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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 07 800 09642 Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2009

IN RE: Petitioner: [redacted]
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)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and it is now before the Administrative Appeals Office (AAO) on appeal. The AAO will summarily dismiss the appeal.

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, a sports promotion and management company, seeks to employ the beneficiary as a professional boxer for a period of three years.

The director denied the petition on November 15, 2007 on two independent and alternative grounds. First, the director determined that the petitioner failed to meet the evidentiary criteria for classification of the beneficiary as an alien of extraordinary ability in athletics, set forth at 8 C.F.R. § 214.2(o)(3)(iii). Specifically, director found that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(A), and submitted evidence to satisfy only two of the eight criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). Second, the director denied the petition based on the petitioner's failure to submit a written advisory opinion from the appropriate consulting entity, as required by 8 C.F.R. § 214.2(o)(2)(ii).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner provides the following statement on Form I-290B, Notice of Appeal or Motion:

> The evidence submitted with the petition has clearly demonstrated not only that [the beneficiary] is an athlete of extraordinary ability, but that he is one of only a handful of with [sic] comparable achievement and high regard in his field.

Counsel indicated on Form I-290B that no supplemental brief and/or additional evidence will be submitted.

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 extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of his field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii).

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 evidentiary criteria for aliens seeking classification as O-1 aliens with extraordinary ability in the fields of science, education, business or athletics are set forth at 8 C.F.R. § 214.2(o)(3)(iii). Specifically, the petitioner must establish that the beneficiary meets the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(A), or three of the

eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). If the criteria do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility. 8 C.F.R. § 214.2(o)(3)(iii)(C). The evidence submitted must demonstrate that the beneficiary has earned sustained national or international acclaim and recognition for achievements in the field.

In addition, the regulation at 8 C.F.R. 214.2(o)(2)(ii)(D) provides that all O-1 petitions must be accompanied by a written advisory opinion from the appropriate consulting entity. Pursuant to 8 C.F.R. § 214.2(o)(5)(i)(B), evidence of consultation shall be in the form of a written advisory opinion from a peer group (which could include a person or persons with expertise in the field), labor and/or management organization with expertise in the specific field involved.

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition.

The director denied the petition, in part, based on the petitioner's failure to submit the required written advisory opinion for a peer group, labor or management organization. The petitioner filed the nonimmigrant petition electronically on May 16, 2007. The petitioner indicated on the O and P Classification Supplement to Form I-129 that it had not obtained the required written consultation, and specifically marked the option "No – Copy of request attached." The petitioner did not identify the organization to which it had allegedly submitted the request, nor did it provide a copy of a consultation or a request for a consultation from a peer group or labor organization when it provided initial evidence in support of the petition on May 25, 2007.

Accordingly, on July 23, 2007, the director issued a request for evidence (RFE), advising the petitioner that it must submit a consultation from the national office of an appropriate labor union or a consultation from an appropriate U.S. peer group. Although the petitioner submitted a response to the RFE, it did not submit the requested consultation, or even acknowledge this request. Accordingly, the director denied the petition.

On appeal, counsel does not identify an erroneous statement of fact or conclusion of law on the part of the director with respect to this issue, or even acknowledge the director's finding that this requirement was not met. Pursuant to 8 C.F.R. § 214.2(o)(5)(i)(A), consultation with appropriate U.S. peer group or labor organization is mandatory before a petition for O-1 classification can be approved. Since the petitioner has neither submitted the required consultation nor established that an appropriate peer group or labor organization does not exist, the petition cannot be approved.

The remaining issue is whether the petitioner established that the beneficiary qualifies for O-1 classification as an alien with extraordinary ability in athletics. The director determined that the petitioner failed to meet the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iii)(A), and likewise failed to meet three of the eight evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

On appeal, counsel for the petitioner simply asserts that the beneficiary is qualified for O-1 classification, without addressing how the submitted evidence demonstrates the beneficiary's eligibility under the relevant regulatory evidentiary criteria. Neither the petitioner nor counsel have submitted any statement, either with the initial petition, in response to the RFE, or on appeal, addressing the evidentiary criteria, although the

director specifically advised the petitioner in the RFE that it must explain the significance of the submitted documentary evidence.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

> An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

On appeal, counsel for the petitioner does not identify specifically an erroneous statement of fact or conclusion of law on the part of the director. Counsel's general objections to the denial of the petition, without specifically identifying any errors on the part of the director, are simply insufficient to overcome the well-founded conclusions the director reached based on the evidence submitted by the petitioner. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the appeal will be summarily dismissed.

Furthermore, contrary to counsel's statement, the director did not deny the petition solely because the director was not persuaded that the beneficiary is an alien with extraordinary ability in athletics. As noted above, the director cited two separate grounds for the denial of the petition, only one of which is even disputed by the petitioner on appeal.

Beyond the decision of the director, the AAO notes that the petitioner has not satisfied the regulatory requirement at 8 C.F.R. § 214.2(o)(2)(ii)(B), which mandates that the petitioner submit a copy of any written contract between the petitioner and the alien beneficiary, or a summary of the terms of oral agreement under which the alien will be employed. The petitioner's initial evidence included a document titled "Management and Boxers Agreement." The document is not signed and appears to have been created in June 2005, approximately two years before the instant petition was filed. There is no evidence that this contract was ever executed, much less extended until July 2010, the validity date requested on the Form I-129 petition. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion

with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in support of the appeal, the petitioner has not sustained that burden.

ORDER: The appeal is summarily dismissed.