



U.S. Citizenship  
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[Redacted]

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: SEP 09 2005  
EAC 03 085 50808

IN RE: Petitioner: [Redacted]  
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*

*S* Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner seeks classification of 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 that the record did not establish that the beneficiary had achieved the sustained national or international acclaim requisite to classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part:

(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.

Specific supporting evidence must accompany the petition to document the "sustained national or international acclaim" that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international acclaim through evidence of a "one-time achievement (that is, a major, international recognized award)." *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.*

In his decision, the director stated, "Merely meeting three of the ten categories of evidence suggested by regulation does not automatically establish the beneficiary's eligibility for the classification of 'Alien of Extraordinary Ability.' Determinations of eligibility are made on the basis of the quality and caliber of the evidence presented." On appeal, counsel contends that this statement "contravenes the regulations" and "constitutes a due process violation" because meeting three regulatory criteria "establish[es] that one qualifies as an alien of extraordinary ability." Counsel's contention is misguided for two reasons. First, satisfaction of at least three criteria will demonstrate the requisite sustained acclaim, but an alien must still satisfy two other statutory provisions before he will be accorded immigrant status as an alien with extraordinary ability. Section 203(b)(ii) and (iii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii) and (iii). Second, the director discussed the beneficiary's eligibility under all of the regulatory categories, but found that the submitted evidence did not satisfy any of the criteria at 8 C.F.R. § 204.5(h).

Moreover, we do not read the director's comments as going beyond the regulation. Rather, his decision reflects the understanding that the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), or under 8 C.F.R. § 204.5(h)(4), must depend on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "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).

In this case, the petitioner seeks classification of the beneficiary as an alien with extraordinary ability in athletics as a fencing coach. Yet most of the record documents his previous accomplishments as a fencer, thus raising the question of whether the beneficiary seeks to enter the United States to continue work in his area of alleged extraordinary ability as required by section 203(b)(1)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(iii). Although experience as an athlete is undoubtedly relevant to coaching the same sport, the two endeavors are not identical and an alien who seeks to enter the United States as a coach under the extraordinary ability immigrant classification cannot rely solely on acclaim as an athlete. However, given the nexus between athletic competition and coaching, in a case where an alien has clearly achieved national or international acclaim as an athlete and has sustained that acclaim in the field of coaching at a national or international level, an adjudicator may consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability. Accordingly, we apply this standard and address the record and counsel's claims in the following discussion of the regulatory criteria relevant to the beneficiary's accomplishments.

*(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.*

As evidence under this criterion, counsel cites (on page two of her initial brief) the beneficiary's "numerous certificates and awards from national and international competitions." The record contains 35 photocopies of certificates. All but one of these documents are printed in foreign languages and were submitted without complete and certified English translations as required by 8 C.F.R. § 103.2(b)(3). Because the petitioner failed to submit certified translations of the documents, we cannot determine whether the evidence supports the beneficiary's eligibility under this criterion. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. *See* 8 C.F.R. § 103.2(b)(3). The only certificate printed in English affirms that the petitioner won third place in the Foil Individual Event at the 1998 Tehran International Fencing Championships.

Counsel claims the beneficiary has won many championships as a fencer, including bronze medals at the World Cup competitions in 1991 and 1995, the fencing championship of the former Soviet Union in 1988 and 1992, and 12 national fencing championships in Kazakhstan from 1985 to 1999. The record does not fully corroborate counsel's claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no primary evidence of any awards won by the petitioner as a fencer except for his third-place finish at the 1998 Tehran championships. However, the petitioner submitted several Russian newspaper articles, which provide secondary evidence of some – but not all – of his alleged achievements including his two World Cup bronze medals in 1991 and 1995, his 1988 championship of the former Soviet Union, the Soviet Cup in 1989 and a silver medal at the same competition in 1991, and his third place finish in the international "Friendship Cup" in Germany in 1987. While this evidence

demonstrates that the petitioner has won international fencing competitions, his most recent documented victory was in 1998, nearly five years before this petition was filed. Hence, his awards do not evidence sustained acclaim as a fencing athlete.

On appeal, the petitioner submits evidence that one of the beneficiary's fencing students, Kurt Getz, won one international Junior Men's Foil competition and has been ranked first nationally and within the top ten internationally as a junior fencer. Other documents submitted on appeal indicate that the beneficiary has coached two fencers who have been ranked nationally as within the top ten of their Veteran categories and that three of his students have been ranked nationally as within the top ten of their respective Youth Men's categories. Although nationally or internationally recognized prizes or awards won by a coach's students may be considered comparable evidence of the coach's eligibility under this criterion pursuant to 8 C.F.R. § 204.5(h)(4), the evidence submitted on appeal in this case arose after the petition was filed and cannot be considered. The petitioner must establish the beneficiary's eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12), *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the record does not demonstrate that national youth, junior or veteran championships evidence achievements at the highest level of fencing.

The evidence properly submitted indicates that the beneficiary won two national championships in the former Soviet Union, and five bronze medals at international fencing competitions. These achievements evidence the beneficiary's past acclaim as a fencer, but the record does not demonstrate that he sustained this acclaim during the nearly five years following his most recent fencing award in 1998 and preceding the filing of this petition. The record also fails to establish that the beneficiary sustained his past acclaim as a fencer through his subsequent work as a fencing coach. Accordingly, the beneficiary does not meet this criterion.

*(ii) 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.*

Counsel claims the beneficiary meets this criterion by virtue of his designation as a Master of Sports of the former Soviet Union and through his graduation from the Kazakhstan Institute of Physical Education and subsequent teaching for the National Leagues of Kazakhstan. The record contains a copy of a certificate issued to the beneficiary in 1990 by the Government Committee on Physical Culture and Sports of the former Soviet Union, which accorded the beneficiary the "Rank of Master of Sports of the USSR, International Class." Counsel states that "[o]nly very elite athletes, who have achieved outstanding results in their field receive such recognition," but the record does not corroborate this claim. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Obaighena*, 19 I&N Dec. at 534; *Laureano*, 19 I&N Dec. 1; *Ramirez-Sanchez*, 17 I&N Dec. at 506. In addition, the record does not establish that the beneficiary's certificate of professional credentials also evidences his membership in any athletic association.

Similarly, the beneficiary's diploma from the Kazakhstan Institute of Physical Education evidences only his graduation from the Institute with a specialization in "physical education and sports" and his qualification as a "teacher and a trainer of fencing." The record contains no evidence that the Institute is an athletic association, rather than an academic institution. The petitioner also submitted no evidence that the Institute required outstanding achievements for admission and graduation. Finally, the record contains a certificate from the

Department of State National Leagues of Youth, Tourism and Sports of the Republic of Kazakhstan, which verifies that the beneficiary worked for the Department as an "Athlete-Instructor of National State all-star League in Fencing." The petitioner submitted no evidence that the Department is an athletic association that requires outstanding achievements of its members. Accordingly, the beneficiary does not meet this criterion.

*(iii) Published material 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.*

The petitioner submitted copies of ten Russian newspaper articles that discuss the beneficiary's achievements as a fencer. The record is devoid of documentation to verify the national or international circulation of any of the newspapers that printed the submitted articles and the petitioner submits no other evidence that the newspapers are professional, major trade publications or other major media, publication in which would demonstrate the requisite national or international acclaim. In addition, the most recent articles date from 1995, nearly eight years before this petition was filed, and do not demonstrate the requisite sustained acclaim.

The record also contains no materials about the beneficiary published prior to filing which demonstrate that he sustained his former acclaim as a fencer through his subsequent work as a fencing coach. On appeal, the petitioner submits an article from the March 13, 2005 edition of the *New York Times* entitled "With Star Tutor, Fencer Eyes Olympics." Although this article discusses the beneficiary's achievements as both a fencing athlete and coach, we cannot consider the article because it was published after the petition was filed. The petitioner must establish the beneficiary's eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. See 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. On appeal, the petitioner also submits an excerpt from a book entitled "Fencing Is My Life" by Sergei Golubitsky. The excerpts briefly mention the beneficiary three times as a "star" fencer and competitor at international tournaments. The excerpts show that the book is about its author, Sergei Golubitsky, not the beneficiary. In addition, the petitioner submitted no publication information for this book or other evidence that it was published before the petition was filed. Accordingly, the beneficiary does not meet this criterion.

*(iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.*

The petitioner does not claim that the beneficiary is eligible under this criterion, but the record contains relevant evidence which merits brief discussion. The record indicates that the beneficiary was a fencing instructor of the National State All-Star League in Kazakhstan from 1997 to 1999 and that he has coached fencing students at various levels in the United States for the petitioner and another academy since 2000. On appeal, the petitioner submits evidence that the beneficiary coached the United States Junior National Team at the World Cup competition in France in November 2004. We cannot consider this evidence because it arose after the petition was filed. The petitioner must establish the beneficiary's eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. Moreover, while coaching inevitably entails judging the work of student athletes, duties or activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself, or in a substantial proportion of positions within that occupation. The petitioner submitted no evidence that the beneficiary has judged of the work of other fencers or fencing coaches in a manner significantly outside the general duties of his teaching and coaching positions and reflective of national or international acclaim. Accordingly, the beneficiary does not meet this criterion.

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

Participation in major national or international athletic competitions may be considered as comparable evidence of an athlete's or a coach's eligibility under this criterion pursuant to 8 C.F.R. § 204.5(h)(4). The record in this case shows that the beneficiary competed in several national and international fencing championships from 1987 to 1998. However, the record does not demonstrate that the beneficiary sustained his acclaim as a fencer after 1998 or as a fencing coach. On appeal, the petitioner submits evidence that the beneficiary's fencing students have participated in international junior fencing championships and national youth, junior and veteran competitions. We cannot consider this evidence because it arose after the petition was filed. The petitioner must establish the beneficiary's eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. Accordingly, the beneficiary does not meet this criterion.

*(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

The petitioner initially claimed the beneficiary was eligible under this criterion by virtue of his participation in the national athletic teams or delegations of Kazakhstan at various international tournaments, including the 1992 and 1996 Olympic Games. The record documents the beneficiary's inclusion on national fencing teams or athletic delegations, but the most recent competition in which he participated was in 1998, nearly five years prior to the filing of this petition. The record does not demonstrate that the beneficiary sustained his acclaim as a fencer for Kazakhstan after 1998 or through his subsequent work as a fencing coach.

On appeal, the petitioner submits a letter from Michael Massik, Executive Director of the United States Fencing Association (USFA), affirming that the beneficiary was a fencing coach of the United States Junior National Team at the World Cup competition in France in November 2004 and that he was appointed a member of the U.S. delegation to the Junior World Championships in Austria in March 2005. Mr. Massik explains that the USFA believes the beneficiary's coaching "at these events is critical to the success of the United States team." Yet we cannot consider this evidence because it arose after the petition was filed. The petitioner must establish the beneficiary's eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. The record contains another letter written by Mr. Massik and dated August 11, 2004. In that earlier letter, Mr. Massik expresses the USFA's opinion that the beneficiary "possesses extra-ordinary [sic] ability in the sport of fencing," yet Mr. Massik does not state that the beneficiary had any affiliation with USFA prior to the filing of this petition.

The record also does not demonstrate that the beneficiary meets this criterion through his work for the petitioner. The petitioner submitted a letter dated December 2, 2002 from Alan Getz, Managing Director. Mr. Getz describes the beneficiary as a "world-renowned foil fencer" who currently holds the position of head coach for the petitioner and whose duties include "teaching classes and private lessons to students of all ages and abilities. He also serves as coach during competitions in which our students and club members compete. Because of [his] extraordinary ability as a fencer and instructor, he is able to teach our students advanced techniques, strategies, and tactics, as well as train, guide and help them improve in their sport. He will therefore be instrumental in the continuing development and success of our fencing club." Even if this letter evidenced the beneficiary's critical role for the petitioner, the record contains no evidence that the Fencing Academy of Westchester has a distinguished reputation. In fact, Mr. Getz states that the Academy opened in July 2002. Although he describes the Academy as "a fencing school and club" that is a "state-of-the-art training facility"

for fencers at all levels “who compete at the national and international levels,” the record contains no independent evidence that the Academy earned a distinguished reputation in the four months after its opening and the date of Mr. Getz’s letter.

On appeal, the petitioner submits a second letter from Mr. Getz dated February 23, 2005. In this letter, Mr. Getz explains that “since [the beneficiary’s] affiliation with the Fencing Academy in 2002 . . . his students have earned in excess of 25 national medals for their excellence in the sport” and that “the success of the Fencing Academy is closely entwined with the coaching skills, reputation and extraordinary ability of [the beneficiary].” This letter may demonstrate that the beneficiary now holds a critical role for the Academy whose reputation has also been enhanced by the beneficiary’s recent achievements. However, we cannot consider this second letter because it discusses accomplishments made by the beneficiary after the petition was filed. Again, the petitioner must establish the beneficiary’s eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. We also note that the record does not document the 25 national medals allegedly won by the beneficiary’s students. Accordingly, the beneficiary does not meet this criterion.

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

The petitioner did not initially claim that the beneficiary met this criterion. The Form I-140 lists the beneficiary’s annual salary as \$48,000, an amount verified by Mr. Getz in his first letter. On appeal, counsel claims the beneficiary meets this criterion because Mr. Getz’s second letter states, “we have entered into a contract with him for 2005 which compensates him at the rate of 100% of the fees earned by him for . . . lessons . . . [and] his 2005 income should easily equal or exceed \$120,000.” Again, we cannot consider this evidence because it arose after the petition was filed. The petitioner must establish the beneficiary’s eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49.

On appeal, counsel submits a printout from the U.S. Department of Labor’s Bureau of Labor Statistics listing the 2003 annual wage estimate for “Coaches and Scouts” as \$28,760. This figure is not probative. The relevant comparison is the salary of fencing coaches employed by private academies, not all “Coaches and Scouts.” The record contains no primary evidence of the beneficiary’s income at the time of filing or any evidence that his remuneration at that time was significantly higher than other similarly employed fencing coaches or comparable to fencing coaches at the very top of their field. Accordingly, the beneficiary does not meet this criterion.

Finally, we address counsel’s claim that the prior approval of the beneficiary’s petition for O-1 nonimmigrant status and the subsequent extensions of that status mandate the approval of this petition because “the criteria for establishing that one qualifies as an alien of extraordinary ability for purposes of classification as an O-1 nonimmigrant and as an immigrant worker under INA 203(b)(1)(A) are identical.” Contrary to counsel’s assertion, the statutory and regulatory provisions for an O-1 nonimmigrant visa petition and an employment-based immigrant petition for an alien with extraordinary ability in athletics are not identical. For example, evidence of an alien’s prospective income may demonstrate his eligibility for O-1 nonimmigrant status, but an alien must show that he has already commanded a high salary pursuant to the corresponding regulatory criterion for classification as an immigrant with extraordinary ability. Compare 8 C.F.R. § 214.2(o)(3)(iii)(B)(8) with 8 C.F.R. § 204.5(h)(3)(ix). In addition, a petitioner may document an alien’s eligibility for O-1 nonimmigrant status through evidence of the alien’s employment in a “critical or essential capacity,” but the comparable provision for an extraordinary ability immigrant petition requires evidence of the alien’s “leading or critical role.” Compare 8 C.F.R. § 214.2(o)(3)(iii)(B)(7) with 8 C.F.R. § 204.5(h)(3)(viii). The beneficiary in this case

was previously granted O-1 nonimmigrant status under section 101(a)(O)(i) of the Act, 8 U.S.C. § 1101(a)(O)(i) and now seeks entry into the United States as an employment-based immigrant under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A). The grant of the former nonimmigrant status does not mandate the approval of this immigrant petition.

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his or her field. The evidence in this case indicates that the beneficiary won several national and international prizes as a foil fencer in the late 1980s through 1998 and participated in the 1992 and 1996 Olympic Games as a member of the Kazakhstan delegation. However, the record does not establish that the petitioner sustained his past acclaim as a fencer in the nearly five years following his last documented athletic award and preceding the filing of this petition. The record also fails to establish that, at the time of filing, the beneficiary had sustained his former acclaim as a fencing athlete through his subsequent work as a fencing coach. He is thus ineligible for classification as an alien with extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), and his 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. This decision is rendered without prejudice to the filing of a new petition with the requisite supporting documents under section 203(b) of the Act, 8 U.S.C. § 1153(b).

**ORDER:** The appeal is dismissed.