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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

26 JUL 2002

File: [redacted] Office: Nebraska Service Center Date:

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)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Associate Commissioner for Examinations remanded the matter to the center director because of procedural deficiencies and factual errors in the initial decision. The center director again denied the petition. Pursuant to instructions in the remand order, the center director certified the decision to the Associate Commissioner for review. The director's decision will be affirmed.

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.

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.

The director initially denied the petition based on a lack of evidence that the petitioner intends to continue working in the area of claimed extraordinary ability as required by section 203(b)(1)(A)(ii) of the Act and a parallel regulation at 8 C.F.R. 204.5(h)(5). The Associate Commissioner remanded the matter, stating that the petitioner has established his intention of continuing in his field but that the director had failed to address the critical issue of whether the petitioner has earned the sustained acclaim necessary to qualify for classification as an alien of extraordinary ability.

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 Service 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 petitioner is a track and field athlete, specializing in the indoor high jump. At the time he filed the petition, he was also employed as an assistant recruiting coordinator at the University of Nebraska.

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). Counsel has contended that the petitioner has satisfied this criterion through his selection to compete in the 1996 Olympic Games. While selection for an Olympic team is surely a significant honor that carries significant weight in this proceeding, we cannot accept that such selection constitutes a prize or award. Simply participating in the Olympics is not the highest level an athlete can reach, and there is no actual prize involved. An alien who had actually won an Olympic medal would have a much stronger claim to have satisfied the one-time achievement clause. In this instance, the petitioner did not even actually compete in the Olympics, let alone win a medal. We will discuss the Olympic team issue in further detail in the context of counsel's response to the certified denial.

Barring the alien's receipt of a major international 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. Counsel asserts that the petitioner has satisfied the following criteria:

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

The petitioner has won a number of medals and prizes in significant track and field competitions, such as the NCAA Division I indoor high jump national championship in 1995. The director found that the petitioner has satisfied this criterion, and we concur with that finding.

Published materials 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.

Counsel states "[t]he amount of published material concerning [the petitioner] is immeasurable." Because the regulation requires the submission of published materials, we can only consider the materials actually contained in the record. Counsel cites four examples. The first example is a book, *Annuario Dell'Atletica*, which counsel states is "published annually by the Athletic Federation of Italy." The book consists of statistical information, listing the top-ranking athletes in various events. The petitioner's last name appears at #3 on two of these lists. This book contains thousands of names and statistics. We cannot find that this book is "about" every one of these

athletes, and nothing in the volume distinguishes the petitioner from any of the other listed athletes. While these published statistics corroborate the petitioner's enviable athletic record, we cannot find that a last name followed by statistics, within a nearly 600-page book filled with such material, constitutes published material about the alien at a level reflecting sustained acclaim. The record contains no other information about this untranslated Italian-language reference book.

The remaining three examples of media coverage are, in fact, the 1995, 1998 and 1999 editions of the University of Nebraska's *Nebraska Track and Field Media and Recruiting Guide*. The record contains no evidence that these media guides constitute major national or international media publications.

Following a request for additional evidence, the petitioner has submitted a partial page from *The Globe and Mail*, a Canadian newspaper. The newspaper includes results from various athletic competitions, and reports the petitioner's second-place finish at a 1999 competition in Canada. The newspaper contains no other mention of the petitioner apart from his name and the height of his high jump. Elsewhere on the page is a four-column article about a runner named Donovan Bailey. The record contains no indication that the petitioner has ever been the subject of a comparable article, consisting of actual text and narrative rather than a list of statistics, in any nationally circulated major publication.

Another article, reporting the aforementioned Canadian competition, includes four sentences about the petitioner's involvement in that event. The publication is identified as the August 1999 issue of *Athletics*. This publication, like the above issue of *The Globe and Mail*, was published several months after the petition's March 2, 1999 filing date. See *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Evidence that did not exist as of the filing date, describing events that had not yet happened as of the filing date, cannot retroactively demonstrate that the petitioner was already eligible as of that date.

Three articles from the *Lincoln Journal-Star* discuss the recruitment of various female athletes by the University of Nebraska. The articles each refer briefly to the petitioner, identifying him as the recruiter. One 1998 article contains four sentences about the petitioner, stating that he "was a standout high jumper for the Huskers from 1992 until 1996." Other articles state only that the petitioner was a track and field athlete for the university before becoming a recruiter.

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.

The petitioner did not initially claim to have satisfied this criterion. Subsequently, the petitioner has submitted a letter from Matt Martin, track and field recruiting coordinator for the University of Nebraska, who states that the petitioner "is uniquely qualified to judge the talents of prospective students-athletes." Evaluation of potential recruits in this manner appears to be a routine duty

expected of all university athletic recruiters, rather than a mark of recognition that elevates the petitioner above the vast majority in his field.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

To satisfy this criterion, an athlete must do more than simply show that he or she has won major competitions. A separate criterion, above, addresses prizes and awards, and therefore it would be redundant to consider a prize or award to constitute *prima facie* evidence of a major contribution.

As evidence of the petitioner's contributions, counsel cites five letters that accompany the petition. Three of the letters are from officials of the University of Nebraska. Head track and field coach Gary Pepin states that the university recruited the petitioner "because of his superb world ranking." Mr. Pepin discusses the petitioner's statistics and states that the petitioner "was a fierce competitor" who "demonstrated leadership both in the classroom and on the track," but he does not indicate that the petitioner has had any influence on his sport apart from winning or placing highly in various competitions.

Matt Martin, identified above, likewise cites the petitioner's athletic statistics and states (in a letter dated February 11, 1999) that "we are in the planning stages of preparing [the petitioner] for the 2000 Olympic Games in Sydney, Australia." Mr. Martin asserts that the petitioner "jumped 7' 5 $\frac{3}{4}$ " which is the second best jump in Nebraska Track and Field history." A national or international record could be considered a contribution of major significance, as it would become the standard against which future achievements are judged, but "the second best jump" in the history of one university's program does not rise to this level. The third letter from a University of Nebraska official is from Bill Byrne, director of Athletics. Mr. Byrne's letter, signed with a rubber stamp, does little more than verify the petitioner's attendance at the university and praise him "as an NCAA champion and an extraordinary student."

The fourth witness, Ferenc Kamasi, was the petitioner's coach prior to 1991. Mr. Kamasi primarily lists competitions in which the petitioner won or placed highly. Nemanja Mirosavljev, who has twice competed in the Olympic Games as a rifle shooter and who has known the petitioner "since his early age," states that the petitioner "managed to secure a place in the extensive line of Novi Sad's distinguished athletes."

In response to a request for further evidence, the petitioner has submitted additional letters. Gary Pepin, in his second letter, states that the petitioner has contributed to the University of Nebraska's growing reputation as a major force in collegiate track and field, both through his own competitive accomplishments and through his subsequent efforts as "an indispensable member of our recruiting staff." While these developments have enhanced the university's reputation, there is no indication of how the petitioner's work has affected his sport at a national or international level.

Following the initial denial and remand of the petition, the director again denied the petition. The director stated that the petitioner's selection for the 1996 Olympic team, "though clearly a

favorable factor," does not amount to a major international award. The director found that the petitioner has received lesser national and international prizes, but that the petitioner has not been the subject of major media coverage. The director stated that, while the petitioner's recruiting work involves some degree of "judging" the work of other athletes, it does not establish or reflect his own acclaim as a competitive athlete.

The director certified the decision to the Administrative Appeals Office and allowed counsel an opportunity to supplement the record with additional materials. Counsel protests that the second denial of the petition rests on completely different grounds than the initial denial. Nevertheless, the director's initial decision did not indicate that the petitioner has earned sustained national or international acclaim. The initial decision, indeed, did not touch on that issue, and therefore the director's second decision does not constitute a "reversal" as counsel contends. A principal purpose of the remand order was to ensure that the issue of acclaim received due consideration. Counsel asserts that the director violated procedure by not issuing a request for evidence, but the record shows that the director did issue such a notice (prior to the first denial), and that the petitioner responded to that notice through counsel. The petitioner was therefore on notice that his evidence was deficient. Counsel cites no regulation or case law requiring a second such notice in the event of a remand order.

Counsel argues that "winning the NCAA Division I Championships in the high jump qualifies as a major, internationally recognized award." This argument fails because competition is limited to college students, attending NCAA Division I colleges and universities in the United States. Counsel acknowledges, in response, that the petitioner "solely focused on competing in the NCAA system and not internationally." At best, the NCAA championship is a national award.

Counsel asserts that the petitioner was prevented from competing internationally, and thus forced to forfeit his place on the Olympic team, because of turmoil and sanctions arising from the then-ongoing civil war in his native country. Whatever the reason, the petitioner did not compete internationally during his college years in the early 1990s and therefore he was not in a position to win any internationally recognized prizes or awards. It is entirely conjectural and speculative to assert that, had the political situation been different, the petitioner would have earned a greater level of acclaim and recognition. We must concern ourselves with the evidence of record, which reflects what did happen rather than what might have happened if certain hypothetical conditions had been met.

Counsel asserts that it is incorrect to view the petitioner in comparison only with other collegiate athletes, and cites statistics showing that the petitioner's jump of 7' 5 $\frac{3}{4}$ " "put him in the 17th best place in the entire world, for the indoor season of 1995." We have not disputed the petitioner's great talent as a high jumper, and we have acknowledged his prizes for doing so. Nevertheless, the statute requires "extensive documentation" of sustained national or international acclaim. A table of statistics is not extensive documentation, and sustained acclaim involves more than simply establishing a high ranking.

Subsequent to the certified denial, counsel claims for the first time that the petitioner has met an additional 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.

Counsel states “[b]y qualifying for his country’s Olympic team, [the petitioner] . . . has met the ‘membership in an organization requiring outstanding achievement’ criterion.” Counsel asserts that the petitioner “had to perform a high jump of at least 7’ 5½” within 18 months prior to the games. This was an international qualifying standard.” The petitioner’s best jump during that period was one-quarter of an inch higher than the “international qualifying standard.” We note that the record contains no documentation from the International Olympic Committee, or from any national Olympic organization, to confirm that the petitioner was ever actually named as a member of any Olympic team in 1996. While the argument could be made that membership on an Olympic team demonstrates selection by a recognized national authority to compete at the highest level of a given sport, and thus represents comparable evidence as allowed by 8 C.F.R. 204.5(h)(4), here the petitioner was never named to membership on such a team. Counsel’s assertion that the petitioner would have been named to the team if circumstances had been different is, again, speculative and conjectural and not based on any actual evidence in the record. The “comparable evidence” clause at 8 C.F.R. 204.5(h)(4) applies when a given criterion does not apply to an alien’s field of endeavor, not when an individual alien’s particular circumstances prevent him or her from meeting the criterion. In this instance, the connection is simply too tenuous; counsel argues, in effect, that the petitioner joined an exclusive association by jumping higher than the international qualifying standard.

We note here Matt Martin’s February 11, 1999 statement that “we are in the planning stages of preparing [the petitioner] for the 2000 Olympic Games in Sydney, Australia.” Counsel’s brief, dated November 26, 2001, contains no mention at all of the 2000 Olympic Games, and the new exhibits in the latest submission are equally silent regarding those games. If we are to consider the assertion that the petitioner was “planning” to qualify for the 2000 Olympics, we must also consider the total absence of evidence that he did in fact so qualify.

Another newly claimed criterion, first addressed in the director’s decision, is:

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

The director had stated “[t]he University of Nebraska appears to have a very distinguished reputation in collegiate athletics; however, the petitioner’s role as a student athlete, while clearly successful and contributing to the university’s reputation, does not appear to qualify as a leading or critical role within the reasonable meaning of the term.” Counsel condemns this logic as “circular” and states “[h]ow is it possible for an athlete to play MORE of a leading role with an institution in

the field of athletics than to win the highest award for which that institution competes?" The petitioner did not have any leadership role with authority over the University of Nebraska or a significant part thereof. The petitioner has indeed performed well as an athlete at the university, but the university had already built a reputation for track and field excellence before the petitioner's arrival there; witnesses assert that the university regularly sends student athletes to the Olympic games. The petitioner's prizes and awards have been given due weight, and have satisfied the criterion pertaining to prizes and awards. Those very same prizes do not satisfy a second criterion merely because the petitioner was attending a university with a highly regarded athletic program at the time he won them.

With regard to the criterion pertaining to judging the work of others, counsel argues that the director "does not dispute that [the petitioner] has supplied substantial evidence that he judges the work of others in his field." The director had found, with regard to this criterion, that "the petitioner's employment as a recruiter would appear to regularly involve judging athletic talent. However, this facet of his employment would not be particularly relevant to the basis of the petition, which has to do with the petitioner's level of acclaim as an athletic competitor rather than as a coach or recruiter." Counsel argues that the petitioner's recruiting work is relevant because it is the petitioner's skill as an athlete that allows him to make sound judgments as a recruiter.

It remains that counsel has not claimed, and the petitioner has not shown, that the petitioner has earned sustained national or international acclaim as a recruiter. There is no evidence that the petitioner's recruiting work has attracted significant attention outside of Nebraska. Also, as the director noted, recruiting "regularly involve[s] judging athletic talent." By counsel's reasoning, every recruiter meets this criterion. The purpose of the regulatory criteria is to distinguish those at the very top of the field from the vast majority in the same field. If everyone in a particular occupation meets a given criterion (for example, all recruiters judge the work of others), then the criterion is useless as a way of distinguishing those at the very top of the field. Furthermore, athletes are evaluated in some way not only by recruiters, but by coaches, trainers, team captains, and so on. The criterion becomes meaningless if everyone in a position to express opinions about another's work is said to be a "judge of the work of others." Even then, the petitioner is not even the top recruiter at the University of Nebraska, let alone in the entire country or world. Far more persuasive would be service as a judge at an Olympic event or other national or international competition.

Counsel states that the director's interpretation of the petitioner's media coverage is "distorted." Counsel cites the various reports of the petitioner's performance at athletic competitions. Such reports are routine in the local media. It cannot suffice simply to show that the petitioner's name has appeared in print. In order to place him at the top of the field, the evidence must show that the petitioner has received more media coverage than almost anyone else in his sport. Lists of statistics from competitions cannot meet this threshold unless the petitioner can show that it is extremely unusual for such statistics to be reported at all. Given that most newspapers have a regular "Sports" section, and most local news broadcasts devote time to sports news, it would seem highly unlikely that the majority of scores and outcomes go unreported.

Counsel states that, had the petitioner remained in his native country, "with the marks that he achieved between 1991 and 1996 he would have ranked in the top three in his country every single year." The petitioner submits several new letters and exhibits, intended to establish that he had reached the top of his field between 1991 and 1995. It remains that the petitioner chose to come to the United States as a student during those years, and it is appropriate to consider his performance by U.S. standards. Even then, if the petitioner seeks to qualify now as an alien of extraordinary ability, he must show that he is now at the top of his field, not simply that he was at the top several years before he filed the petition. Even if we were to find that the petitioner was a nationally acclaimed athlete at the top of his field while he was an undergraduate student at the University of Nebraska, the record is entirely devoid of evidence that the petitioner was at the top of his field in 1999 when he filed the petition, or at any time after 1995. The purpose of the highly restrictive immigrant classification that the petitioner seeks is not to reward aliens for prior achievements, but to admit aliens who are (rather than were) at the top of their respective fields and whose future accomplishments will thus benefit the United States.

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 high jumper 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 is not persuasive that the petitioner's achievements continue to set him significantly above almost all others in his field at a national or international level. 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 director's decision to deny the petition will be affirmed.

ORDER: The director's decision is affirmed, and the petition is denied.