U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 27 2008

EAC 06 092 52754

IN RE: Petitioner: [redacted]
Beneficiary:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

(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.

Citizenship and Immigration Services (CIS) and the 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 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 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.

On May 12, 2008, the AAO withdrew the director's initial decision and remanded the petition for further action and consideration. In its decision, the AAO found that the petitioner's medals at the European Championships and membership on the Hungarian national team at three Olympics (Atlanta, Sydney, and Athens) satisfied the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(i) and (ii). An alien, however, must meet at least three regulatory criteria to be eligible for the classification sought. Therefore, the AAO instructed the director to consider the petitioner's eligibility as defined at 8 C.F.R. § 204.5(h)(3).

With regard to the grounds for revocation cited by the director in the September 13, 2007 NOR, the AAO determined that the petitioner had submitted evidence establishing that he would continue to participate in competitive swimming.[2] *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii), and 8 C.F.R.

[2] The director's grounds for the initial revocation were based solely upon the petitioner's full-time employment as a Technology Consultant for Advanced Automation Consulting, Inc. The petitioner submitted a letter indicating that he commenced employment with this company on July 1, 2006, but he also submitted evidence showing that he continued to train for the European Championships in which he competed later that summer. The director failed to consider the latter evidence and concluded that the petitioner was not seeking to enter the United States to continue swimming. The

§ 204.5(h)(5). For example, at the time of filing, the petitioner submitted a November 3, 2005 letter stating that he was training in South Carolina for the 2006 European Championships. The petitioner also submitted an August 28, 2007 letter from the Hungarian Swimming Association stating that he was a member of the Hungarian National Team and that he was preparing for the 2008 Olympic Games. The preceding evidence indicated that the petitioner was continuing to compete in a manner consistent with sustained national or international acclaim at the very top level of his sport. As such, the director's initial basis of revocation was withdrawn.

The AAO's decision also instructed the director to "inquire as to how the petitioner will substantially benefit prospectively the United States by training for a foreign national team." The AAO further stated: "The director shall also inquire as to the petitioner's ultimate intentions in the United States. In considering the petitioner's intentions, however, the director shall take into account that coaching does not necessarily fall within an athlete's area of expertise. *See Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002)." With regard to prospective national benefit, the AAO concluded: "If it is the petitioner's intention to benefit the United States through coaching, the petitioner would need to demonstrate that he enjoys extraordinary ability as a coach or that coaching falls within his area of expertise such as through the submission of evidence that he has coached swimmers at the national level." Any such evidence must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

On June 18, 2008, the director issued a second NOIR to the petitioner requesting evidence establishing that he satisfies the regulation at 8 C.F.R. § 204.5(h)(3). The petitioner was also requested to submit "clear evidence" of his plans to continue work in his field in the United States and evidence that he will substantially benefit prospectively the United States. The petitioner's response was incorporated into the record of proceeding and will be addressed below.

On July 24, 2008, the director again revoked the approval of the petition. In the second NOR, the director determined that the petitioner had not satisfied at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The director also determined that the petitioner had not submitted clear evidence that he would continue to work in his area of extraordinary ability in the United States. Finally, the director concluded that the petitioner had not demonstrated that his entry into this country will substantially benefit prospectively the United States.

On certification, counsel argues that the petitioner meets the statutory and regulatory requirements for classification as an alien of extraordinary ability. In a supplemental brief counsel cites *M.B. v. Quarantillo*, 301 F. 3d 109 (3d Cir. 2002), in which the court held that INS did not act arbitrarily and capriciously in denying an alien's request to have his dependency status determined by a state juvenile court. In the cited matter, the court agreed with the District Director that the alien did "not satisfy one of the statutory eligibility requirements." Counsel states: "This case upholds the Petitioner's position in regard to the plain language of the statute and recognizes that all decisions are based in the plain language of the statute . . . ." We concur

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director also concluded that the petitioner's employment as a technology consultant would not prospectively benefit the United States because it did not constitute a "pursuit in the arena of swimming." In withdrawing the director's initial grounds for revocation, the AAO stated: "While employment in an unrelated field may, on a case-by-case basis, suggest that an alien is no longer pursuing employment in the field of extraordinary ability and certainly justifies further inquiry by the director, we are satisfied in this matter . . . that the petitioner continues to compete as a swimmer."

with counsel that CIS decisions should follow the plain language of the statutory eligibility requirements. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987).

The first issue to be determined in this matter is whether the evidence submitted by the petitioner satisfies the regulation at 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific regulatory 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 relevant criteria at 8 C.F.R. § 204.5(h)(3) follow below.

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

The petitioner submitted evidence showing that he was a gold medalist (2000) and a silver medalist (2002) in the 400 Individual Medley at the European Championships. As such, the petitioner has established that he 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.*

The petitioner submitted evidence showing that he participated in three Olympic Games (1996, 2000, and 2004) as a member of the Hungarian national swim team.[3] As such, the petitioner has 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.*

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*,

[3] Membership on an Olympic Team or a major national team such as a World Cup soccer team can serve to meet this criterion. Such teams are limited in the number of members and have a rigorous selection process. We reiterate, however, that it is the petitioner's burden to demonstrate that he meets every element of a given criterion, including that he is a member of a team that requires outstanding achievements of its members, as judged by recognized national or international experts. We will not presume that every national "team" is sufficiently exclusive.

nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.[4]

The petitioner submitted swimming results posted at http://sportsillustrated.cnn.com reflecting that he competed in Heat 7 of the qualifying round at the 2000 Olympics. The petitioner also submitted a July 27, 2003 article posted at http://usatoday.com entitled "Phelps finishes with another world record." At the conclusion of the article, the petitioner's name appears in the results section among dozens of other swimmers who competed in the men's 400 individual medley at the 2003 World Swimming Championships. The petitioner's initial submission also included results for the European Swimming Championships (1926 to present) posted at http://gbrsports.com. The petitioner's name appears among the medalists for the 2000 and 2002 European Championships. The petitioner submitted similar event results posted at http://swimnews.com, http://fina.org, and http://sportsfacts.net for other international competitions in which he participated. In response to the director's second NOIR, the petitioner submitted a listing of top times for the 2000-01 University of South Carolina men's swimming season posted at http://gamecocksonline.cstv.com.[5] The preceding internet postings merely list the petitioner's name among numerous competitive participants and are not primarily about him. The plain language of this regulatory criterion, however, requires that the published material be "about the alien." Further, the plain language of this criterion requires the title, date, and author of the material. We cannot conclude that the preceding documentation meets these requirements.

The petitioner also submitted the University of South Carolina "Men and Women 2003-04 Media Guide" for swimming and diving. The media guide mentions the petitioner in various sections, but there is no evidence that this promotional item from the university's athletic department constitutes a professional or major trade publication or some other form of major media.

In response to the director's second NOIR, the petitioner does not address this regulatory criterion.

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

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

There is no evidence establishing that the petitioner has made original athletic contributions of major significance in the field. In response to the director's second NOIR, the petitioner does not address this regulatory criterion. Thus, the petitioner has not established that he meets this criterion.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.*

There is no evidence establishing that the petitioner meets this regulatory criterion. The petitioner's field is not in the arts. The plain language of this regulatory criterion indicates that it applies to visual artists (such as

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[4] Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

[5] The petitioner posted the fastest time for the men's team in four swimming events.

sculptors and painters) rather than to competitive athletes. The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. The petitioner's participation and success in competitive events has previously been addressed under the awards criterion at 8 C.F.R. § 204.5(h)(3)(i). Virtually every athlete "displays" his or her work in the sense of competing in front of an audience. In response to the director's second NOIR, the petitioner does not address this regulatory criterion.

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

In response to the director's second NOR, counsel argues that the petitioner meets this criterion by swimming for the Hungarian national team at the Olympics and at international events such as European Championships. The petitioner previously submitted a September 4, 2007 letter from [redacted] Head Diving Coach, University of Miami, stating that "all swimmers and divers . . . " satisfy the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(i), (ii), and (viii) " . . . when the athlete wins his or her national championship." Here it should be emphasized that the ten regulatory criteria at 8 C.F.R. § 204.5(h)(3) are separate and distinct from one another. Because separate criteria exist for awards, memberships, and performing in a leading or critical role for distinguished organizations, CIS clearly does not view the three criteria as being interchangeable. If evidence sufficient to meet one criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three criteria would be meaningless. The plain language of the statute requires "extensive documentation" of sustained national or international acclaim. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i). CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony.[6] *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Thus, the content of the experts' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of achievements and recognition that one would expect of a swimmer who has sustained national or international acclaim.

In order to establish that he performed in a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of his role within the entire organization or establishment and the reputation of the organization or establishment.

Counsel states: "The Petitioner has performed in a leading and critical role for the Hungarian National Swim Team since 1995." Counsel then discusses the petitioner's awards and Olympic team membership which have already been addressed at 8 C.F.R. §§ 204.5(h)(3)(i) and (ii). Counsel further states:

> The Hungarian Swim team leads all nations of the World with 24 Olympic Games appearances. Hungary first competed in the Olympic Games in 1896, winning two gold meals in track and field. The 1896 swimming competitions were held in the open seas and [redacted] Hungary became the first Olympic champion (gold medal) in swimming. Hungarian [redacted] gold medal at the

[6] According to his letter, [redacted] coaching expertise is diving rather than swimming.

> Olympics in Atlanta[,] and gold medal at the Olympics in Sydney are both teammates of the Petitioner. . . . The Hungarian Swim Team is the powerhouse team in Europe.

Counsel argues that the Hungarian Swim Team has a distinguished reputation, but the record lacks evidence (such as published media reports) to substantiate his claims. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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).

With regard to the petitioner's role for the Hungarian swim team, we find that the petitioner's evidence does not establish that his role as a team member was leading or critical. The petitioner, who specialized in the individual medley, submitted an August 28, 2007 letter from the Hungarian Swimming Association stating he "has been a valuable member of the Hungarian National Swimming Team since 1995." A March 10, 2005 letter from the Hungarian Swimming Association states: "Since 1995 [the petitioner] is one of the most valuable member of the Hungarian national swimming team." These letters, however, do not provide specific information differentiating the petitioner's role from that of the other national team members, including its Olympic medalists (such as [redacted] For example, the record lacks evidence comparing the petitioner's results at swim competitions to those of the other members of the team (such as a comprehensive tally of the men's first place finishes or medals won) during the years he competed. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without objective evidence showing that the petitioner's achievements differentiated him from those of his team members, we cannot conclude that he was responsible for his team's success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of national or international acclaim. While all team members certainly play a vital role in swimming competition, the evidence submitted by the petitioner does not demonstrate that his role significantly differentiated him from the other members of the team (including those competing in freestyle, backstroke, breaststroke, butterfly, and relay events), or indicate how his role was leading or critical for the team as a whole.

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

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

In response to the director's second NOIR, counsel argues that the petitioner meets this criterion by receiving a sports scholarship from the University of South Carolina (USC). The petitioner submitted letters from the Office of Student and Financial Aid at USC reflecting that the petitioner received an "athletic grant-in-aid" of full tuition and fees from Fall 2001 through Spring 2005. The petitioner also submitted a May 22, 2008 letter from [redacted] Swimming Coach during the four years the petitioner attended USC, stating:

> As a head coach, one of my responsibilities was to determine who received scholarship monies based on their ability to impact the overall program. Like every other Division I school that was fully funded, I had 9.9 scholarships to distribute among our male swimmers for a squad that numbered a least eighteen

> members and more often more. It is the individual schools discretion to decide how they wish to use the 9.9 scholarships, however, my personal experience is that only exceptional swimmers (top 5% of Division I swimmers) are likely to receive a "full ride."

Counsel states:

> [The petitioner] had a full swimming scholarship at USC which "is significantly high remuneration for services as an athlete." There are 1,000,000 registered swimmers in the United States. There are 142 Universities in division I, [the petitioner's] division, that offer swimming scholarships to men. There are 9.9 scholarships in general per University for men swimmers. Not all scholarships are full scholarships like [the petitioner's] full ride.

There is no evidence comparing the dollar amount of the petitioner's total scholarship to the amounts received by other collegiate swimmers. Further, we cannot conclude that a "grant-in-aid" limited to collegiate athletes is evidence that the petitioner "is one of that small percentage who have risen to the very top of the field of endeavor." *See* 8 C.F.R. § 204.5(h)(2). CIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.[7] Likewise, it does not follow that a collegiate swimmer who receives financial aid at the discretion of his university should necessarily qualify for an extraordinary ability employment-based immigrant visa. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor." There is no indication that top swimmers' remuneration is limited to collegiate scholarships rather than paid endorsements or other compensation. The plain language of this criterion requires the petitioner to submit evidence of a high salary "in relation to others in the field" (rather than restricted to those at the collegiate level). The petitioner offers no basis for comparison showing that his remuneration was significantly high in relation to others in his field.

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

In this case, we find that the petitioner meets only two of the regulatory criteria, three of which are required to establish eligibility. 8 C.F.R. § 204.5(h)(3). The petitioner has failed to demonstrate his receipt of a major,

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[7] While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

> [T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court's reasoning indicates that CIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the sustained national or international acclaim necessary to qualify as an alien of extraordinary ability.

The remaining issues to be determined are whether the petitioner will continue work in his area of extraordinary ability in the United States and whether his entry will substantially benefit prospectively the United States. *See* sections 203(b)(1)(A)(ii) and (iii) of the Act, 8 U.S.C. §§ 1153(b)(1)(A)(ii) and (iii), and 8 C.F.R. §§ 204.5(h)(5). Part 5 of the Form I-140 petition, filed on February 2, 2006, lists the petitioner's occupation as "Swimmer." The November 3, 2005 letter submitted by the petitioner states:

> This is to certify that I graduated from the University of South Carolina in May of 2005 Bachelor of Science in Computer Information Systems. I am currently living and training in Columbia, South Carolina.
>
> I have been a member of the Hungarian National Swim Team from 1995 until the present. I currently hold 22 Hungarian National Championship titles.
>
> I am currently training with my college coach, [redacted] I am practicing for the 2006 European Championship, which will be held in my home city Budapest, Hungary this summer.
>
> * * *
>
> I have participated in the past three Olympic Games and I also plan on qualifying for the next one in 2008 Beijing, China.

On June 18, 2008, the director issued a second NOIR to the petitioner requesting him to submit "clear evidence" of his plans to continue work in his field in the United States and evidence that he will substantially benefit prospectively the United States.[8] The regulation at 8 C.F.R. § 204.5(h)(5) requires "clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States."

In response, the petitioner submitted a May 12, 2008 letter stating:

> After graduation I stayed in Columbia, South Carolina to train for the 2006 European Championship and for the 2008 Olympics. At the same time I was a Volunteer Assistant Coach assisting Head [redacted] with the training of USC swimmers.
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> * * *

[8] As discussed, the AAO's decision instructed the director to "inquire as to how the petitioner will substantially benefit prospectively the United States by training for a foreign national team." The AAO further stated: "The director shall also inquire as to the petitioner's ultimate intentions in the United States."

> Because I have been suffering from a shoulder injury, after participating in the 2006 European Championship, I decided to focus on my physical well-being, and only trained but did not compete for a year. Due to two further injuries in the fall of 2007, and in the Spring of 2008, a broken foot and a knee injury, I realized the my Olympic preparation could not be continued and decided to shift my focus to participate in Masters Swimming and coaching.
>
> Because my injuries prevent me from swimming as much as it is necessary for my Olympic preparation, I found another way to share my skills and my knowledge of swimming with young swimmers. I started working with [redacted]. . . at Mecklenburg Aquatic Club and assisting him with the training of all level of swimmers including Team Elite Carolina, a group of swimmers preparing for the 2008 Olympics.
>
> * * *
>
> Currently I am training for the 2008 [United States Masters Swimming] Long Course Meters National Championship where I am expected to finish on top of my league.

The preceding statements indicate that the petitioner no longer intends to compete as a swimmer in a manner consistent with sustained national acclaim at the very top level of his sport. A petitioner must demonstrate eligibility from the time of filing continuing until the alien obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The director's second NOR stated that it was unclear as to whether the petitioner would be able to continue swimming "in a capacity that would exhibit extraordinary ability." We note here that United States Masters Swimming is a recreational league open to swimmers of all ability levels at the local level and that competition is limited to one's age group.[9] The petitioner has not established that participation in this age-based recreational league constitutes continuing work in his area of expertise. While training for and competing in the European Championships and the Olympics is consistent with sustained national or international acclaim at the very top of the field, training for a recreational age-group competition is not. Thus, the petitioner's intention to train for the United States Masters Swimming competition is not clear evidence that he will continue work in his area of extraordinary ability or evidence that his participation will substantially benefit prospectively the United States.

As evidence of his intention to work as a swimming coach in the United States, the petitioner submitted letters of support from the Mecklenburg Aquatic Club.

A May 10, 2008 letter from [redacted] Head Elite Coach, Mecklenburg Aquatic Club, states:

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[9] *See* http://www.usms.org/comp/, accessed on August 18, 2008. For example, the 2008 Long Course Meters National Championships involved multiple age group competitions ranging from the male 18-24 category up to the male 85-89 category.

> I was the head swim coach for Auburn University from 1990 to 2007. In 2003 both my men's and women's teams won NCAA, national titles in swimming. In 2004, 2006 and 2007, we also won NCAA, national titles. In 2004, at the Athens Olympic games, my swimmers won two gold, a silver, and two bronze medals. . . . I have coached over 22 Olympians and many national and world champions. . . . I have been named National Coach of the Year eight times.
>
> * * *
>
> As a head coach my responsibilities include the preparation of a small group of elite swimmers for the 2008 Olympics.
>
> At this club we train all levels of swimmers, and [the petitioner] proved to be a great asset. . . . I greatly appreciate the petitioner's assistance, since there are very few swimmers with his outstanding international results and experience who are able to teach the young athletes.

A May 10, 2008 letter signed by members of Team Elite Carolina, the Mecklenburg Aquatic Club's select group of accomplished swimmers, states: "Team Elite Carolina is an extraordinary group of swimmers training for the Olympics at Mecklenburg Aquatic Club. The team was formed in the summer of 2007 . . . . [The petitioner] has been assisting Team Elite Carolina with their preparation to the Olympic Games."

A subsequent letter from [redacted] dated July 30, 2008 states: "[The petitioner] is personally responsible for the continuous growth of training and development of our national and world champion swimmers and his continued coaching at our facility is crucial for the continued success of our swimmers."

The record, however, lacks clear information detailing the extent of the petitioner's participation and involvement as a coach of the Mecklenburg Aquatic Club's elite swimmers. Nevertheless, none of the preceding letters demonstrate that the petitioner, rather than [redacted] or a prior coach, was primarily responsible for the national successes of Team Elite Carolina swimmers.[10]

The petitioner also submits an August 18, 2008 letter from [redacted], Executive Director, College Swimming Coaches Association of America, stating: "[The petitioner's] specialized knowledge is in the area of coaching swimming at the highest international level, knowledge derived from his own experience as an Olympic swimmer for his native Hungary . . . and his post-competitive coaching experience with some of the world's most knowledgeable and successful coaches." Coaching experience gained under a top coach, however, does not automatically establish that the petitioner himself has extraordinary ability as a swimming coach.

While the petitioner may have recently began providing coaching assistance at the Mecklenburg Aquatic Club, there is no evidence in existence at the time of filing demonstrating that he enjoyed extraordinary ability as a coach or that coaching was within his area of expertise. A petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. The director's second NOR

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[10] [redacted] achievements as a coach indicate that the very top of the field is a level far above the petitioner's own level of coaching achievement.

stated that there was no evidence establishing that the petitioner "has coached swimmers that have reached the national level as a result of his coaching."[11] We concur with the director's finding. Further, while a competitive swimmer and a coach certainly share knowledge of the sport, the two rely on very different sets of basic skills. Thus, competing as a swimmer and working as a coach are not necessarily 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, [redacted] 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 court noted a consistent history in this area. In the present matter, nothing in the record establishes that the petitioner intended to work principally as a swimming coach in United States as of the petition's filing date or that coaching, rather than competitive swimming, constituted the petitioner's "area of extraordinary ability." According to Part 5 the Form I-140 petition and the initial supporting documentation, the petitioner seeks extraordinary ability classification as a "Swimmer," not as a coach. Further, the record includes no evidence showing the petitioner's nationally or internationally acclaimed coaching achievements as of February 2, 2006. As discussed previously, a petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Aside from our finding that coaching is not the petitioner's area of expertise, the request that he now be considered as a coach based on his 2008 involvement with the Mecklenburg Aquatic Club constitutes a material change in the petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If the petitioner now seeks to coach at the Mecklenburg Aquatic Club and to provide substantial prospective national benefit to the United States as a swimming coach, then he should file a new petition requesting classification as a coach of extraordinary ability.

The petitioner previously submitted an unpublished decision in which the AAO held that an Olympic medalist synchronized swimmer's intention to coach was sufficiently related to her area of expertise. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. For example, in the cited matter, there is no evidence the alien was employed full-time in an unrelated occupation such as a technology consultant.[12] Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Review of the record does not establish that the petitioner has distinguished himself 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

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[11] For example, nothing in the record demonstrates that the petitioner was primarily responsible for the development and coaching of swimmers who achieved success at the national or international level in the same manner as [redacted]

[12] As discussed, the record includes a January 10, 2007 letter from Advanced Automation Consulting, Inc. stating that petitioner is a full-time "Technology Consultant" who "started on July 1, 2006 and works a minimum of 40 hours per week."

very top of his field. Nor is there clear evidence that the petitioner will continue work in his area of expertise in the United States and that his participation in his sport will substantially benefit prospectively the United States. 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 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).

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The burden remains with the petitioner in revocation proceedings to establish eligibility for the benefit sought under the immigration laws. *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); *Matter of Estime*, 19 I&N Dec. at 452 n.1; *Matter of Ho*, 19 I&N Dec. at 589. Here, the petitioner has not sustained that burden.

ORDER: The director's decision of July 24, 2008 is affirmed. The approval of the petition remains revoked.