U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 30 2007

WAC 01 087 54978

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)

ON BEHALF OF PETITIONER:

[redacted]

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.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, California Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately revoked the approval of the petition on July 20, 2006. The matter is now before the Administrative Appeals Office on appeal. The director's decision will be withdrawn, and the petition will be remanded for further action and consideration.

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 that the evidence submitted by the petitioner was not adequate to demonstrate his "extraordinary ability in martial arts" or that he had "reached the very top in [his] field of endeavor."

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 into the United States will substantially benefit prospectively the United States.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part: "The Secretary of Homeland Security 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."

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 unrebutted, 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. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

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. at 582, 590. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

The Form I-140, Immigrant Petition for Alien Worker, was filed on March 8, 2001 seeking to classify the petitioner as alien of extraordinary ability as a Judo coach.

On August 22, 2001, the director issued a notice requesting the petitioner to submit evidence that he is coming to the United States to continue work in his area of expertise.

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

The petitioner responded by submitting a May 18, 2001 from the president of the [redacted]., Springfield, Massachusetts, stating: "We, the college committee plan to hire you as soon as you receive your legal residence or legal working visa. You will then become professor of our Judo and Taichi classes. At that time we will provide health insurance. Your pay will start at $35,000 annually." The petitioner also submitted a 2001 flyer promoting student registration for a Judo camp offered by him in Wilbraham, Massachusetts.

On December 3, 2004, the petitioner appeared at the Los Angeles, California District Office for an interview pertaining to his eligibility for adjustment of status to permanent resident. In support of his Form I-485, Application to Register Permanent Residence or Adjust Status, the petitioner submitted an undated letter from [redacted] **Director, Asia-America Martial Arts Exchange Association, stating:** "Currently [the petitioner] serves as President and chief instructor of Asia-America Martial Arts Exchange Association which was established in May 2004. His monthly salary is $3000."[1] The petitioner also submitted a filing receipt from the New York State Department of State, Division of Corporations and State Records reflecting not-for-profit incorporation of the Asia-America Martial Arts Exchange Association as of May 18, 2004 and the organization's Certificate of Incorporation. The petitioner's documentation also included his 2003 Form W-2, Wage and Tax Statement, and his U.S. Income Tax Return identifying "[redacted]

[1] The letterhead bears the following addresses: [redacted] and [redacted]

[redacted]' of '[redacted] as his sole employer for that year. The interviewing officer concluded that the petitioner had failed to provide sufficient evidence of his employment in the martial arts field since his entry into the United States on October 4, 2000. The petition was then forwarded to the California Service Center for issuance of a notice of intent to revoke the approval of the petition.

On April 18, 2006, the director of the California Service Center issued a notice of intent to revoke the approval of the petition. The director's notice stated, in pertinent part:

> In December, 2004, the district officer during his interview with the beneficiary indicated that the beneficiary has failed to meet statutory requirements under section 203(b)(1_(A) [sic] of the Act. The beneficiary has not worked in his field of extraordinary ability in martial arts since he entered the U.S.
>
> The beneficiary indicated that he came to the U.S. on October 4, 2000 to travel all over the U.S. coaching a Judo Team. The beneficiary's current employment letter is from Asia-America Martial Arts Exchange signed by [redacted] who points out that the beneficiary is the president and chief instructor. The letterhead shows 3 different addresses, one in California, the second one in New York and the third one in Massachusetts. When asked if he ever god [sic] paid for coaching he said that he worked for a non-profit organization and never got paid, as everything was as a volunteer.
>
> On August 2003 he opened a company in New York with 2 other co-owners, one of whom is [redacted] The beneficiary provided a copy of his taxes for 2003 with a W-2 from [redacted] Northeast INC Mandarin Gourmet with the same address from the letterhead of the Asia-America Martial Arts Exchange Association's employment letter. He stated that he only worked part time at this location. The beneficiary cannot provide any pay stubs from his current employer. Applicant's current address is in Hacienda Heights, CA. He stated that his partners are taking care of his business in New York.
>
> While the beneficiary/petitioner, is not required to have an employer, he is required to be coming to the U.S. to continue work in his field of expertise.
>
> There is no evidence in the record that the beneficiary/petitioner is employed in his field of expertise. As such, the USCIS proposed [sic] to revoke the petition.

The director's notice of intent to revoke is problematic in that it failed to address the May 18, 2001 letter from the president of the [redacted] and the 2001 flyer promoting student registration for a Judo camp offered by the petitioner in Wilbraham, Massachusetts. Further, the regulation at 8 C.F.R. § 204.5(h)(5) states that "letter(s) from prospective employer(s)" are acceptable forms of evidence, but it does not require an individual to submit "pay stubs from his current employer" as indicated in the director's notice. Finally, the director's notice states that the petitioner "is not required to have an employer" and then contradicts this statement by concluding that "[t]here is no evidence in the record that the beneficiary/petitioner is *employed* in his field of expertise" [emphasis added].

Despite the preceding deficiencies, the director's notice does raise an important issue pertaining to the petitioner's eligibility pursuant to 203(b)(1)(A)(ii) of the Act. The fact that the petitioner's sole employer for

2003 was [redacted]" raises a valid concern as to whether the petitioner will work as a Judo coach in the United States or whether he will work as a restaurant employee. Section 203(b) of the Act requires that "the alien seeks to enter the United States to continue work in the area of extraordinary ability." As the petitioner seeks an employment-based immigrant classification based on sustained national or international acclaim and extraordinary ability as a Judo coach, it is reasonable for the director to require evidence that he has been and will continue to be employed principally as a Judo coach (rather than working only occasionally as a Judo coach and supporting himself primarily through unrelated employment as a restaurant worker). We cannot ignore that the plain language of the regulation at 8 C.F.R. § 204.5(h)(5) requires "clear evidence that the alien is coming to the United States to continue work in the area of expertise."

On May 12, 2006, the California Service Center received the petitioner's response to the notice of intent to revoke and this documentation was incorporated into the record of proceeding. The petitioner's response included a May 2, 2006 letter from the Asia-America Martial Arts Exchange Association confirming the petitioner's employment as its president and chief instructor and copies of several checks issued to the petitioner by the association. The petitioner also submitted copies of his U.S. Income Tax Returns for 2004 and 2005 and their corresponding transcripts (issued by the Internal Revenue Service) establishing that the tax returns were filed and processed. The W-2 Forms filed with the petitioner's 2004 and 2005 tax returns reflect that the Asia-America Martial Arts Exchange Association was the petitioner's primary employer during those years. The petitioner also submitted two letters of support from [redacted], President, Judo America, and Chairman, Junior Development, USA Judo, describing how the petitioner has worked with USA Judo and Judo America. We find that the preceding evidence adequately satisfies the regulation at 8 C.F.R. § 204.5(h)(5). Thus, the petitioner's evidence has overcome the grounds for revocation cited in the notice of intent to revoke.

On July 20, 2006, the director of the California Service Center revoked the approval of the petition. While the director's notice of revocation identified the evidence submitted by the petitioner in response to the notice of intent to revoke, it failed to offer a conclusive finding as to whether the evidence had satisfied the regulation at 8 C.F.R. § 204.5(h)(5). After listing the petitioner's evidence, the director's notice of revocation then stated:

> Classification as an alien of extraordinary ability you [sic] must prove that you are a person who has risen to the very top of your field. 8 C.F.R. 204.5(h)(2) defines extraordinary ability to mean "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."
>
> However, the documentation you have submitted has failed to provide convincing evidence that you have reached the very top in your field of endeavor.
>
> 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 would substantially benefit prospectively the United States.

> The evidence in this instance indicates that the petitioner has achieved some measure of success. However, the evidence falls far short of clearly demonstrating the petitioner's extraordinary ability in martial arts. Accordingly, the petition filed for the above named beneficiary is revoked as of the date of approval.

On appeal, counsel argues that the director's "decision is inconsistent with notions of fundamental fairness and procedural due process." Counsel further states that "the decision is so vague that it did not offer a meaningful discussion on the petitioner's deficiencies as they related to the pertinent criteria and it did not present the petitioner with an opportunity to mount a meaningful rebuttal on appeal." We concur with counsel's observations. As discussed previously, the April 18, 2006 notice of intent to revoke was based on the petitioner's failure to submit clear evidence that he was coming to the United States to work as a Judo coach. The ultimate grounds for revocation cited in the director's July 20, 2006 notice of revocation, however, differ from those cited in the notice of intent to revoke.

The regulation at 8 C.F.R. § 205.2 states, in pertinent part:

> Revocation on Notice.
>
> (b) *Notice of intent.* Revocation of the approval of a petition or self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.
>
> (c) *Notification of revocation.* If, upon reconsideration, the approval previously granted is revoked, the director shall provide the petitioner or the self-petitioner with a written notification of the decision that explains the specific reasons for the revocation. . . .

The petitioner has not been given the opportunity to offer evidence in opposition to the grounds for revocation cited in the July 20, 2006 notice of revocation. A revocation can only be grounded upon, and the petitioner is only obliged to respond to, the allegations in the notice of intent to revoke. 8 C.F.R. § 205.2(b); *Matter of Arias,* 19 I&N Dec. 568, 570 (BIA 1988). Furthermore, the director's notice of revocation fails to adequately explain the specific reasons for the revocation.

As the director has found that the petitioner's evidence does not meet the requirements set forth at 8 C.F.R. §§ 204.5(h)(2) and (3), we must remand the matter to the director for the purpose of issuing a new notice of intent to revoke advising the petitioner of the specific deficiencies in the evidence as it relates to these regulatory criteria. If the director concludes that the petitioner's response does not overcome the deficiencies in the record, the director shall issue a decision that specifically addresses the petitioner's evidence and that applies the pertinent statutory and regulatory requirements in the analysis of the evidence.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The burden remains with the petitioner in revocation proceedings to establish eligibility for the benefit sought under the immigration laws. *Matter of Cheung,* 12 I&N Dec. 715 (BIA 1968); *Matter of Estime,* 19 I&N Dec. at 452 n.1; *Matter of Ho,* 19 I&N Dec. at 589.

ORDER: The director's decision is withdrawn. The petition is remanded for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.