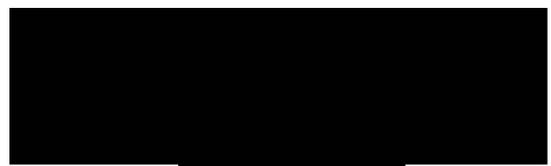


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U.S. Citizenship
and Immigration
Services

B2



File: [Redacted]
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Office: NEBRASKA SERVICE CENTER

Date FEB 12 2009

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)

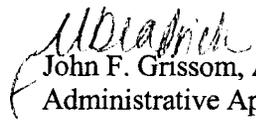
IN BEHALF OF PETITIONER:



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.

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, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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. Specifically, the director concluded that the petitioner meets only two of the regulatory criteria, of which an alien must meet at least three to be eligible.

On appeal, counsel’s sole assertion is that the petitioner meets the membership criterion set forth at 8 C.F.R. § 204.5(h)(3)(ii). For the reasons discussed below, counsel is not persuasive that evidence already found to be sufficient to directly meet the leading role criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii) must also be considered as comparable evidence to meet the membership criterion, a completely separate criterion.

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.

U.S. Citizenship and Immigration Services (USCIS) 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.

According to the petition, this petition seeks to classify the petitioner as an alien with extraordinary ability as a track and field coach. The petitioner was working as an assistant coach for the University of Alabama at the time. 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 such an award, the regulation 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 regulation at 8 C.F.R. § 204.5(h)(4) provides that, where the regulatory criteria are not readily applicable, a petitioner may submit comparable evidence to meet those criteria.

The record contains evidence that the petitioner coached Olympic athletes for the Bahamas who won Olympic medals under his tutelage. While the record contains several assertions that the petitioner served as head coach for at least some Olympic teams, the only official Bahamas team roster in the record is for the 2000 Olympic Team. The roster lists the petitioner only as an assistant coach. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As the record does not resolve the inconsistency regarding whether the petitioner was a head coach or assistant coach for the 2000 team, the assertions that he served as a head coach for other national teams have less credibility.

As the criterion set forth at 8 C.F.R. § 204.5(h)(3)(i), the alien's receipt of lesser nationally or internationally recognized prizes or awards, does not readily apply to coaches, the director accepted that the Olympic medals won by the petitioner's athletes constitute sufficient comparable evidence to meet this criterion. The director further found that the petitioner had performed in a leading or critical role for organizations or establishments that have a distinguished reputation pursuant to 8 C.F.R. § 204.5(h)(3)(viii).

On appeal, counsel cites a non-precedent decision by this office finding that serving as an Olympic coach could serve as comparable evidence 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 pursuant to 8 C.F.R. § 204.5(h)(3)(ii). First, while the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, 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'r. 1988). It would be absurd to suggest that USCIS 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).

The non-precedent decision cited by counsel did not find that serving as an Olympic coach could meet both the leading or critical role criterion and the membership criterion. In this matter, the director acknowledged that serving as an Olympic coach, even at the assistant coach level, carries significant evidentiary weight. The director concluded that the evidence directly relates to the leading role criterion and that the petitioner thus meets that criterion. Upon reflection, while an *athlete's* membership on an Olympic team may warrant consideration under the membership criterion, we concur with the director that the most appropriate criterion for an Olympic *coach* (who is appointed for the team rather than selected as a member of the team) is the leading or critical role criterion. Where evidence directly relates to one of the regulatory criteria, USCIS is not obligated to consider that same evidence as comparable evidence to meet a second criterion. Significantly, section 203(b)(1)(A)(i) of the Act requires the submission of "extensive evidence." The regulation at 8 C.F.R. § 204.5(h)(3) requires that an alien meet at least three of the ten regulatory criteria. To consider the petitioner's role as a coach not only as a leading or critical role but also as comparable evidence of a membership would undermine the statutory and regulatory requirements for extensive evidence and that an alien meet at least three separate and independent criteria.

Finally, counsel also notes on appeal that the petitioner is the beneficiary of a non-immigrant visa in a similar classification. While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. 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 USCIS 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 petitioner'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. at 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d at 1090.

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).

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a coach 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 indicates that the petitioner shows talent as an assistant coach, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established 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.