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U.S. Citizenship and Immigration Services

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MAY 03 2007

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:

SRC 06 052 52028

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.

Marcia Deadrick

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in athletics. The director determined the petitioner had not established that the beneficiary has earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel argues that the petitioner has submitted sufficient evidence establishing that the beneficiary meets at least three of the regulatory criteria for classification as an alien of extraordinary ability.

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.

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

This petition, filed on December 6, 2005, seeks to classify the beneficiary as an alien with extraordinary ability as a BMX Bicycle Racer. 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 a major internationally recognized award, the

regulation at 8 C.F.R. § 204.5(h)(3) 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 pertaining to 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 submitted awards, point standings, and official statistics showing that the beneficiary won lesser nationally recognized awards as a BMX racer. In addressing this evidence, the director's decision stated: "The beneficiary has provided extensive documentation attesting to his national championships, but has not proven that the beneficiary has been recognized internationally." The plain language of this criterion, however, allows for lesser "nationally" recognized prizes or awards.

On appeal, counsel argues that the director "erred in requiring evidence of international recognition." We concur with this observation and find that the petitioner's evidence is adequate to demonstrate 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.*

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. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. In addition, it is clear from the regulatory language that members must be selected at the national or international level, rather than the local or regional level. Therefore, membership in an association that evaluates its membership applications at the local or regional chapter level would not qualify. 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 the beneficiary's member card for the National Bicycle League (NBL) identifying his membership class as "Super" and listing an expiration date of May 20, 2006.

In response to the director's request for evidence, the petitioner submitted a February 8, 2006 letter from Connie Shepler, NBL Administrative Director, stating:

> The National Bicycle League is a racing organization for racers of any age. Age ranges from 4 years old to 65 and older. The NBL has racing proficiencies in the Rookie, Novice, Expert, Cruiser (24" bikes) and Girls classes in the amateur ranks. The Pro riders have 4 classes to choose from, including Elite, A-Pro [Super], Pro Cruiser and Pro Open. The NBL currently has approximately 30,000 members and membership is open to anyone; there are no minimum requirements.

According to [redacted] letter, NBL "membership is open to anyone; there are no minimum requirements." Thus, we do not find that this organization requires outstanding achievement as an essential condition for admission to membership.

On appeal, counsel argues that the beneficiary's Super Class ranking indicates places "him at the top of his field of endeavor." The record includes a copy of the beneficiary's Super Class standing as of August 31, 2005 showing that he ranked 28th among Super Class racers in the United States.

The petitioner's appellate submission includes an April 3, 2006 memorandum from Connie Shepler to the beneficiary stating: **"The highest classification of rider in the National Bicycle League is Elite. The** classification following that is Super Class. . . . When you become a new BMX rider you are considered a Rookie, then move up to Novice, then Expert and then you must qualify and be approved to move up to Super Class and then Elite." The petitioner's submission also includes a copy of page 12 of the NBL Rule Book showing that Elite racers rank above Super Class racers such as the beneficiary.

An April 4, 2006 facsimile from Connie Shepler submitted on appeal states: "There are 65 Elite Men, and 123 A Pro/Super Class riders. Total number of members 30,000."

The beneficiary's Super Class ranking, while commendable, does not rise to the level of outstanding achievement in his field, nor does it elevate him to the very top of his field of endeavor. Beyond the Super Class level, there exists the highest level of his sport, the Elite level. The beneficiary's member card for NBL does not reflect that he has attained the Elite classification. Further, we cannot ignore that the 30,000 members of the NBL include rookies (some as young as four years old), novices, and senior citizens. According to the race results and standings submitted by the petitioner, numerous juvenile age group bicyclists compete as NBL members. We note here that the introductory language of section 203(b) of the Act relates to visa "allocation for *employment-based* immigrants." [emphasis added] We find that evaluating the beneficiary among professionals in his field of endeavor is a more appropriate basis for comparison rather than expanding the comparison to include recreational riders such as juvenile age group bicyclists. According to the February 8, 2006 letter from [redacted], "The Pro riders have 4 classes to choose from, including Elite, A-Pro [Super], Pro Cruiser and Pro Open." Individuals in these classes represent a far more appropriate basis for comparison in demonstrating that the beneficiary has reached the very top of his field of endeavor.

Without evidence showing that the beneficiary's admission to membership in the NBL required outstanding achievement or that prospective members are evaluated by national or international experts in consideration of their admission to membership, we cannot conclude the beneficiary meets this criterion.

> *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 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 or international distribution. An alien would not earn acclaim at the national or international 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.[1]

The petitioner submitted an article published in the *Orlando Sentinel* entitled "Storm Trackers," but this article is not primarily about the beneficiary and only mentions him in passing. The petitioner also submitted several captioned photographs of the beneficiary appearing in publications such as *BMX Today*, *BMX Snap*, and *BMX Plus*. The plain language of this criterion, however, requires the submission of "published materials about the alien" including "the title, date, and author of the material." The captioned photographs submitted by the petitioner do not meet these requirements. The record also includes a brief interview of the beneficiary published in *BMX Today* discussing his first Single-A professional win, but the date and author of this material were not identified.[2] Further, there are no circulation statistics or other evidence showing that the preceding publications have substantial national readership. Without evidence demonstrating that the beneficiary has been the primary subject of major media attention, we cannot conclude that he meets this criterion.

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

The director's December 16, 2005 request for evidence notice indicated that the beneficiary "has met one of the ten criteria" at 8 C.F.R. § 204.5(h)(3). This notice states: "The media articles submitted will count towards . . . evidence of the display of the alien's work in the field at artistic exhibitions or showcases." The media articles submitted by the petitioner, however, relate to the criterion at 8 C.F.R. § 204.5(h)(3)(iii) and have already been addressed under that criterion. Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for published material about the alien and display of the alien's work, we do not view the two as being interchangeable. In the March 8, 2006 decision denying the petition, the service center contradicted its earlier finding by specifically stating that the record did not establish the published material submitted by the petitioner "has set the [beneficiary] apart from others as one of that small percentage who have risen to the very top" of his field. We concur with the director's latter finding relating to the media articles.

Clearly, the beneficiary's field is not in the arts. The plain language of the criterion at 8 C.F.R. § 204.5(h)(3)(vii) indicates that this particular criterion is more appropriate for visual artists (such as sculptors and painters) rather than for athletes such as the beneficiary. Given that the beneficiary is BMX racer, he would not satisfy this criterion simply by demonstrating that he has been photographed while competing in various bicycling competitions. Virtually every athlete "displays" his or her work in the sense of competing in front of an audience. Sustained national or international acclaim is generally not established by the mere act of competing in public, but rather by regularly attracting a substantial national or international audience. The record includes no evidence showing that the race events in which the beneficiary competed received the top billing, drew record crowds, or resulted in greater audiences than other similar competitive events that did not feature the beneficiary.

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[1] Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, cannot serve to spread an individual's reputation outside of that county.

[2] As stated previously, beyond the Single-A classification, there exists the Elite classification for top professionals.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

On appeal, the petitioner submits a February 20, 2006 letter from President of [redacted], stating:

> The company pays up to $20,000 per year in BMX race expenses for [the beneficiary] In addition, [redacted] pays between $8,000 and $12,000 per year for his bike parts and product. Randall has also won prize monies.
>
> * * *
>
> If we did not consider [the beneficiary] to be one of the very best BMX racers, we would not be paying out such compensation.

Counsel asserts that the preceding letter from the beneficiary's racing sponsor is evidence that he meets this criterion. The record, however, includes no supporting evidence (such as payroll records, expense reports, or income tax forms) showing the beneficiary's actual compensation for any specific period of time. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, the plain language of this criterion requires evidence of high remuneration "in relation to others in the field." The petitioner offers no basis for comparison showing that the beneficiary's compensation was significantly high in relation to other professionals in his field. For example, according to the February 8, 2006 letter from [redacted] four classes of professional BMX riders exist. The record, however, includes no evidence showing that the beneficiary's compensation places him among the highest paid professionals in his sport at the national or international level. Thus, the petitioner has not established that the beneficiary meets this criterion.

In this case, we concur with the director's finding that 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 the sustained acclaim necessary to qualify as an alien of extraordinary ability.

While CIS has approved one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, that prior approval does not preclude CIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. In publishing the proposed rule, legacy INS specifically distinguished the O-1 nonimmigrant category from the high standard set for immigrant visa extraordinary ability category. *See* 56 Fed. Reg. 30703, 30704 (July 5, 1991). It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v.*

INS, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of beneficiary's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Review of the record does not establish that the beneficiary has distinguished himself 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 the national or international level. Therefore, the petitioner has not established the beneficiary's 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.