1 college hockey programs than ever before. Southern California is sending teams to the National Championships with more frequency than ever before. Three Southern California Players have been drafted into the National Hockey League in the past four years.

There is no evidence showing that the above accomplishments were directly attributable to the beneficiary's individual efforts. For example, the record contains no documentation showing that the beneficiary regularly coached the three National Hockey League draftees mentioned in Andrew Cohen's letter, or that an unusually large number of players under the beneficiary's direct tutelage became top NHL or collegiate prospects.

On appeal, the petitioner submits a letter from P.K. O'Handley, General Manager and Head Coach of the Waterloo Blackhawks. The Waterloo Blackhawks compete in the United States Hockey League

(governed by USA Hockey), a junior league consisting of players 20 years-old or younger. P.K. O'Handley states:

> [The beneficiary] has served as an advisor to our staff and has worked closely with our players and has been a great asset in the development of our team. [The beneficiary] is also a scout for our team.
>
> [The beneficiary] brings a wealth of knowledge... to the Waterloo Blackhawks. He brings a great international approach to our team and has made a great impact on our staff and team. We are in the business of developing ice hockey players for the highest level including the National Hockey League and [the beneficiary's] knowledge of both the game of ice hockey and also the uniqueness of being from another country has proven to be invaluable, without him on our staff we would not be able to do the job we do.

The record contains no evidence showing that the Waterloo Blackhawks has a record of accomplishment distinguishing it from other teams in the United States Hockey League. Moreover, the record does not show how the beneficiary's role was more important than that of other members on its coaching staff. We are not persuaded by the observation, offered by several witnesses, that the beneficiary has a special perspective on hockey because he played in a foreign land. This factor alone cannot establish that the beneficiary has earned national acclaim as a top hockey coach in the United States.

We find that the evidence presented fails to establish that the beneficiary has performed in a leading or critical role for a distinguished organization or establishment, or that his involvement with various teams has attracted sustained national or international attention.

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.*

On appeal, counsel states that the beneficiary has brought commercial success to the hockey programs in which he is involved. This criterion, however, pertains to the "performing arts" rather than athletics. Aside from this issue, the petitioner has not provided financial records documenting the beneficiary's "commercial success" at the national or international level. Nor has it been shown that the youth leagues, conditioning camps, and training clinics that the beneficiary is responsible for are more commercially successful than the vast majority of similar programs offered throughout the country.

Beyond the regulatory criteria, the petitioner submitted several witness letters. Parents of children whom the beneficiary has coached, such as Kurt Russell and Goldie Hawn, for example, have attested to the beneficiary's abilities as a coach and the positive impact that he has had on players under his tutelage. We do not dispute the witnesses' assertions that the beneficiary is a talented and extremely dedicated junior hockey coach. That being said, the evidence presented does not offer support for the contention that the beneficiary is among this nation's most highly acclaimed hockey coaches. The subjective assessments of witnesses selected by the petitioner cannot

overcome the absence of objective documentation that the regulations demand. The regulatory criteria describe types of evidence that the petitioner may submit, but it does not follow that every hockey player or coach who has competed or coached at the junior national level, or even at the professional level, is among the small percentage at the very top of the field. Supplementary information at 56 Fed. Reg. 60899 (November 29, 1991) states:

> The Service disagrees that all athletes performing at the major league level should automatically meet the "extraordinary ability" standard.... A blanket rule for all major league athletes would contravene Congress' intent to reserve this category to "that small percentage of individuals who have risen to the very top of their field of endeavor."

While the burden of proof for this visa classification is not an easy one to satisfy, the classification itself is not meant to be easy to obtain; an alien who is not at the top of his or her field will be unable to submit adequate evidence to establish such acclaim. This classification is for individuals at the rarefied heights of their respective fields; an alien can be successful, and win praise from those close to him, without reaching the very top of his field.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim, is one of the small percentage who has risen to the very top of the field of endeavor, and that the alien's entry into the United States will substantially benefit prospectively the United States. The petitioner has failed to demonstrate the beneficiary's receipt of a major internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish eligibility for classification as an alien of extraordinary ability.

A review of the record does not establish that the beneficiary has distinguished himself as a hockey coach 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 is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. 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.