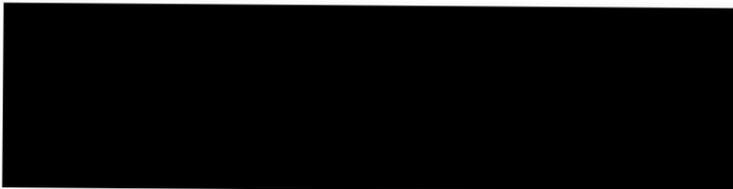


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FILE: WAC 07 021 53890 Office: CALIFORNIA SERVICE CENTER Date: **MAR 11 2009**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

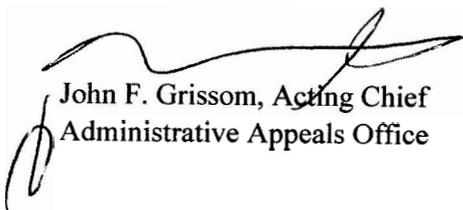
PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON 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.


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 The director's decision will be withdrawn and the petition will be remanded for further action and consideration.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 filed this petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien with extraordinary ability in athletics. The petitioner is self-described as an executive boxing trainer, and seeks to employ the beneficiary as a boxing trainer for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has received sustained national or international acclaim and is one of a small percentage who has risen to the very top of his field of endeavor.

On appeal, counsel for the petitioner asserts that the director erred by denying the petition without first issuing a request for evidence or a notice of intent to deny addressing the issues that formed the basis of denial. Counsel asserts that the request for evidence issued on December 12, 2006 failed to provide the petitioner with any notice of the alleged evidentiary deficiencies with respect to the beneficiary's qualifications as an alien with extraordinary ability in athletics. Counsel requests that the petition be remanded to the director so that a new request for evidence or notice of intent to deny can be issued, or, in the alternative, that the petition be approved based on the evidence of record.

Section 101(a)(15)(O)(i) of the Act 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.

The regulation at 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 regulation at 8 C.F.R. § 214.2(o)(3)(iii) states, in pertinent part:

Evidentiary criteria for an O-1 alien of extraordinary ability in the arts. An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

- (A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or
- (B) At least three of the following forms of documentation:

- (1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - (2) 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 or international experts in their disciplines or fields;
 - (3) 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;
 - (4) 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;
 - (5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
 - (6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
 - (7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
 - (8) Evidence that 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.
- (C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

The record consists of a petition with supporting documentation, a request for additional evidence (RFE) and the petitioner's reply, the director's decision, an appeal and counsel's brief. The beneficiary in this case is a native and citizen of Bulgaria who was in the United States in P-1 status as of the date of filing. The record shows that the beneficiary began his career as a competitive boxer and has worked as a boxing trainer for many years. The petitioner seeks to classify the beneficiary as an alien with extraordinary ability as a boxing trainer.

The petitioner filed the nonimmigrant petition on October 27, 2006, with supporting documentation relating to the evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii). On December 12, 2006, the director issued a

request for evidence in which the director requested the following items: (1) a consultation from the national office of an appropriate labor union, specifically, the International Boxing Federation/United States Boxing Association; and (2) a copy of any written contract between the petitioner and the beneficiary, or if there is no written contract, a summary of the terms of the oral agreement under which the beneficiary will be employed. The petitioner submitted a timely response to the director's request for evidence.

On January 11, 2007, the director denied the petition, concluding that the evidence submitted, without more, is insufficient to establish the beneficiary's eligibility for O-1 classification. Specifically, the director determined that the petitioner "relied solely on testimonials to establish the beneficiary's eligibility," at that such evidence was insufficient to demonstrate that the beneficiary is among that small percentage who have risen to the very top of their field. The director noted that the submitted evidence would bolster "other evidence," such as firsthand evidence of athletic or boxing training achievements by the beneficiary or by boxers he has trained. The director's decision was particularly brief, comprised of only four paragraphs.

Upon review, the AAO will withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

The regulation at 8 C.F.R. § 103.2(b)(8) (2006) states the following:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

Counsel contends on appeal that the director violated 8 C.F.R. § 103.2(b)(8) (2006) by failing to request further evidence prior to denying the petition based on a finding of insufficient evidence of eligibility.¹

Although the director requested additional evidence in this matter, the director did not request additional evidence to address the grounds that ultimately formed the basis for the denial of the petition. Furthermore, the director's

¹ Title 8 C.F.R. § 103.2(b)(8)(ii), the revision of which went into effect on June 18, 2007, currently states:

If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, [U.S. Citizenship and Immigration Services (USCIS)] in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by [USCIS].

Id.; see also 72 F.R. 19100 (April 17, 2007).

decision did not state that the evidence of record presented clear evidence of ineligibility. Rather, the director found that the evidence submitted was “insufficient,” and should have been supported by additional “firsthand evidence.” Therefore, the AAO concurs with counsel that the director was required, pursuant to 8 C.F.R. § 103.2(b)(8) to request additional evidence pertaining to the evidentiary requirements at 8 C.F.R. § 214.2(o)(3)(iii) if the director found that the initial evidence did not fully establish eligibility.

Furthermore, the director’s brief decision did not provide the petitioner with adequate notice of the deficiencies in the evidence, and in fact made no reference at all to the statute or regulations governing the O-1 visa classification. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

The AAO agrees with the director’s conclusion that the evidence of record does not fully establish the beneficiary’s eligibility for the benefit sought. Therefore, this matter will be remanded. The director is instructed to request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. 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. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.