

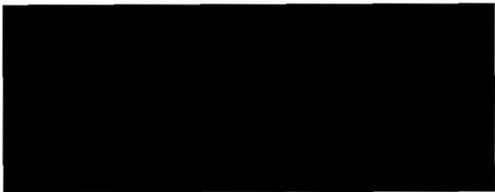
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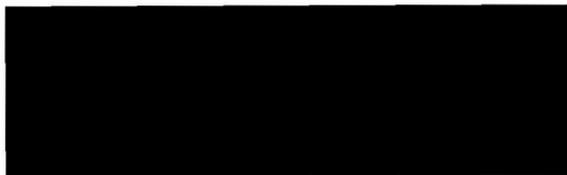
D8



FILE: EAC 08 135 50096 Office: VERMONT SERVICE CENTER Date:

NOV 25 2009

IN RE: Petitioner:  
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:



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).

Jerry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner subsequently filed a late appeal. The director treated the untimely appeal as a motion and affirmed his decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the nonimmigrant 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 operates an ice skating rink and seeks to employ the beneficiary in the position of hockey director for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has achieved sustained national or international acclaim as an ice hockey player or coach with extraordinary ability in athletics. The director observed that the evidence submitted does not demonstrate that the beneficiary has risen to the very top of her field, as required by the regulatory definition of "extraordinary ability."

On appeal, counsel for the petitioner requests that the AAO "reconsider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability."

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 fields of science, education, business or athletics.* 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 either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence;
  - (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 regulation at 8 C.F.R. § 214.2(o)(2)(ii) requires the petitioner to submit copies of any written contracts between the petitioner and the beneficiary; an explanation of the nature of the events or activities, along with an itinerary; and a consultation with an appropriate peer group or labor union.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(iii) provides:

The evidence submitted with an O petition shall conform to the following:

- (A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.

- (B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

It is noted that the decision of U.S. Citizenship and Immigration Services (USCIS) in a given case is dependent upon the quality of the evidence submitted by the petitioner, not just the quantity of the evidence. The mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien satisfies the criteria and is eligible for O-1 classification. The evidence submitted must establish that the beneficiary qualifies as an alien of extraordinary ability. *See* 59 Fed. Reg. 41818-01, 41820. Here, the petitioner indicates that the beneficiary qualifies as an alien of extraordinary ability in athletics, but does not refer to the evidentiary criteria or how the beneficiary meets the evidentiary criteria.

The record consists of a petition with supporting documentation, a request for additional evidence (RFE) and the petitioner's reply, the director's decision, a late appeal and additional evidence in support of the appeal, the director's decision treating the late appeal as a motion, and the instant appeal. The beneficiary in this case is a native and citizen of the Netherlands who last entered the United States in E-2 status. According to the beneficiary's resume, she played hockey on the Dutch national team, as well as on the Geleen, Netherlands boys and ladies teams, between 1994 and 1996, an experience which she has listed under "hobbies." In a letter submitted in support of the petition, the petitioner described the beneficiary's qualifications for the requested visa classification as follows:

[The beneficiary] is clearly an alien of extraordinary abilities in athletics. She has reached a high level of achievement, recognition and commercial success. [The beneficiary] qualifies for an O-1 Visa by virtue of the following criteria: 1) she has been a volunteering member of [the petitioning organization] of Greenville, North Carolina hockey coaching team for the past year and has been a huge asset to our hockey program; 2) she has participated in a hockey team from the Netherlands, and competed around the world in competitions with her team, "The Smoke Eaters"; 3) she has received significant recognition for her achievements as being part of "The Smoke Eaters" hockey team and as an exceptional coach for [the petitioner] and our hockey program here in North Carolina; 4) she has a record of her successes and travels as a player while living in the Netherlands and as a coach for [the petitioner]; 5) she has volunteered her position at this facility, both successfully and professionally.

The petitioner seeks to classify the beneficiary as an alien with extraordinary ability in athletics so that she may serve in the position of hockey director, which will include coaching, planning and implementing class schedules, training other coaches, referees and assistants, marketing, and coordinating and scheduling leagues. The petitioner indicates that the beneficiary will devote approximately 20 hours per week "working directly with hockey programs," and 25 hours per week "marketing the hockey program and other skating programs."

The director denied the petition on August 4, 2008, concluding that the petitioner failed to establish that the beneficiary has reached the very top of her sport or that she has won any major prizes or recognition in the field of competitive ice hockey or hockey coaching. The director noted that the beneficiary's experience as a competitive athlete in the sport occurred more than ten years prior to the filing of the petition, while the beneficiary's experience as a hockey coach does not rise to the level of achievement specified in the statute and regulations. The director also noted that the petitioner indicated that the beneficiary would spend more than half of her time performing marketing and administrative duties, and questioned whether an O-1 caliber athlete or coach would be required to perform such duties.

The petitioner filed a late appeal on September 11, 2008, in which counsel argued that the director placed undue emphasis on the beneficiary's proposed marketing duties. Counsel stated that such duties would be a "passive function and a direct consequence of an athlete's career and fame."

In a decision dated December 30, 2008, the petitioner affirmed the denial of the petition, noting that the petition was denied because the beneficiary did not possess the required sustained international acclaim and recognition for achievements in the field, not because she would perform marketing duties in the proposed position.

Nevertheless, counsel has made the same argument in support of the instant appeal, and further contends that a review of the totality of the evidence will establish "an overall pattern of sustained acclaim and extraordinary ability."

Upon review and for the reasons discussed herein, the petitioner has not established that the beneficiary is fully qualified as an alien with extraordinary ability in athletics.

As a preliminary matter, the AAO notes that the petitioner has submitted evidence related to the beneficiary's achievements as both a competitive ice hockey player, and as a hockey coach.

While a competitive hockey player and a hockey coach share knowledge of the sport of ice hockey, the two rely on different sets of basic skills. Thus, competitive hockey and hockey coaching/instruction are not the same area of expertise. This interpretation has been upheld in Federal Court. In *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002), the court stated:

It is reasonable to interpret continuing to work in one's "area of extraordinary ability" as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee's extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

*Id.* at 918.

The statute requires that the beneficiary seek entry into the United States "to continue work in the area of extraordinary ability." Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i) (2007).

U.S. Citizenship and Immigration Services (USCIS) will not assume that an alien with extraordinary ability as an athlete would necessarily have extraordinary ability as a coach or instructor of his or her sport. However, given the nexus between athletic competition and coaching or sports instruction, 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 such that it can be concluded that coaching is within the beneficiary's area of expertise. Specifically, in such a case, USCIS will consider the level at which the alien acts as a coach. An instructor who has an established successful history of instructing players who compete regularly at the national level has a credible claim; an instructor of novices does not. Accordingly, we will address the evidence regarding the beneficiary's accomplishments as both a hockey player and coach.

If the petitioner establishes through the submission of documentary evidence that the beneficiary has received a major, internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The petitioner does not claim that the beneficiary has received a major, internationally recognized award comparable to the Nobel prize, or that she has trained students who have received major, internationally recognized awards or prizes.

As there is no evidence that the beneficiary has received a major, internationally recognized award, the petitioner must establish the beneficiary's eligibility under at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

In order to meet criterion number one, the petitioner must submit documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 214.2(o)(3)(iii)(B)(1).

The beneficiary's resume does not indicate that she has received any nationally or internationally recognized awards, or coached any students competing at the national level. Further, there is no documentary evidence of the beneficiary's receipt of such awards. Evidence related to the beneficiary's experience as a competitive hockey player includes: (1) a letter from the beneficiary's father and former coach (from 1995 to 1996), who indicates that she was chosen to play for the Dutch national ladies team, that she traveled to Canada to train for the European Championship, and that such experience made her "a very good ice hockey player; (2) a letter from Inge Hermans, the beneficiary's teammate on the Geleen, Netherlands ladies hockey team and National Girls Team, who states that the beneficiary "showed average hockey player skills" and a great passion for the sport; and (3) a certificate indicating that the beneficiary completed the "Basic Abilities and Hockey Technique" course at the Al Raymond Ice Hockey School in the Netherlands in 1995. The record also contains various unlabeled photographs of girls' or women's hockey teams, and other evidence presumably meant to evidence the beneficiary's participation on the Dutch national team, which appears to have competed in the European Championship in 1996. While the beneficiary's selection to the Dutch national team as a teenager is impressive, there is no evidence that she received a national or internationally recognized award while a member of the team, and there is insufficient evidence to support a finding that appointment to the team alone would be equivalent to receipt of a national award.

Furthermore, there is no evidence that the beneficiary played ice hockey competitively after 1996, and thus, the petitioner has not demonstrated that she has any sustained national or international acclaim as an athlete.

The petitioner has submitted several testimonial letters attesting to the beneficiary's talents as a coach and her coaching experience; however, such letters are devoid of any indication that the beneficiary has received nationally or internationally recognized awards for coaching or that she has coached students who have received such awards, or who compete at the national level. Rather, the evidence submitted indicates that the beneficiary completed her USA Hockey coaching certification relatively recently (August 2007 and thereafter) and that she has served as a volunteer coach for the petitioner and several other youth hockey programs in and around Greenville, North Carolina. The beneficiary appears to be a valuable asset to the local hockey community and well-liked and appreciated by her students' parents and her colleagues; however, she does not meet this first criterion.

In order to establish that the beneficiary meets the second criterion, at 8 C.F.R. § 214.2(o)(3)(iii)(B)(2), the petitioner must document 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.

The petitioner submitted evidence that the beneficiary has enrolled in USA Hockey's coaching education program and, as of the date of filing, she had completed the Level 1, Level 2 and Level 3 clinics. It appears that she completed the Level 4 coaching qualification subsequent to the filing of the petition. According to a letter from [REDACTED] the beneficiary's colleague and a hockey coach holding a Level 4 qualification, a Level 4 certification allows the beneficiary to coach up to "Junior level." There is no other documentation submitted with respect to the USA Hockey coaching certification program, and therefore, there is insufficient evidence to establish that possession of such certification constitutes membership in an association that requires outstanding achievements of its members, as judged by recognized national or international disciplines. Based on the limited evidence, which includes copies of USA Hockey coaching clinic registration forms completed by the beneficiary, it appears that the first three coaching levels require attendance at a one-day clinic. It appears that registration is available to anyone who pays the registration fee and has completed the prerequisite level. Such certifications would appear to be common among hockey coaches in the United States. Accordingly, the petitioner has not established that the beneficiary meets this criterion as a hockey coach.

As noted above, the beneficiary's membership in a national team in the Netherlands is significant, but occurred more than ten years prior to the filing of the petition. To meet the evidentiary criteria, the petitioner's evidence must demonstrate sustained national or international acclaim. The petitioner has not established that the beneficiary meets the second criterion.

To meet the third criterion, the petitioner must submit 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. 8 C.F.R. § 214.2(o)(3)(iii)(B)(3).

The petitioner submitted a translated copy of a short article that appears to have been published in a Dutch newspaper, but there is no evidence of the name of the publication or the publication date. The article notes that the "Eaters" ladies ice hockey team returned from an international tournament after achieving a third place finish in competition against teams from Belgium, the Czech Republic, France and Great Britain. The article does not mention the beneficiary.

The petitioner also submitted an article titled "Fitness Can Be Fun" published in the June 2007 issue of *Her Magazine* which appears to be a free local magazine distributed in an around Greenville, North Carolina. The article features the beneficiary among "Pitt County women who exercise and have fun at the same time," and includes a photograph of the beneficiary dressed in ice hockey gear. The article also contains quotes from the beneficiary, who notes the fitness benefits of ice hockey and mentions that she played on the national girls' team in the Netherlands but had stopped playing for ten years prior to her arrival in the United States. Upon review, these articles cannot be considered "major media" about the beneficiary or evidence of her sustained national or international acclaim and recognition in the sport of ice hockey at the national or international level.

The petitioner did not provide any published materials referencing the beneficiary's work as an ice hockey coach or instructor, or any published materials relating to ice hockey players who have been coached by the beneficiary. Accordingly, the petitioner has not established that the beneficiary meets this criterion.

To meet the fourth criterion, the petitioner must submit evidence of the beneficiary'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. 8 C.F.R. § 214.2(o)(3)(iii)(B)(4). The petitioner has not submitted evidence to establish that the beneficiary meets this criterion. The petitioner's evidence includes a letter from [REDACTED] of the Carolina Amateur Hockey Association, Inc., who stated in a letter dated August 15, 2008 that the beneficiary "has received Referee training through USA Hockey and hopes to receive refereeing credentials in the fall of this year." There is no evidence that the beneficiary was a credentialed referee or had any significant experience as a referee in the sport at the time the petition was filed in April 2008.

The fifth criterion requires the petitioner to submit evidence of the beneficiary's original scientific, scholarly, or business-related contributions of major significance in the field. 8 C.F.R. § 214.2(o)(3)(iii)(B)(5)

As noted above, the petitioner has submitted several letters from persons who are familiar with the beneficiary's work and accomplishments as a competitive ice hockey player and ice hockey coach. These individuals all praise the beneficiary's accomplishments and skills as a hockey player and abilities as a coach, but none of the testimonial letters indicate that the beneficiary has made original contributions of major significance to her field.

Furthermore, when considering a petitioner's claim that the beneficiary meets this criterion, USCIS cannot ignore the wording of the regulation. Whereas other regulatory passages refer to "extraordinary ability in the fields of science, education, business, or athletics," 8 C.F.R. § 214.2(o)(3)(iii)(B)(5) refers to "the alien's original scientific, scholarly, or business-related contributions." The omission of "athletic contributions" is a realistic reflection of the nature of athletic competition. Winning a competition is not an "original contribution;" it is expected that any given athletic event will have a winning athlete or team that outscores or outperforms rival competitors. Similarly, possessing a high level of the skills needed to succeed in a

particular sport is generally a matter of degree, rather than an "original contribution" to the sport. Therefore, attestations regarding the beneficiary's talent, skills and success will not satisfy 8 C.F.R. § 214.2(o)(3)(iii)(B)(5) as evidence of the beneficiary's original contributions. Competitive success is already taken into account by 8 C.F.R. § 214.2(o)(3)(iii)(B)(1), pertaining to prizes and awards, and 8 C.F.R. § 214.2(o)(3)(iii)(B)(3) instructs USCIS to take into account any major media attention that an athlete may earn by standing out from others in a particular sport.

The AAO would also consider any recognition the beneficiary may have received from experts in her field for an "original" contribution to the sport of ice hockey as an athlete or instructor. However, none of the persons who provided recommendation letters identified the beneficiary's original contribution. For example, ██████████ President of the Carolina Amateur Hockey Association, states that the beneficiary "has provided the knowledge and skills that these children, young adults and adults need to succeed in the sport of hockey" and has "impacted their lives." ██████████ director of hockey operations for East Carolina University states that the beneficiary's coaching skills are "invaluable" and that she has "made a lasting impression on both these children and their families with regards to her input in their hockey development." ██████████ a parent of a child coached by the beneficiary, states that the beneficiary's "experience as an international women's hockey player and her skill as a teacher of the sport are unique," but she does not identify what makes the beneficiary's contribution to the sport "unique," nor is she an expert in the field. Another parent, ██████████ describes the beneficiary as "a very talented coach," with "exceptional knowledge of hockey," and a "sense of how to understand and relate to each of the children she coaches." While all of the submitted letters are highly complimentary and suggest that the beneficiary is a capable and well-liked children's hockey coach, the petitioner must establish that the beneficiary has received recognition from experts for an original contribution to the sport. The petitioner has not established that the beneficiary meets this criterion.

Similarly, the petitioner has not attempted to establish that the beneficiary has authored scholarly articles in the field in professional or major trade publications or other major media, or otherwise claimed that the beneficiary meets the sixth criterion set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B)(6).

In order to meet the seventh criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7), the petitioner must establish that the beneficiary has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation. As noted above, the beneficiary's only documented coaching experience has been on a volunteer basis with the petitioner and other youth hockey programs in the Greenville, North Carolina area. The record indicates that she teaches young children at entry level, and coaches "mite, squirt and bantam-aged kids at varying competitive levels." The petitioner has not established that any of the youth hockey programs with which the beneficiary is involved has a distinguished reputation in the sport, or that her role as a volunteer coach can be considered to be employment in a critical or essential capacity.

The beneficiary's brief membership on the Dutch national ice hockey team in 1996 is notable, however, the petitioner has not established that she played a critical or essential role on that team. Furthermore, the petitioner's evidence must establish that the beneficiary's has achieved sustained national or international acclaim and recognition for achievements in the field. As addressed above, the beneficiary's brief period of top-level competitive hockey experience was followed by a ten-year break from the sport. The dearth of recent

documentary evidence indicates that whatever acclaim the beneficiary may have earned in the past as a competitive hockey player has not been sustained.

The eighth and final criterion requires the petitioner to establish that the beneficiary has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence. 8 C.F.R. § 214.2(o)(3)(iii)(B)(8).

The record does not document the beneficiary's previous or current salary or remuneration, nor has the petitioner submitted an employment contract agreement for the offered position. The petitioner stated at the time of filing that the beneficiary would receive an annual salary of \$30,000 plus "travel and training costs." Based on the evidence in the record, it cannot be concluded that the beneficiary's salary and benefits package as director of hockey would be substantially higher than that paid to others working in similar roles for ice rinks with hockey programs in the petitioner's geographical region, or other similarly-employed coaches working for the petitioner's facilities. The petitioner has not submitted any evidence that would allow the AAO to determine whether the beneficiary's salary is comparatively high, such as statistical comparisons of salaries in the field of endeavor. Therefore, the petitioner has not established that the beneficiary meets this criterion.

Overall, the record does not establish that the beneficiary has extraordinary ability in athletics, which has been demonstrated by sustained national or international acclaim and that her achievements have been recognized in the field through extensive documentation, as required by section 101(a)(15)(O) of the Act. The petitioner submitted no evidence that the beneficiary has received a major, internationally recognized award and the documentation submitted does not meet three of the eight other evidentiary criteria specified in the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B). Consequently, the beneficiary is not eligible for nonimmigrant classification under section 101(a)(15)(O) of the Act.

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 her field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary's achievements in ice hockey have not risen to this level. Accordingly, the appeal will be dismissed.

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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.