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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED]
SRC 07 130 53241

Office: TEXAS SERVICE CENTER Date:

JUN 05 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)

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).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office 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 that the record did not establish that the petitioner had achieved the sustained national or international acclaim required for classification as an alien of extraordinary ability. The director also found the petitioner had not established that he is one of that small percentage who have risen to the very top of his field of endeavor. Finally, the director determined that the petitioner failed to establish that he is coming to the United States to work in his area of expertise.

On appeal, counsel claims that the petitioner meets 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:

(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.

United States 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, 60898-99 (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.

This petition, filed on March 20, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a swimmer. Initially, the petitioner submitted time rankings, race results, a letter confirming the petitioner's participation on the 2008 Hungarian Olympic team, the University of Southern California ("USC") media guide,

and news articles. In response to a Request for Evidence (“RFE”) dated October 31, 2007, the petitioner submitted copies of awards, news articles, and three letters of recommendation.

Prior to his appellate brief, counsel failed to specifically identify which of the regulatory criteria the petitioner purportedly meets. On appeal, for the first time, counsel claims that the petitioner meets four of the regulatory criteria. Accordingly, we will limit our review to the criteria claimed by counsel on appeal. We note, however, that despite counsel’s now specific claims regarding the petitioner’s satisfaction of the regulatory criteria, counsel fails to address the director’s finding that the petitioner failed to establish that he seeks to enter the U.S. to continue in his field of expertise.

In addition to counsel’s above claims, he also contends that a prior unpublished decision of the AAO overrules the director’s findings in this unassociated case. Counsel does not indicate that the facts of the previous case are analogous to the instant case or provide any further information to support a finding that the AAO’s previous decision (which was, in fact, not sustained but remanded for further review by the director) has any relevance to the current case. Regardless, while 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. Each petition must be adjudicated on its own merits under the statutory and regulatory provisions that apply.

On appeal, counsel also submits additional documents in which he generally asserts that the director’s decision in this case was “an unlawful act” by the adjudications officer who rendered the decision. Counsel also discusses the petitions filed by several of his other clients, none of which are currently before us in this proceeding. Additionally, although counsel requests that the AAO investigate a specific adjudications officer at the Service Center, he provides no authority suggesting that the AAO is an investigative body. We are not persuaded by any of counsel’s arguments or allegations on appeal. Thus, the sole issue to be determined is whether the record supports the petitioner’s claims of eligibility for the benefit sought as of the date of filing, March 20, 2007.

The statute and regulations require that the petitioner seeks to continue work in his area of expertise in the United States. *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the petitioner detailing plans on how he intends to continue his work in the United States. On the Form I-140, the petitioner failed to provide any information in Part 6, “Basic information about the proposed employment.” Further, with his initial submission, the petitioner submitted no personal statement, no letters from prospective employers, contracts, or other information detailing his plans in the United States. In response to the RFE, the petitioner submitted a letter, dated January 24, 2008, in which he generally stated that he is “currently training in Hungary for upcoming competition for the Olympic Games” and that after the Olympics, he “will return to the United States to train under Coach Salo at the University of Southern California” on some unspecified date. He then broadly indicated that he “will be swimming competitively in the Hungarian National Championships and international meets forever.” The petitioner submitted no further evidence in response to the RFE or on appeal, such as a letter from Coach Salo to confirm the petitioner’s vague statement regarding his intent to return to the U.S. for training after the 2008 Olympics. Therefore, although we withdraw the director’s unsupportable findings that the petitioner failed to meet this statutory requirement because his “activities . . . are not amenable to an employment-based immigrant classification” and because he will be “supporting himself through unrelated employment,” we agree with his

ultimate determination. Given the lack of specific probative information from the petitioner regarding his future plans to return to the United States and in the absence of any of the other suggested evidence, the petitioner's vague statements about coming to the U.S. to swim "forever" is not sufficient to establish that he seeks to continue work in his area of expertise in the United States.

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 a such an award, the regulation at 8 C.F.R. § 204.5(h)(3) 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 criteria at 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 petitioner claims eligibility related to the following criteria under 8 C.F.R. § 204.5(h)(3).

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

The record establishes that the petitioner has had top place finishes in several international competitions, including 2nd place in the 50 meter breaststroke at the 2002 European Championships, 3rd place in the 50 meter breaststroke at the 2003 World Championships, and 1st place in the 100 meter breaststroke at the 2006 Spring Championships. Such evidence is sufficient to demonstrate the petitioner's eligibility for this criterion.

Accordingly, we hereby withdraw the director's determination on this issue and find that the petitioner meets this criterion.

(ii) 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 order to demonstrate that membership in an association meets this criterion, a 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 experience, proficiency certifications, 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. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner submitted evidence that he participated on the Hungarian national team and the letter from the Hungarian Swimming Association Secretary General, [REDACTED], shows that the petitioner continued to represent Hungary through 2008. Accordingly, we withdraw the determination of the director on this issue and find that the petitioner has demonstrated eligibility under this criterion.

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

On appeal, the petitioner asserts eligibility under this criterion by virtue of his participation on the national athletic team of Hungary at various international swim meets, including the 2008 Olympic Games. The petitioner's membership on the Hungarian national team and the awards received by him have already been addressed under the regulatory criterion at 8 C.F.R. §§ 204.5(h)(3)(i) and (ii). We emphasize that the regulatory criteria are not interchangeable but rather are separate and distinct from one another. Therefore, we will not presume that winning a qualifying prize or award or securing team membership is also evidence that the alien has performed in a leading or critical role for his team or for the entity sponsoring the competition. To hold otherwise would render meaningless the statutory requirement for extensive evidence and the regulatory requirement that an alien meet at least three separate criteria.

The specific issue to be established for this criterion is the nature of the role the petitioner was selected to fill, not whether he regularly or successfully competed as a member of a team. The nature of the role must be such that selection to fill that role is indicative of or consistent with national or international acclaim. The letter from ██████████ states that the Hungarian national team "has been one of the powerhouse teams in Europe" and that winning a championship in Hungary "is very difficult" but contains no information to distinguish the petitioner from other members of the team. As indicated above, simply being selected for this team is not sufficient to demonstrate eligibility under this criterion.

The record also does not demonstrate that the petitioner meets this criterion through his participation on the USC Swimming and Diving program. As described above, the USC media guide states that the petitioner contributed to the success of the medley relay team and was selected as an All-American while enrolled at USC. The evidence does not distinguish him from other members of his team, who earned similar honors. For example, according to the guide from the university, ██████████ was a three time All-American in 2006, ██████████ was a two-time All-American in 2005 and a three time All-American in 2006, and ██████████ won the NCAA title in the 1650 yard event and won a silver medal at the 2004 Olympics in the same event. The petitioner, however, does not provide evidence which sets him apart from these other members of USC's program. Finally, the petitioner also failed to submit evidence which demonstrates that USC has a distinguished reputation in the petitioner's field. The USC media guide relates the USC swim team's accomplishments, but no evidence compares those accomplishments to other swimming programs or otherwise demonstrates that USC's program enjoys a distinguished reputation.

For all of the above reasons, the petitioner has not demonstrated eligibility under this criterion.

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

On appeal, counsel claims that the petitioner meets this criterion but provides no documentary evidence to establish that the petitioner has received any salary. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). Further, any salary that the petitioner expects to receive in the future is irrelevant as the regulation refers to a salary already received. Without evidence of a prior salary and information about how that salary compares to others working within

the field, the petitioner is unable to establish that he “commanded” a high salary in relation to others in the field. Accordingly, the petitioner failed to establish that he meets this criterion.

Finally, beyond the director’s decision, we find the petitioner has failed to establish that his entry into the United States will substantially benefit prospectively the United States. As discussed above, the petitioner has failed to establish his extraordinary ability as demonstrated by the required sustained acclaim and has also failed to establish through extensive documentation that his achievements have been recognized in his field. In addition, the petitioner has failed to establish that he seeks to enter the United States to continue work in his area of extraordinary ability. Given his failure to satisfy these statutory requirements, the petitioner’s substantial benefit cannot be automatically assumed. As previously discussed, the petitioner has failed to provide any specific description of his future plans in the United States. Given his failure to provide sufficient details about his future prospects, opportunities, plans or intent, it is unclear how he will substantially benefit prospectively the United States. More importantly, it is unclear how, as a member of the Hungarian National team, he will substantially benefit prospectively the United States by training for and competing with that foreign national team. For this additional reason, the petition may not be approved.

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).

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his field. The evidence in this case indicates that the petitioner won several national and international prizes as a swimmer and was a member of the Hungarian national swim team. However, the record does not establish that the petitioner achieved sustained national or international acclaim so as to place him at the very top of his field; that he seeks to enter the United States to continue work in competitive swimming, and if so, for whom; or that his entry into the United States will substantially benefit prospectively the United States. He is thus ineligible for classification as an alien with extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), and his 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.