Genco Op. No. 94-15 (INS), 1994 WL 1753119

U.S. Department of Justice

Immigration and Naturalization Service

General Counsel's Office

Legal Opinion: Your July 16, 1993, request for advisory opinion; Availability of benefits under Section 203(b)(2) to athletes as aliens of exceptional ability in the arts

Terrance M. O'Reilly, Director, AAU

HQ 203-P
March 3, 1994

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***1** Editor's note: The AAU requested reconsideration of this opinion. The later opinion was not yet completed by the end of 1994.

I. QUESTION

You have asked whether an athlete who is unable to meet the standards for classification as an alien of extraordinary ability under the Immigration and Nationality Act ("INA" or "Act"), Section 203(b)(1)(A), may be classified as an alien of exceptional ability in the arts under INA Sec. 203(b)(2), based on the case Matter of Masters, 13 I&N Dec. 125 (D.D. 1969).

II. SUMMARY CONCLUSION

Congress amended the Immigration and Nationality Act in the Immigration Act of 1990 and classified "athletics" separately from the "arts." Therefore, an athlete may not be classified as an alien of exceptional ability in the arts under INA Sec. 203(b)(2), as amended.

III. ANALYSIS

A. Under Prior Law, Tournament Golfers Were Considered To Be Performing Artists

When the Masters case was decided, third preference visas were made available to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States.

INA Sec. 203(a)(3) (1965) (emphasis supplied). The requirement for a labor certification by the Secretary of Labor for third preference beneficiaries was added to Section 212(a)(14) in 1965. Sec. 10(a), Act of Oct. 3, 1965, Pub. L. 89-236, 80 Stat. 917.

Matter of Masters, supra, was decided in 1969. The alien was a tournament golfer and was seeking third preference status as an alien of exceptional ability in the arts. In that case, in which the alien had a labor certification, the district director referred to the definition of "art" in Modern English Usage, by Fowler. That definition, according to the decision, included "artiste, a professional singer, dancer, or other public performer and state[d] that when an artiste makes his

occupation into a fine art, he becomes an artist." Matter of Masters, supra at 126. The district director determined "that professional tournament golfers are basically entertainers and may be included within the arts as that term was used in Section 203(a)(3) of the Act, if such golfers have the exceptional ability required by that section." Id.

The district director concluded that the petitioner's evidence had established that the beneficiary was a person of exceptional ability in the "art" of playing professional tournament golf who would substantially benefit prospectively the national economy of the United States. The petitioner had submitted newspaper clippings, professional tournament brochures, and a letter from the President of the Ladies Professional Golf Association of the United States, of which the beneficiary was a member. This evidence established that the beneficiary had won major professional golf tournaments in several countries, had competed against the best women golfers in the world, and was the tenth highest money winner among professional women golfers competing in the United States in 1967. The words "athlete" and "athletics" do not appear in the Masters case. B. Congress Created Separate Immigrant and Nonimmigrant Categories for "Arts" and "Athletics"

***2** When Congress enacted the Immigration Act of 1990, it specifically included "business," "education," and "athletics" in the first employment-based preference, INA Sec. 203(b)(1)(A), in addition to special categories for outstanding professors and researchers, INA Sec. 203(b)(1)(B), and certain multinational executives and managers, INA Sec. 203(b)(1)(C). These categories were not in the predecessor third preference statute. Congress also specifically included "business," "education," and "athletics" in nonimmigrant categories. INA Sec. 101(a)(15)(O)(i) and (P)(i).

Congress distinguished between "artistic" and "athletic" performance in Sec. 101(a)(15)(O)(ii)...

