U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 17 2009

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IN RE: Petitioner:
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.

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).

Mari Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be withdrawn and the petition will be denied on its merits.

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.

Prior counsel filed the initial appeal on March 14, 2007, asserting that she would file a brief or additional evidence within 30 days. On August 3, 2007, counsel advised that she was now representing the petitioner and requested a copy of the record and additional time to submit a brief upon receipt of the record. On January 15, 2008, the AAO summarily dismissed the appeal, concluding that there was not an "open-ended or indefinite period in which to supplement an appeal."

On February 15, 2008, counsel filed a motion supported by documentation of a grievance against prior counsel. Counsel supports the motion with a brief addressing the merits of the petition and additional evidence. While we continue to find that a request for a copy of the record does not stay the period during which a petitioner or counsel can supplement the appeal, we find that counsel's request for some additional time as the new attorney was generally reasonable. We reiterate, however, that there is no regulation that allows the petitioner an open-ended or indefinite period in which to supplement an appeal and there is no statutory or regulatory provision that allows for an extension of time to file an appellate brief while a Freedom of Information Act (FOIA), 5 U.S.C. § 552, request is pending.

While counsel asserts that the petition was denied based on information to which the petitioner did not have access, the petition was actually denied for lack of sufficient evidence of eligibility. The director did not rely on derogatory evidence that the petitioner himself had not provided. The full record of proceeding is now before the AAO and contains only those documents submitted by the petitioner and the director's notices, which counsel has seen because she resubmits them on motion. Counsel has now supplemented the record with a brief and new evidence, requesting that the matter be remanded to the director for consideration of the new evidence.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The new evidence submitted was not specifically requested previously and, thus, may be considered on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). As the AAO is competent to consider the new evidence on appeal, there is no need to remand the matter to the director. For the reasons discussed

below, however, the new evidence does not carry the evidentiary weight ascribed by counsel and cannot overcome the director's concerns.

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.

The petition, as initially completed, seeks to classify the petitioner as an alien with extraordinary ability as a karate instructor. In response to the director's notice of intent to deny the petition, prior counsel indicated that the petitioner would also compete and submitted an offer to sponsor the petitioner as a competitor. 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. Throughout the proceedings, prior counsel and counsel have asserted that the petitioner meets the following criteria.[1]

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

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

The petitioner initially submitted certificates for participation and awards from various karate competitions. The petitioner also submitted a certificate from the President of the [redacted] listing several awards not documented at the time. The director's notice of intent to deny the petition noted the lack of evidence regarding qualifications to compete in these competitions. In response, the petitioner submitted a letter from the General Secretary of the [redacted]. Mr. [redacted] lists several awards and championships the petitioner won as a member of the Romanian national Shotokan Karate Do of United Nations (SKDUN) team. The petitioner also submitted the Constitution of SKDUN and the association's General Contest Rules. These documents do not indicate the qualifications for SKDUN competitors. The record contains Romanian newspaper articles covering the competitions. In addition, an article in *Traditional Karate* affirms that the attendance at a SKDUN event by 17 countries demonstrates the prestige of the competition.

The director concluded that the petitioner had not demonstrated the significance of the competitions. On motion, counsel asserts that the petitioner "has won every major international competition in Shotokan karate, beginning in 1999." The petitioner submits a letter from [redacted] for the World Traditional Karate Organization (WTKO). While [redacted] asserts that the petitioner has risen to the top of Shotokan Karate, he does not specify how many international Shotokan Karate affiliations exist and whether all international competitions in Shotokan are equally significant regardless of affiliation or, if not, how SKDUN compares with other Shotokan affiliations.

The petitioner also submits several more awards at SKDUN, WTKO and Federația Română De Arte Marțiale sponsored events. The photographs reveal that the competitions were held in gymnasiums rather than stadiums with makeshift award platforms. (One photograph shows a collection of soda cans, plastic bags and other personal items cluttered behind the award platform.)

While the record would have been bolstered by evidence of how SKDUN events compare with events hosted by other Shotokan karate events, we acknowledge the large number of awards at international events that have garnered at least some media coverage. Thus, we are satisfied that the petitioner 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.

In response to the director's notice of intent to deny the petition, prior counsel asserted that the petitioner meets this criterion through his "membership" on a SKDUN national team that permits

competition at invitational events. While the petitioner submitted SKDUN competition rules, they do not address whether the competitions are open or invitational. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

The director concluded that the record did not support the conclusion that the petitioner was a member of an organization or association that requires outstanding achievements of its members.

On motion, counsel no longer asserts that the petitioner's national team membership serves to meet this criterion. Rather, she asserts that the petitioner's Romanian title as "Merited Master of Sport" serves to meet this criterion. The record already contained a January 21, 2002 certificate issued to the petitioner by the Romanian Ministry of Education and Sports certifying the petitioner's title as a Merited Master in Sport. On motion, the petitioner submits a letter from [redacted] gymnast who is also a Merited Master of Sport. [redacted] asserts that the title is reserved for champions of official competitions. In addition, affirms that the award is based on "outstanding lifetime achievements."

The record does not contain the official rules for designating an athlete as a Merited Master of Sport. While we do not question the sincerity of the petitioner's references, it remains that the official rules of designation constitute the primary evidence of "membership" eligibility requirements. Without evidence that such rules and secondary evidence of those rules are both unavailable, we cannot accept unsupported assertions. 8 C.F.R. § 103.2(b)(2). More specifically, 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'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). Without official evidence of the requirements for being designated a Merited Master in Sport, the petitioner cannot establish that he meets this criterion. Moreover, a title is not necessarily a "membership." Thus, the petitioner must establish that this title is sufficiently comparable to a membership such that it is equally indicative of national or international acclaim. 8 C.F.R. § 204.5(h)(4).

Finally, we are not persuaded that merely competing at the international level serves to meet this criterion. Thus, the petitioner's "membership" on the Romanian national team cannot be considered as evidence to meet this criterion.

In light of the above, the petitioner has not established 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.

The petitioner initially submitted foreign language newspaper articles, some with translations. In response to the director's notice of intent to deny, the petitioner resubmitted the articles with certified translations. The petitioner did not provide the publication name or date as required by the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Regardless, the articles all report the results of competitions generally. None of them can be said to be "about" the petitioner.

On motion, the petitioner submitted new certified translations of the previously submitted articles and new articles, including an article in *Traditional Karate*. The new translations identify the publications' names. Some of the new articles, however, do not even mention the petitioner by name. Rather, they are "about" the Romanian national team in the aggregate.

The regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires the submission of published material "about" the alien. None of the materials can be considered to be "about" the petitioner. If he is named at all, he is only listed in the chart of results that follow the article or in a photograph caption.

Finally, the record contains no evidence regarding the distribution or circulation of any of these publications. Thus, the petitioner has not established that any of them constitute major media.

In light of the above, the petitioner has not established that he meets this criterion.

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.

In response to the director's notice of intent to deny, prior counsel asserted that the petitioner was eligible to judge the work of others but could not referee because he continued to compete. While there may be a legitimate reason why the petitioner cannot meet this criterion, it remains that he does not. The regulation at 8 C.F.R. § 204.5(h)(3)(iv) does not require evidence of eligibility to serve as a judge but rather evidence that the alien has participated as a judge. Counsel no longer asserts that the petitioner meets this criterion on motion and we find that he does not.

Comparable evidence pursuant to 8 C.F.R. § 204.5(h)(4)

In response to the director's notice of intent to deny, prior counsel asserted that the reference letters served as comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). On motion, counsel asserts that the petitioner's "personal command appearance" before the Romanian Prime Minister serves to meet this criterion. Counsel further asserts that the petitioner was part of a team that attracted record attendance in Bucharest.

The regulation at 8 C.F.R. § 204.5(h)(4) provides that a petitioner may submit comparable evidence where the ten criterion set forth at 8 C.F.R. § 204.5(h)(3) do not "readily apply." Neither prior counsel nor counsel has explained how the regulatory criteria do not apply. Rather, they both assert that he

meets at least three of the criteria. Moreover, it is not clear that the evidence submitted is comparable to the objective evidence mandated under the ten criteria at 8 C.F.R. § 204.5(h)(3).

Subjective letters, while sincere, are not comparable to the objective evidentiary requirements set forth in the ten criteria at 8 C.F.R. § 204.5(h)(3). Rather, expert letters are far more useful when they are well supported in the record and explain how the objective evidence of record serves to meet the regulatory criteria. Counsel's assertions on motion bear more discussion.

asserts that the Romanian Shotokan team, numbering between 25 and 30, performed in a sold-out performance at the Sala Polivalenta in Bucharest. While the petitioner was a member of the team, there is no evidence that he was singled out in the promotional materials and served as the primary draw for the crowd. The regulatory criterion at 8 C.F.R. § 204.5(h)(3)(x) relates to commercial success and requires evidence of box office receipts. The petitioner did not submit statistics from officials at the Sala Polivalenta confirming the box office receipts for this event. The record also lacks published material confirming the alleged record-breaking significance of this event.

In light of the above, the petitioner has not demonstrated that the regulatory criteria are not readily applicable and the evidence submitted pursuant to 8 C.F.R. § 204.5(h)(4) has not been demonstrated to be "comparable" to the objective evidence required under 8 C.F.R. § 204.5(h)(3).

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 CIS 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 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).

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 karate competitor 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 a karate competitor, 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.