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

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 03 2008

SRC 06 199 51361

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.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially approved the preference visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that 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 revocation of the approval of an immigrant petition. *Id.* 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. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

The petitioner seeks classification as an "alien of extraordinary ability" in athletics, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability and that he sought to continue in his area of expertise.

On appeal, counsel submits copies of a complaint filed by counsel with the United States District Court, Southern District of Florida and counsel's "Third Emergency Motion and Memorandum of Law" and Service Center decisions relating to counsel's other clients. None of this evidence relates to the eligibility of the petitioner in this matter. Counsel also submits a supplemental brief asserting that the director's decision is contrary to an expert opinion submitted and asserting that the director did not

inquire in the notice of intent to revoke whether the petitioner sought to continue in his area of expertise but that the petitioner nevertheless submitted such evidence. Counsel does not address the director's specific concerns.

The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim of sustained national or international acclaim. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

Moreover, counsel is factually wrong that the director's August 23, 2007 notice of intent to revoke the approval of the petition was not concerned with whether or not the petitioner continues to compete as a swimmer. The director noted: "In fact, it appears the [petitioner] has not swam competitively since graduating from college in 2005 and has been employed for a rental company as a salesman since graduation."

While counsel's assertions on appeal are not persuasive, we find that the director failed to accord proper weight to the petitioner's Olympic participation and bronze medal. Moreover, the director failed to consider evidence that the petitioner has continued to train as a swimmer since graduating, a fact that is not contradicted by his adjustment of status interview, the videotape of which appears in the record. Nevertheless, we cannot ignore that the petitioner is training to compete on the Brazilian national team. Thus, for the reasons discussed below, we must remand the matter to the director for an inquiry as to whether the petitioner will substantially benefit prospectively the United States as mandated by section 203(b)(1)(A)(iii), quoted below.

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.

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 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a swimmer. 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). As acknowledged by the director, the petitioner competed in the Olympics in 2000 and 2004. He received a bronze medal in 2000. The director dismissed the significance of this medal because it is a bronze medal and because it was a relay race involving a team of swimmers. We are satisfied that an Olympic medal, even a bronze, constitutes a one-time achievement. Moreover, we do not find that the significance of this award is diminished because it was a relay rather than an individual medal. The petitioner was personally awarded the bronze medal and was one of the relay swimmers to compete in the relay race. It is not a case where the petitioner was on the sidelines while his team won without his participation. Thus, we are satisfied that the petitioner has the one-time achievement necessary to establish the required national or international acclaim *as an athlete*.

The next issue is whether the petitioner seeks to enter the United States to continue working in his area of expertise pursuant to section 203(b)(1)(A)(ii) of the Act. The director noted that the petitioner stated at his adjustment of status interview that he had not competed since graduating from college in August 2005 and acknowledged the petitioner's assertion that he is training for the 2008 Olympics. The director concluded, however, "there is insufficient evidence to demonstrate the petitioner/beneficiary is continuing his participation as a swimmer as of the filing of the instant petition on June 14, 2006 or anytime thereafter."

In response to the director's notice of intent to revoke the approval of the petition, counsel asserted that the petitioner had won a bronze medal at Swim Miami in 2006 and references a letter from [redacted] Head Swimming and Diving Coach at the University of Miami. [redacted] asserts that

swimmers get little financial compensation for swimming and must make a living in another field. Counsel references exhibit 12 as evidence that the petitioner has won "back to back bronze medals" at Swim Miami. Exhibit 12 includes a Certificate of Excellence issued to the petitioner by Swim Miami 2006. It does not confirm any award at this competition in 2006 or any other year. The petitioner also submitted Internet materials about Swim Miami that do not list any results and a letter from [redacted], Director of Operations at Swim Gym / Miami Sports International, purporting to confirm that the petitioner won a bronze medal at Swim Miami, a Swim Gym event, in 2005 and 2006.

The non-existence or unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Primary evidence of an award is the award itself. Secondary evidence of an award may include news coverage of the award. Only where the petitioner demonstrates that primary and secondary evidence are both unavailable or do not exist can the petitioner rely on affidavits. *Id.* The petitioner has not submitted primary or secondary evidence documenting his bronze medals at Swim Miami or evidence that primary and secondary evidence of this award does not exist or is unavailable. Thus, the letter from [redacted] is insufficient evidence that the petitioner won bronze medals at these events. Nevertheless, the record does establish that the petitioner competed at this event in 2006. Moreover, the record contains a September 14, 2007 letter from [redacted] Technical Director of the Brazilian Swimming Federation, confirming that federation's interest in the petitioner's participation in the 2008 Olympics as part of Brazil's national team.

The director does not appear to have taken this evidence into consideration. We find that this evidence adequately demonstrates that the petitioner continues to participate in competitive swimming.

While we withdraw the director's bases of revocation, the record does not, at this time, demonstrate that the petitioner meets section 203(b)(1)(A)(iii) of the Act. Specifically, the director shall inquire as to how the petitioner will substantially benefit prospectively the United States by training for a foreign national team. The director shall inquire as to the petitioner's ultimate intentions in the United States. We acknowledge the assertion by [redacted] that the petitioner is a "great asset" to Swim Gym as a coach and mentor to members of that center's various swim programs. In considering the petitioner's intentions, however, the director shall take into account that coaching does not necessarily fall within an athlete's area of expertise. *See Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002).[1] If it is the petitioner's intention to benefit the United States through coaching, the petitioner would need to demonstrate that he enjoys extraordinary ability as a coach or that coaching falls within his area of

[1] That 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.

Id. at 918.

expertise such as through the submission of evidence that he has coached swimmers at the national level.

Therefore, this matter will be remanded. The director must issue a new notice of intent to revoke regarding the petitioner's ability to substantially benefit the United States prospectively. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.