

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B2

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUL 29 2009
LIN 07 174 51803

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:

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

The petitioner seeks classification 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 the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. More specifically, the director found that the petitioner had failed to demonstrate receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

On appeal, counsel for the petitioner argues that the petitioner meets the statutory requirements and at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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 to the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and the 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 has 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 she has sustained national or international acclaim at the very top level.

This petition, filed on June 19, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a professional baseball player. 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, internationally 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. A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three of the criteria outlined in 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. 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).

The AAO notes that the petitioner is currently in the United States as a P-1 nonimmigrant, a visa classification that requires the alien to perform as an athlete, either individually or as part of a team, at an internationally recognized level of performance, and that the alien seeks to enter the United States "temporarily and solely for the purpose of performing as such an athlete." See section 214(c)(4)(A) of the Act, 8 U.S.C. § 1184(c)(4)(A).

While USCIS approved at least one P-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 standard. It must be noted that many Form I-140 immigrant petitions are denied after USCIS 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 USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The petitioner has submitted evidence that, he claims, meets the following criteria under 8 C.F.R. § 204.5(h)(3).¹

¹ The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

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

The petitioner submitted documentation indicating that he had received the "Roloids Relief Man Award 1998 Team Champion." The petitioner submitted no documentation to establish that the award is a nationally or internationally recognized award for excellence in his field. On appeal, counsel asserts that the award "is only available to honor the top reliever pitchers" and "is based on a system of points where different amounts are allocated to each save and/or win and the highest scoring relief pitchers are honored each year." Although counsel referenced the website for the award, he did not provide any corroborative documentation from the website. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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 petitioner again submitted no documentation to establish that the Roloids Relief Man Award is nationally or internationally recognized as an award for excellence in his field.

Additionally, section 203(b)(1)(A)(i) of the Act requires the alien to demonstrate sustained national or international acclaim. A single award, received nine years prior to the date the petition was filed, is not consistent with sustained acclaim.

Counsel also asserts on appeal that the petitioner "is recognized as one of the most prestigious members of the Mexican League of the Pacific" and that his team "in this league went on to win two titles in the Series of the Caribbean competitions in 1996 and 2002, in addition to nine championships within the league." Counsel does not explain, however, how these titles and championships constitute an award to the petitioner.

The petitioner has failed to establish that he meets this criterion.

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.

To demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or work experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

The petitioner claims to meet this requirement based on his profession as a major league baseball player. According to counsel, "Major League Baseball teams require outstanding achievements of their members, as only a very small percentage of baseball players ever make it to the Major Leagues." While it may be true that only a very small percentage of baseball players play in the major league, the petitioner submitted no evidence that in order to become a major leaguer, a player must have an outstanding achievement. Baseball scouts recruit players based on "talent" and potential.² Recruiting a good or talented player is not the equivalent of requiring outstanding achievement as a condition of employment or "membership" in the major leagues.

The petitioner also claims to meet this criterion based on his membership in the Major League Baseball Players Association (MLBPA). In his unsigned April 29, 2008 letter accompanying the petitioner's response to the RFE, counsel stated that membership in the MLBPA is limited "only to those players who play for an MLB [Major League Baseball] team." Counsel further asserts, "A high percentage of professional baseball players never make the major leagues and by virtue of earning a spot on a major league team, [the petitioner] has demonstrated outstanding achievements in the field of professional baseball." Nothing in the record supports counsel's assertion regarding membership in the MLBPA. Counsel's assertions are not evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Counsel renews his argument on appeal, citing to the webpage for the MLBPA. However, counsel did not include documentary evidence from the MLBPA website to corroborate his statements. Further, counsel acknowledges that the MLBPA is the collective bargaining unit for major league baseball players, but argues that membership is only "open to the best baseball players." Nonetheless, the petitioner submitted no documentary evidence to establish that membership in the MLBPA is limited to those who have achieved outstanding achievement as judged by recognized national or international experts in their disciplines or fields. USCIS has long held that athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.

The petitioner has failed to establish that he meets this criterion.

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.

² See, e.g., McAdam, Sean, "Scouts Must Dig Deeper Than Tools," Special to ESPN SportsZone, www.hsbaseballweb.com/pro-scouting/scouts_dig_deep.htm; "Major League Baseball Scouting Bureau Questions & Answers," www.hsbaseballweb.com/pro-scouting/mlsb_interview.htm, both accessed on July 20, 2009 and copies of which have been incorporated into the record.

In order to meet this criterion, published material must be primarily about the petitioner and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as *The New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

The petitioner submitted a copy of a newspaper article about him that appeared in the *Post-Gazette*. The article is not dated and the petitioner submitted no documentation to establish that the *Post-Gazette* is a professional or major trade publication or is other major media. On appeal, counsel asserts that the article appeared in the August 31, 1997 edition of the *Pittsburgh Post-Gazette*. However, the petitioner's evidence does not corroborate counsel's statement. Counsel also references, in a footnote, a website for the newspaper that apparently describes the paper's circulation. However, no documentation from this website was included in the record. Counsel's unsupported statements are not evidence. *See id.*

The petitioner submitted a copy of a November 19, 1998 article from the *post-gazette.com* website reporting that he had been traded. The petitioner also submitted a copy of an article about him from the December 13, 2005 edition of the *St. Louis Post-Dispatch*, and a copy of a February 16, 2007 edition of the newspaper that was reprinted on *STLtoday.com* and accessed by the petitioner on February 27, 2007. The petitioner submitted no documentation to establish that *post-gazette.com*, the *St. Louis Post-Dispatch*, or *STLtoday.com*, is a professional or major trade publication or is other major media.

The petitioner submitted a copy of an August 25, 1998 edition of the *St. Louis Post-Dispatch* reporting that he was the pitcher at the time Mark McGwire become only the third MLB player to hit 53 home runs. This article is about Mark McGwire and not the petitioner. Copies of other articles from *post-gazette.com*, the *Los Angeles Times*, *The New York Times*, and *The San Diego Union-Tribune*, reprinted from the website of ProQuest, report on the results of games in which the petitioner played. Although he is mentioned in the articles, the articles are not primarily about the petitioner.

The petitioner also submitted copies of articles retrieved from the *esmas.com* and *worldbaseballclassic.com* websites. However, all of these documents are in Spanish and are not accompanied by English translations. The regulation at 8 C.F.R. § 103.2(b)(3) requires that documents submitted in a foreign language "shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Another article in Spanish does not identify the source, the date or an author of the work. Therefore, it also lacks probative value.

Other documentation submitted included information taken from the website of the Cleveland Indians and the Oakland Athletics, teams for which the petitioner played, and statistics about the petitioner taken from the websites of *sportplanet.com* and *baseball-almanac.com*, and his career highlights taken from the MLB website. These documents do not include the date or author of the material as required by the regulation. Further, in today's world, many news articles and printed materials, regardless of size and distribution, are posted on the Internet. To ignore this reality would be to render the "major media" requirement meaningless. We are not persuaded that international accessibility via the Internet by itself is a realistic indicator of whether a given publication is "major media." The petitioner must still provide evidence, such as a widespread distribution, readership, or overall interest in the publication in order to demonstrate that the publication is a professional or major trade publication or major media in order for us to credit this material.

The petitioner submitted documentation indicating that he has appeared on baseball cards. On appeal, counsel asserts that this is evidence that the petitioner meets this criterion and is further evidence of his achievements as an MLB player. However, baseball cards do not contain a title, date or author and are therefore not published material as contemplated by the regulation.

The petitioner has failed to establish that he meets this criterion.

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

To meet this criterion, the petitioner must show that he performed in a leading or critical role for organizations or establishments and that the organizations or establishments have a distinguished reputation.

The evidence establishes that the petitioner was a member of the 2002 Oakland Athletics when it had a 20-game winning streak and won the American League West Division Championship, and was a member of the St. Louis Cardinals when the team won the 2006 World Series. The evidence sufficiently establishes that the petitioner has played for organizations with distinguished reputations.

In his April 29, 2008 letter accompanying the petitioner's response to the RFE, counsel stated:

[The petitioner] served for five MLB teams from 1997 – 2006. As a relief pitcher, [he] participated in an average of 68 of his team's 162 games each season (i.e. 42% of the time). As a professional pitcher, participation in 42% of a team's games amounts to performance of a "critical role" for that team. [The petitioner] performed this critical role for ten seasons. [His] salary history evidences how critical his role was to each of the teams he played for.

We note first that it should be emphasized that the regulatory criteria are separate and distinct from one another. Because a separate criterion exists for remuneration, USCIS does not view

these criteria as being interchangeable. If evidence sufficient to meet one criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three criteria would be meaningless. The petitioner's salary and other compensation are the subject of the criterion discussed immediately below.

The petitioner submitted a copy of a page from the website of *baseball-reference.com*. A review of that website reveals that the owner of the site uses 68 as the average number of appearances for all relief pitchers. The site indicates that during his 10-year history, the petitioner played in 557 games, an average of approximately 34.4% instead of the 42% alleged by counsel. As noted by the director, the document indicates that the petitioner pitched in 439.7 innings, approximately 3% of the innings that would have been played during his 10-year career.

On appeal, counsel asserts that as a "left-handed specialist, [the petitioner] will not have the opportunity to pitch as much as a regular pitcher, therefore, his statistics must be compared in light of the fewer opportunities to pitch." Nonetheless, the petitioner provided no evidence that his pitching as a "left-handed specialist" was in the nature of a critical or leading role for any of the teams on which he played.

The petitioner has not established that he meets this criterion.

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 submitted documentation, including copies of his contracts, federal tax returns, and a page from the *USA Today* website indicating that his salary, without bonuses, ranged, according to his contracts, from \$150,000 in 1997 to \$1,900,000 in 2005 and back to \$1,600,000 in 2007.

The petitioner submitted information from the *USA Today* website listing the salaries of his teammates during 2004, 2005 and 2006. However, while this data reflects the petitioner's salary as it compares to his teammates, it is not evidence of his salary relative to all others in his field. Other documentation from the *USA Today* website shows the median salary of major league baseball teams for 2006 and 2007. This documentation only reflects the median salary of major league players in each team. It does not reflect the salaries of those who were in the upper echelon of salaried players. Therefore, it cannot be determined from the evidence submitted that the petitioner's compensation was significantly high compared to those players who earned more than the median salary.

The petitioner also submitted documentation regarding 2008 salaries of major league players. However, as these salaries were paid in 2008, they are not evidence of this criterion. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1) and (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petition was filed on June

19, 2007. Therefore, salaries paid in 2008 cannot establish that the petitioner was compensated at a significantly high level relative to others in his field prior to the filing of the petition.

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 his field of endeavor. Review of the record, however, does not establish that the petitioner has distinguished himself 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. 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.