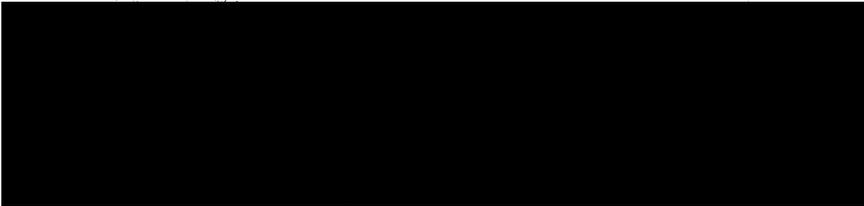




U.S. Citizenship
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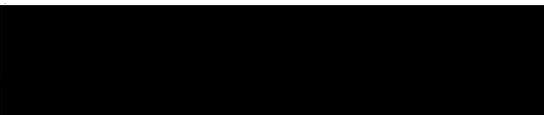
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File: LIN 04 133 52799 Office: NEBRASKA SERVICE CENTER

Date: OCT 13 2004

IN RE: Petitioner:
Beneficiary



Petition: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

IN 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

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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The nonimmigrant visa petition was initially denied by the Director, Nebraska Service Center, on May 5, 2004. The petitioner filed an appeal. On August 27, 2004, the service center director reopened the matter "to return jurisdiction to the Nebraska Service Center" and again denied the petition, certifying the decision to the Administrative Appeals Office (AAO) for review. However, pursuant to 8 C.F.R. § 103.3(a)(2)(iii), the service center may issue a decision on a pending appeal only if the decision shall be favorable, otherwise the director must promptly forward the appeal to the AAO pursuant to 8 C.F.R. § 103.3(a)(2)(iv). Accordingly, the AAO considers this matter to be an appeal from the initial denial of May 5, 2004 rather than a certification.

The petitioner is a National Basketball Association (NBA) team. The beneficiary is a former basketball player and coach that the petitioner seeks to employ as a scout to identify and recruit professional basketball players. The petitioner seeks a change of the beneficiary's nonimmigrant classification to that of an O-1 nonimmigrant, as an alien with extraordinary ability in athletics under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the "Act"). The petitioner seeks to continue the beneficiary's employment in the United States as a scout for a period of three years at a salary of \$65,000 per year.

The director denied the petition finding that the petitioner failed to establish that the beneficiary qualifies as an alien with extraordinary ability in athletics for the purposes of this proceeding.

On September 16, 2004, counsel for the petitioner submitted a brief and six additional exhibits. Counsel asserts that the beneficiary is an alien of extraordinary ability in the field of "basketball scouting."

It is noted that one of the exhibits submitted on appeal is a copy of a July 22, 2004 investigation report from the Nebraska Service Center's Office of the Ombudsman (NSCO) advising counsel that "the petitioner has met 5 out of 8 criteria and is eligible for the benefit sought." It is unclear whether the service center director reopened his decision as a result of this conflicting report; however, as noted above, the service center does not have the authority to issue an unfavorable decision on an appeal. Counsel contends that the petition is approvable, "[a]s correctly determined by the NSC Ombudsman." The NSCO is the creation of the director, it is unique to the Nebraska Service Center, and is not part of the Department of Homeland Security Citizenship and Immigration Services Ombudsman (CIS Ombudsman). According to the CIS website, the NSCO "accepts complaints and requests for intervention or assistance from Congressional offices, stakeholder or community-based organizations, or individual customers where normal means have not resulted or will not result in fair, consistent, effective, and/or efficient administration of a decision and/or service rendered by the NSC." See USCIS website, <http://uscis.gov/graphics/fieldoffices/nebraska/aboutus.htm#ombudsman> (accessed October 7, 2004). However, the NSCO does not have delegated authority to adjudicate petitions. See 8 C.F.R. § 103.1(b) (listing the positions authorized to exercise the powers and duties of an immigration officer). Most significantly, the NSCO does not have the delegated authority to adjudicate appeals. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 103.1(f) (as in effect on February 28, 2002). The role of the NSCO is limited to the internal administrative functions of the Nebraska Service Center. Therefore, the investigation reports and conclusions of the NSCO carry no weight in this proceeding and will not be considered.

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part:

Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

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. § 214.2(o)(3)(iii). 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.

The statute and regulation require the beneficiary to "continue to work in the area of expertise." Counsel argues the beneficiary's "experience playing and coaching at the highest levels of collegiate and professional basketball" is relevant to "his extraordinary ability in the field of basketball scouting." While we do agree that the beneficiary's experience as a basketball player and coach is relevant, the petitioner must show that the beneficiary has extraordinary ability as a scout. While playing basketball, coaching basketball, and scouting for basketball players do require similar knowledge of the sport of basketball, they rely on different sets of basic skills. 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.

Thus, although the beneficiary's ability as a player and coach may be relevant, the petitioner must still demonstrate that the beneficiary has extraordinary ability as a scout.

Moreover, for us to assume that the beneficiary is entitled to classification by virtue of being employed as an NBA scout would be to contravene the intent of Congress as the classification is limited to that small category of individuals who have risen to the very top of their field of endeavor. In the immigrant context of extraordinary ability as it relates to professional athletes, courts have held that the plain reading of the statute suggests the appropriate field of comparison of a professional hockey player's ability, for instance, is not a comparison of that player's ability with that of all hockey players at all levels of hockey; but rather the player's ability within the NHL. *See* 56 Fed. Reg. 60897, 60899 (Nov. 29, 1991); *see also Racine v. INS*, 1995 WL 153319 (N.D.Ill. Feb. 27, 1995). We apply the same reasoning in this case and find that the petitioner must show the beneficiary has risen to the very top of his field as an NBA scout.

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). As an indicator of the level of achievement expected to qualify for this classification, the regulation cites the "Nobel Prize" as the sole example of a major, internationally recognized award. 8 C.F.R. § 214.2(o)(3)(iii)(A). Accordingly, the regulation permitting eligibility based on a single award must be interpreted very narrowly, with only a small number of awards qualifying as major, internationally recognized awards. Examples of one-time awards which enjoy truly international recognition include the Nobel Prize, the Academy Award, and (most relevant for athletics) the Olympic Gold Medal. These prizes are "household names," recognized immediately even among the general public as being the highest possible honors in their respective fields. It has not been shown that the awards given to the beneficiary either as a player, a coach, or a scout, receive immediate international recognition on a par with the almost universally-known awards described above.

Barring the alien's receipt of a major internationally recognized award, the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B) outlines eight alternative criteria, at least three of which must be satisfied for an alien to establish the sustained national or international acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence counsel claims demonstrates that the beneficiary meets the criteria discussed below.

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

Counsel contends that the "beneficiary's success [as a coach and scout] is documented by his selection of "young Slovenian players who became the junior champions at the European championships in Ohrid, Macedonia in 1997." In support of this statement, counsel refers to two photocopied articles that have been translated into English. Counsel, however, does not provide the date, author, or publication source for either article.

The first article, entitled "Interior Has Great Players" quotes the beneficiary as saying, "Our goal is, with all due respect . . . to win the fifth championship title." The article then indicates that the beneficiary "took over the team" at a critical moment and the team is aware "that the play-off will not be easy." Contrary to counsel's assertions, this article does not demonstrate that the beneficiary was responsible for any of the player selections and, further, only indicates the team will be going to the play-offs.

The second article, entitled "Smelt Olympia Again won the First Place," makes no mention of the beneficiary or the fact that beneficiary was responsible for the team's player selection. Further, though the article states "Smelt Olympia won the fifth title of champions" this does not persuasively establish, as counsel contends, that the team won the "European championships" while the beneficiary was coach.

The record contains two additional articles documenting the beneficiary's role as head coach of the team Smelt Olympia. However, neither of these articles indicates the beneficiary was responsible for the player selection or that the team won the European championships. We note from the first article that the beneficiary "took over" the team after its inception. Thus, it is questionable how the beneficiary could have had a role in selecting the players as counsel claims.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In addition to the above, unsubstantiated claims, counsel contends that the beneficiary was the recipient of "Coach of the Year Award." Again, however, the record contains no documentary evidence to support counsel's claims. On appeal, counsel explains that the beneficiary "left [the award] in Europe when he entered the U.S. and has not been able to obtain the actual award from Europe." Rather than attempting to obtain a letter from the organization that issued the purported award to the beneficiary, counsel submits letters from several individuals describing the beneficiary's awards.

The first letter, written by [REDACTED] sports journalist for the news agency, [REDACTED] states:

[The beneficiary] is the only NBA scout who played the collegiate basketball in the United States and the highest-level international basketball in Europe. He had tremendous success as a basketball coach. He was

with Basketball Club Olimpija [REDACTED] during the period of time when this club won six national championships. As a head coach of Olimpija, [the beneficiary] was awarded Coach of the Year honor at the end of the successful 1996 campaign for yet another national basketball title.

[The beneficiary] was instrumental in one of the greatest sports successes in the young history of Slovenia, which seceded from former Yugoslavia in 1991. Namely, [the beneficiary] personally selected twelve young Slovenian players who stunned the European basketball milieu by becoming the junior champions [sic] at the European Championship played in Ohrid, Macedonia, in 1997.

Counsel also submits a letter from [REDACTED] General Manager and Vice President of Basketball Operations of the petitioning team. [REDACTED] discusses the beneficiary's award for "Coach of the Year," as well as being a player in the national championships. [REDACTED] states that he selected the beneficiary "to serve as scout . . . due to his international recognition and proven ability to analyze and develop top talent." Mr. [REDACTED] further states that:

As a professional player [the beneficiary] led his team to six national championships and one European championship. Upon retiring as a professional player, [the beneficiary] was selected to serve as head coach of Olympia, one of Europe's top teams. As a coach, he led his team to victory in the national championship and was named coach of the year.

The record contains a third letter, written by [REDACTED] the [REDACTED] which confirms that statements of [REDACTED] that, as a player and coach, the beneficiary participated in and won several national championships and was named coach of the year for his role in the Olympia team.

Generally, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). We find these letters to be insufficient evidence to establish that the beneficiary has won national or international awards as a coach or player. The statements do not establish the organization presenting the awards or the criteria the awards were based upon.

Moreover, even were we to find that the petitioner had won national or international awards as a player or coach, there has been no evidence submitted to establish that the beneficiary has received any awards in his field of endeavor as an NBA scout.

Counsel's reliance on the beneficiary's receipt of awards as a player and coach "at the highest levels of collegiate and professional basketball" as being sufficient evidence of meeting this criterion is misplaced. Though the beneficiary's experiences as a player and coach are relevant to his work as a scout, the awards purportedly given to the beneficiary as a player and coach cannot take the place of the required evidence that the beneficiary received national or international awards in his field of endeavor as an NBA scout.

On appeal, counsel argues that CIS should "consider the success of players [the beneficiary] has developed and/or scouted" in its review of the beneficiary's awards. As it is not clear that significant awards exist for basketball scouts, as they do for players and coaches, we find that it is reasonable for CIS to look to those players that the beneficiary has scouted as comparable evidence under 8 C.F.R. § 214.2(o)(3)(iii)(C) to establish whether the beneficiary has sustained national or international acclaim as an NBA scout. To be considered as comparable evidence for this criterion, it must be established that the player has won nationally or internationally recognized prizes or awards. In addition to the awards received by players, we also find

that awards by teams for whom the beneficiary has acted in the capacity of a scout may also be considered as comparable evidence for this criterion.

In her argument, counsel refers to the beneficiary as being "instrumental in the success of ██████████ Nesterovic . . . the starting center for the San Antonio Spurs, the NBA's 2003 World Champions." Counsel argues that ██████████ "is playing pursuant to a guaranteed [six year] \$42 million dollar contract" and that ██████████ "fully credits [the beneficiary] with developing him as a player and scouting him to the NBA."

Though counsel submits statistics related to ██████████ play, and claims that ██████████ "is one of the best centers in the NBA," neither the statistics nor counsel's unsupported statement is evidence that a player scouted by the beneficiary has won a nationally or internationally recognized prize or award. Though ██████████ was part of an NBA championship team, there is no evidence that ██████████ or any other player¹ has received an award based on individual talent, such as an "MVP award," "Rookie of the Year award," "Defensive Player of the Year award," or "Sixth Man award," after being scouted and recommended by the beneficiary.²

Further, the opinion of sports journalist ██████████ that the petitioner "is developing to where it is entering the NBA's circle of top teams" and that "they are building a powerhouse" based in part on the beneficiary's role as scout, is not evidence that the petitioner has won a nationally or internationally recognized award as the result of the beneficiary's work as a scout. While the petitioner may have won the Western Division of the NBA, the petitioner's success in regional playoffs will not be equated to a nationally or internationally recognized award. The petitioner has not made it to the NBA finals, much less won the NBA Championship during the beneficiary's tenure as a scout, and speculation about the petitioner's future standing in the NBA does not establish the beneficiary's eligibility at the time of filing.³ A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978)

Thus, the petitioner has failed to establish the beneficiary meets this criterion.

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;

Counsel asserts that the beneficiary's employment with the petitioner is tantamount to his being a "member" of an association and that scouts are only chosen to work for an NBA team if they are outstanding. In her initial submission, counsel states:

¹ Though not cited by counsel for this criterion, the record contains a letter from ██████████ the Dallas Mavericks. In addition, to ██████████ states that the beneficiary has recommended other "international talents [including] ██████████ etc." The record, however, contains no evidence that any of these players have won nationally or internationally recognized prizes after being scouted by the beneficiary.

² See <http://www.nba.com/history/records/index.html> (accessed September 28, 2004).

³ See http://www.nba.com/history/awards_finalschampsmvp.html (accessed September 28, 2004).

Consistent with [the beneficiary's international reputation as one of the world's top basketball scouts, [the beneficiary] has been invited to join the NBA's Minnesota Timberwolves as a scout. Only the best players, coaches, and scouts are invited to join one of the NBA's 39 teams.

* * *

To join an NBA team, an individual must be recognized for their outstanding achievements in the field of basketball.

In support of her statement, counsel submits two letters and statistics on the Minnesota Timberwolves as evidence that the beneficiary was selected as an NBA scout because of his outstanding achievements.

One of the letters, written by [REDACTED] Vice President of Basketball Operations – International for the NBA, states that “[t]here is no union or association for NBA scouts.” [REDACTED] further states:

I have had the opportunity to become acquainted with many international players, coaches, and scouts . . . Over the years, I have followed [the beneficiary's] career as a player, coach, and scout. I have also observed the quality of recruits he has recommended to the NBA. He has consistently had the ability to identify and develop top talent worldwide. From these observations and comments, it is my opinion that [the beneficiary] is internationally recognized as one of the top people in the field of basketball scouting.

In 2003, I organized the Africa 100 Camp. This was one of the NBA's major initiatives to bring top young players together for an intensive four-day basketball camp and address important social issues. To ensure the success of this camp, I identified the NBA's top coaches and scouts who were known for their extraordinary coaching skills. One of those select individuals I invited was [the beneficiary].
4

On appeal, counsel states that the director has “arbitrarily refused to consider and address any of the evidence showing that [the beneficiary's] membership in the NBA is due to his outstanding achievements. Although we agree that the director did not discuss the beneficiary's membership in the NBA, we note that the petitioner's initial submission addressed the beneficiary's membership as part of an NBA team, not as a member of the NBA. Regardless, we find this distinction to be irrelevant as we do not find that the beneficiary can be considered a “member,” as contemplated by this criterion, of the NBA or the petitioning team.

In this case, the beneficiary is an employee of the petitioning team; he did not gain his position as a scout by competing for placement against other scouts. Therefore, the beneficiary cannot meet this criterion based upon his employment with the petitioner. Further, contrary to counsel's assertion, the beneficiary's employment with the petitioner does not mean he “has membership in the NBA.” Though he may be employed by a team that is part of the NBA, the record does not establish that the beneficiary is a “member”

⁴ It is noted that in her reference to the Africa 100 camp, Ms. Bohuny does not state that she used the beneficiary's skills as a scout in order to select the players brought to the camp, but rather she invited the beneficiary because he was “known for [his] extraordinary coaching skills.”

of the NBA organization for purposes of establishing this criterion, any more than a secretary or sports physician employed by the petitioning NBA team could be considered to be a "member" of the NBA. Counsel's assertions that the beneficiary is a member of an association are also undermined by the letter from Ms. Bohuny, who states that "there is no union or association for NBA scouts."

On appeal, counsel also argues that there is "no legal support" for the director's conclusion with respect to this criterion. In order to undermine the director's position, counsel argues:

The law, in stating that an individual qualifies for O classification based upon the receipt of a major prize, such as the Nobel Prize, clearly recognizes that accomplishments during employment are a basis for establishing an individual's extraordinary ability.

Counsel's statement misinterprets the director's decision and the regulatory criteria. The director did not determine that the beneficiary did not qualify for this criterion because his work was not extraordinary. Instead, the director found that the beneficiary's mere employment with the petitioning team was not tantamount to membership in an association. Counsel's argument that the petitioning team "is one of the top teams in the NBA" and that the beneficiary is "widely known to be one of the very top basketball scouts in the U.S. and Europe" is irrelevant to the determination as to whether the petitioner is an "association."

The petitioner has failed to establish the beneficiary's membership in any association that requires outstanding achievements of their members.

Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

The director found the petitioner failed to establish that there was published material about the beneficiary in major trade publications or media. In his decision, the director noted that though numerous articles were submitted:

[T]he beneficiary is merely mentioned in these articles. The articles are not about the beneficiary and his achievements as a player or scout. Further, most were printed off the Internet, and some written by the petitioner itself. No evidence was submitted to establish that any of these publications were in professional or major publications or major media.

On appeal, counsel argues "while the professional or major media articles attached to the petition did not write about [the beneficiary's] personal life or background, they were objective accounts of his contributions and role in professional basketball." Counsel also argues the director erred in concluding that the media publications submitted were not considered major publications.

A review of the record reveals numerous articles that only mention the beneficiary's name. We agree with the director that the mere mention of the beneficiary's name in an article does not satisfy this criterion as the article must be *about* the beneficiary *relating to his work* as a scout.

Notably, however, the record does contain one article which can be considered about the beneficiary in his role as a scout. The article, published January 2, 2004, in the Minnesota *Star Tribune*, is entitled "Wolves' Scouts Prepare for Quick European." This article does more than simply mention the beneficiary's name. It discusses, in detail, a week-long trip to be undertaken by the beneficiary in his capacity as a scout for the petitioner.

However, while counsel argues that scouts are rarely written about in their capacity as a scout, this one article is not sufficient evidence to establish sustained national or international acclaim under this criterion. Further, we find that the *Star Tribune* cannot be considered major media. While it has a daily readership of approximately 380,354, its readership is primarily within the Minneapolis/St. Paul market;⁵ there is no indication of wider circulation. Accordingly, the petitioner has not established that this criterion.

Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

The petitioner has submitted numerous letters, including a recent letter from Ryan Blake, NBA Assistant Director of Scouting, favorably documenting the beneficiary's evaluation of the skills of many players. However, neither the beneficiary's previous work as a coach nor his current job as a scout encompass the duties envisioned in this criterion of "participation on a panel or individually." In occupations where a person is a coach, instructor, or professor, simply performing one's job by evaluating another person's work is inherent in the job, just as evaluating the talent of an athlete in order to determine if they fit on the petitioning team is inherent in the beneficiary's job. The use of the word "participation" implies that there is some contest or competition which requires a judge or judges to determine the winner. In the case of the beneficiary, there is no match or competition, only the determination as to whether the player's performance would benefit the petitioner. Clearly, the intent of the regulation requires more than a showing that the beneficiary is competent at his job. To allow the beneficiary to meet this criterion, simply by performing the duties of his job, would negate the intent of the statute which requires a showing that the beneficiary is one of the small percentage who has risen to the very top of the field of endeavor. Therefore, absent evidence the beneficiary has participated either individually or as a member of a panel as a judge, beyond the duties required in his current position or as a coach, we cannot find the beneficiary meets this criterion.

Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;

To establish that his work is of major significance, the petitioner must show the beneficiary's contribution has demonstrably influenced his field. In her initial submission, counsel stated that the beneficiary "is internationally recognized for his ability to recruit top talent to the NBA" and that "international coaches, managers, and players recognize [the beneficiary's] contribution as instrumental in identifying these extraordinary players."

Counsel failed to identify, however, how the beneficiary's contribution of "recruit[ing] top talent to the NBA" is original or of a major significance. Though counsel argued that "[s]everal of the players [the beneficiary] recruited are not only starters, but NBA leaders," this fact does not demonstrate how the introduction of these players to the NBA has had a major significance to the field of basketball or basketball scouting.

Counsel submitted several letters in which the authors indicate their "respect and admiration" for the beneficiary and confirm the beneficiary's recommendation of several players who play in the NBA. Counsel also submitted the players' statistics. However, despite the statistics presented by counsel, there was no evidence that the introduction of these players has changed the game of basketball or methods of scouting in any way such that their introduction could be considered a major significance. In finding that the beneficiary did not meet this criterion, the director stated "well recognized" contributions do not equate to contributions of major significance." The director also noted that the beneficiary's work could not be considered original as "all the teams get the same information about the players . . . and [the beneficiary] takes a chance just like every other scout."

⁵ Audit Bureau of Circulation Survey (September 20, 2003), as reported on the Minnesota Star Tribune Website. See http://company.startribune.com/company/applications/ic/pr/ViewPressRelease.jsp?article_id=15544

On appeal, counsel argues that the director "arbitrarily and capriciously relied on this false premise to deny the petition." Counsel's argument is without merit. The petition was denied because the director found that the petitioner had not met any one of the seven evidentiary requirements, not simply this criterion. Moreover, the director's negative finding with regard to this criterion was not based solely upon the director's suggestion that the beneficiary "takes a chance like every other scout" when scouting or recommending a player. The director's decision was based on the fact that the petitioner failed to establish the beneficiary's contribution was original and of major significance.

On appeal, counsel refers to the opinion of [REDACTED] (cited in the first criterion) that the petitioning team has improved because of the beneficiary's abilities as a scout. We note, however, that while the petitioner may have improved with the assistance of the beneficiary's scouting ability, the petitioner has yet to make it into the NBA finals or won an NBA championship based on the beneficiary's scouting efforts. As such, it is not clear how the beneficiary's contribution to the petitioner, or the NBA as a whole, can be considered significant.

Regarding the statistics contained in the record, counsel states:

[E]ach of the players [recruited by the beneficiary] is nationally rated as one of the top ten players in the NBA for a particular skill they possess. Many of the players have been invited to participate in NBA all star competitions.

Counsel then argues, "[t]his objective, statistical data was submitted to show the quality of player [the beneficiary] has recommended." We do not dispute that the beneficiary has had a role in bringing players to the NBA, nor do we wish to discredit the talent of the players the beneficiary has brought to the NBA. However, the mere fact that the beneficiary scouted talented players does not demonstrate how the beneficiary's contributions were significant or original. Though the players may be highly rated in a particular skill, the record does not demonstrate that any of the players have brought a new skill or element or have changed the game of basketball in any way so as to consider their introduction to the NBA a significant or original contribution.

Counsel also refers to the numerous letters written in support of the petition, and argues that these letters show the beneficiary "is acclaimed throughout the NBA for his recruitment of major player talent." Again, however, the fact that the beneficiary is known for his ability to bring skilled players to the NBA does not mean that bringing players to the NBA is an *original* contribution. A scout is expected to recruit talented players. Duties or activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 214.2(o)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself. If the beneficiary had developed some quantitative measurement to determine a player's skill and ability and eventual success, or introduced a new theory or technique in scouting, we may consider them to be evidence of the beneficiary's original contribution of major significance.

In the letter written by Ms. Bohuny, she states "[t]he global nature of [basketball] is reflected in the fact that the NBA now has 72 international players accounting for over twenty percent of our league." We note that [REDACTED] provides no evidence to show how many of the 72 players were recommended by the beneficiary versus other scouts or how those players who were scouted and recommended by other scouts compared to those players selected by the beneficiary. Without evidence comparing the beneficiary's success versus other scouts in the NBA, the petitioner has not shown how the beneficiary's achievements as a scout constitute a contribution of major significance. Certainly it is not unreasonable to require a showing of comparative evidence, in addition to simply documenting the beneficiary's accomplishments in witness letters.

The fact that the beneficiary is a successful and well-known scout among those who work with him does not mean that it is because his work is considered original or that it has been of major significance. Therefore, though

the record shows that the beneficiary has been able to bring some players into the NBA, the petitioner has failed to show how this is an original contribution that is a major significance to basketball.

Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;

No evidence has been submitted to establish the beneficiary's eligibility under this criterion.

Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;

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

In his decision, the director noted that the beneficiary had only signed one top player for the petitioner. The director further noted that there was no evidence that the petitioner had "sustained performance at a [high] level." Based upon these facts, the director found the beneficiary could not be considered critical or essential and that the petitioner was not considered an organization with a distinguished reputation.

On appeal, counsel argues that based upon the language contained in the director's request for evidence, counsel assumed the director considered the petitioner to be an organization with a distinguished reputation. While we agree with counsel that the director's ultimate decision appears to go beyond the language of the request for evidence, we do not believe the petitioner has been prejudiced in this regard.

There is ample evidence available regarding the NBA and its associated basketball teams on the Internet. This information, in addition to the information already contained in the record, including sports journalists' opinions and statistics, demonstrates that the petitioner has not won any significant title in the NBA.

As noted in previous criterion, the petitioner has yet to advance to the NBA finals or win an NBA championship. Therefore, regardless of the information that counsel would have submitted had she been aware of the CIS's unfavorable determination at the time of the request for evidence, counsel could not overcome the fact that the petitioner has not been, until recently, a winning team.

Moreover, the fact that on appeal counsel had the opportunity to submit additional documentation and make additional arguments related to this criterion negates any finding of harm. As such, we find the petitioner was not prejudiced by the director's ultimate decision.

On appeal, counsel also argues that the petitioner is distinguished because it is "nationally recognized as an NBA team" and that "within the NBA, they are one of the top teams." Though counsel presents evidence that "since [the beneficiary] has been serving as a [s]cout, the [petitioner] has won more games than it lost," we are not persuaded the petitioner has a distinguished reputation.

First, the fact that the petitioner is "nationally recognized" as an NBA team is not indicative of whether the team has a distinguished reputation. When issuing the final rule at 8 C.F.R. § 214.2(o), the Immigration and Naturalization Service (legacy INS) specifically rejected one commenter's proposal that all hockey players in the National Hockey League should be eligible for O-1 classification, noting that this classification, as it relates to athletics, "can only be accorded to the small percentage of individuals who have risen to the very top of their field of endeavor." 59 Fed. Reg. 41818, 41820 (Aug. 14, 1994). The same reasoning applies to the present case; not every team in the NBA may be considered to be distinguished for purposes of

establishing this criterion. Although not definitive, the petitioner has yet to compete in an NBA final or win a championship title. Whereas the Los Angeles Lakers could demonstrate that it has a distinguished reputation by virtue of the fact that it has won three championships since 1999, the petitioner has not presented adequate evidence to establish that it has earned a reputation that distinguishes it from other teams in the NBA.

Second, that the petitioner is *now* improving its standing within the NBA does not overcome the fact that the petitioner has yet to establish how it is distinguished from other NBA teams within the meaning of 8 C.F.R. § 214.2(o)(3). Given the previously cited opinion of sports journalist [REDACTED] that the petitioner "is developing to where it is entering the NBA's circle of top teams" and that "they are building a powerhouse," we do not find that the petitioner is able to establish that it currently has a distinguished reputation or that it had such a reputation at the time of filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. Again, a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248.

The remaining issue for this criterion is whether the beneficiary has been employed in a critical or essential capacity. On appeal, counsel argues that the beneficiary was "instrumental in bringing top tier talent to the Petitioner and the NBA." We must note that the regulatory criterion refers to those organizations and establishments for which the alien has been employed. As the beneficiary is not, and has not been employed by the NBA, his bringing players to the NBA is irrelevant for the determination of this criterion.

Counsel refers to a letter from [REDACTED] Senior Writer for ESPN.com and ESPN the Magazine, as a testament to the critical role the beneficiary has played. In his letter, [REDACTED] states:

[The petitioner's] former center [REDACTED] was a relative unknown player when he was drafted by the [petitioning team] . . . [he] was identified by [the beneficiary] . . . and became a critical component for the [petitioner's] playoff runs over the years.

While the petitioner's accomplishment in scouting a talented player may be of note, the issue is not how the alien has performed in the role of scout for this or other organizations, but the nature of the role itself. In other words, because the petitioner is claiming that the alien meets this criterion based on his performance as a scout for the petitioning entity, the petitioner must then demonstrate that the position of scout is an essential or critical role within its organization. The petitioner has not demonstrated how the position of scout is essential or critical to the petitioner, or that the alien has been employed in an essential or critical role within this organization.

Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence;

Counsel, upon her initial filing, failed to argue or present any evidence that the beneficiary meets this criterion. In response to the director's request for evidence, the petitioner submitted a copy of the beneficiary's employment contract with the petitioner, however, counsel did not argue in any of her points that this criterion was one of those met by the beneficiary.⁶

It was not until this appeal that counsel presented an argument that the beneficiary meets this criterion. On appeal, counsel refers to the contract contained in the record, which reflects that the beneficiary's base term of compensation is between \$65,000 and \$70,304. Counsel then argues that because the U.S. Department of Labor shows that for the position of "Scout, Professional Sports," the average entry-level wage is \$16,430 and the

⁶ See Counsel's Response to the Request for Evidence dated April 22, 2004. Counsel highlights seven of the regulatory criteria and provides arguments and evidence that the beneficiary meets each of those seven criteria. The criterion related to the beneficiary's salary is not one of those categories highlighted by counsel.

average wage for the most experienced scouts is \$47,400, the beneficiary's salary is "well above the average paid to scouts in professional sports.

We are not persuaded by counsel's argument and find that it is not sufficient to simply compare the beneficiary's salary to the salaries of all other "scouts in professional sports." As noted throughout this decision, the beneficiary must be evaluated in the field in which he seeks classification, an NBA scout. There is no basis for counsel's assertion that the realm in which the beneficiary's salary should be compared is that of *all* professional scouts, to include professional baseball, hockey, and football scouts. Instead, we find that as the beneficiary seeks to be classified as an alien of extraordinary ability as an NBA scout, it is only reasonable to compare the beneficiary's high salary with the salaries of the most experienced and acclaimed scouts in the business. There is no such information within the record. Thus, the petitioner failed to establish the beneficiary meets this criterion.

Finally, 8 C.F.R. § 214.2(o)(5)(i)(A) requires, in pertinent part:

Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for O-1 or O-2 classification can be approved.

It must be noted that the favorable opinions of members of the NBA and the petitioner's management are considered in this matter, however, nothing in those opinions demonstrate that the regulatory standards had been satisfied. Accordingly, it must be concluded that the petitioner has failed to establish that the beneficiary qualifies as an alien with extraordinary ability in athletics within the meaning of section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i).

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. The fundamental nature of this highly restrictive classification demands comparison between the beneficiary and others in his field. The classification is not meant to be easy to obtain and is for individuals at the rarefied heights of their respective fields. An alien can be successful, but still not have obtained sustained national or international acclaim and be considered at the top of the field.

As in this case, an alien who is not at the top of his or her field will not be able to submit adequate evidence to establish such acclaim. The petitioner has not provided sufficient evidence to establish the beneficiary has obtained or sustained national or international acclaim as an NBA scout. As eligibility for extraordinary ability, the statute requires proof of "sustained" national or international acclaim and proof that the alien's achievements have been recognized in the field of endeavor through "extensive documentation." The petitioner has not established that the beneficiary's abilities have been so recognized.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.