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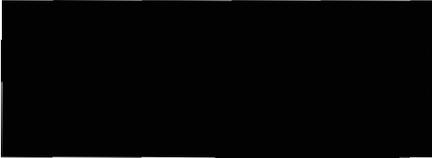
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 02 266 50459

Office: TEXAS SERVICE CENTER Date: JUL 28 2008

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:



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

DISCUSSION: The Director, Texas Service Center, initially approved the preference visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) without considering the petitioner's response to the NOIR. The director subsequently reopened the matter on motion and issued a new NOR that took into account the petitioner's response to the NOIR. The petitioner filed an appeal with the Administrative Appeals Office (AAO), which remanded the matter to the director for further action and consideration. The director again served the petitioner with a NOIR, and ultimately revoked the approval of the petition. The matter is now before the AAO on certification. The decision of the director will be affirmed, and the approval of the petition will remain revoked.

The petitioner seeks classification as an "alien of extraordinary ability" in athletics, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined that the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. The director also determined the petitioner had not submitted clear evidence that he would continue to work in his area of expertise in the United States.

On certification, counsel repeats his argument that the petitioner is a permanent resident of the United States. Counsel further argues that "the notice of certification should be stricken" based on "the bias and prejudice" of the adjudicating officer. Aside from the preceding issues, counsel argues that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and has submitted other comparable evidence of his extraordinary ability pursuant to 8 C.F.R. § 204.5(h)(4).

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In Matter of Estime, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

This petition, filed on September 11, 2002, seeks to classify the petitioner as an alien with extraordinary ability as a swimmer. The director denied the petition on November 3, 2003 with little discussion of the evidence submitted. The director reopened and approved the petition on January 29, 2004. On June 4, 2003, the petitioner filed a Form I-485, Application to Register Permanent Residence or Adjust Status. The petitioner subsequently sought a Writ of Mandamus to compel action on the Form I-485. On May 24, 2007, the petitioner was interviewed at the Miami District Office. Although the interviewing officer initially stamped the application approved, she did not, as will be discussed in more detail below, formally adjust the petitioner's status. Rather, she determined that the Form I-485 application was not approvable. She returned the Form I-140 petition to the director for review and possible revocation of the approval of that petition.

On July 13, 2007, the director issued a NOIR. The petitioner submitted a response. Despite that response, the director issued a final revocation notice on August 17, 2007, concluding no response had been submitted. On August 30, 2007, the petitioner filed the initial appeal. In that appeal, counsel requested that this office remand the matter to the director for a new decision that takes into account the response to the NOIR. The director reopened the matter on his own motion and issued the new decision, which considered the response to the NOIR. On November 14, 2007, the petitioner filed a second appeal with the AAO, which remanded the matter to the director for further action and consideration on January 18, 2008. The director again served the petitioner with a NOIR, and ultimately revoked the approval of the petition on April 14, 2008. The director's decision was certified to the AAO for review.

Revocation vs. Rescission

Counsel repeats his claim that the petitioner adjusted status to that of a lawful permanent resident on May 24, 2007. Thus, counsel suggests, the only way for U.S. Citizenship and Immigration Services (CIS) to challenge the validity of the petition would be through rescission proceedings pursuant to section 246 of the Act, 8 U.S.C. § 1256.

In addressing this issue, the AAO's January 18, 2008 decision notice stated:

[C]ounsel asserts that the petitioner is already a lawful permanent resident based on the action of a district adjudications officer at the Miami District Office. Counsel asserts that at the petitioner's interview on May 24, 2007, the district adjudications officer stamped the Form I-485 approved and signed and dated the stamp. Before the petitioner left, however, the officer made an inquiry with another staff member at the office and obliterated her stamp. Counsel does not assert that the officer stamped the petitioner's passport or issued the petitioner a Form I-94 bearing a lawful permanent residence designation. In fact, the Form I-94 remains in the record. The record contains no Form I-181, Memorandum of Creation of Record of Lawful Permanent Residence, the generation of which is the final step of adjusting status. Citizenship and Immigration Services I-485 Standard Operating Procedures 7-4.7. *See also Nelson v. Reno*, 204 F. Supp. 2d 1355, 1359 (S.D. Fla. 2002).

Counsel provides no legal authority for the proposition that the mere placement of an approval stamp, with the officer's signature and date, on the Form I-485 renders the applicant a lawful permanent resident at that moment. Significantly, *Nelson*, 204 F. Supp. 2d at 1360, held that an erroneously placed "I-551" stamp, which serves as the applicant's record of lawful permanent resident status, is

not itself an approval of lawful permanent resident status. In that case, the necessary adjustment procedure, approval of the Form I-130, the Form I-485 *and the Form I-181*, had not occurred. In *Bassey v. INS*, 2002 WL 31298854 (N.D. Cal. 2002), an approval notice and a passport stamp were both deemed insufficient evidence that the alien had adjusted status where the underlying Form I-130 had not been approved. Finally, in *Ayoub v. Chertoff*, 2005 WL 1028180 (E.D. Mich. 2005), a passport stamp was held not to establish adjustment of status where the Form I-485 was denied the day after the passport was stamped.

We acknowledge that the district court decisions cited above are not binding and may not have involved a situation where the I-485 was stamped approved, although an approval notice was issued in *Bassey*. Nevertheless, we find their reasoning persuasive and applicable in this matter. We are satisfied that the district adjudications officer in Miami did not complete the full processing required to formally adjust the petitioner's status. For example, the record lacks evidence that the officer in Miami created a Form I-181. Thus, as the petitioner has not adjusted status to that of a lawful permanent resident, the director was authorized to review the Form I-140 for potential revocation.

On certification, counsel argues that *Nelson v. Reno*, 204 F. Supp. 2d 1355, 1359 (S.D. Fla. 2002); *Bassey v. INS*, 2002 WL 31298854 (N.D. Cal. 2002); and *Ayoub v. Chertoff*, 2005 WL 1028180 (E.D. Mich. 2005) "are distinguishable [from] the instant case in that no underlying petition or I-485 was approved in those cases." Counsel cites *Peng v. Gonzales*, 2007 WL 2141270 (N.D. Cal. 2007), in which it was held that CIS issued a letter addressed to the alien with the stamped signature of the Field Office Director and informing her that "her adjustment of status had been granted" was "sufficient to establish a prima facie case that her status had been adjusted." We further note that, in *Peng*, the Assistant United States Attorney telephoned the alien's attorney and indicated that the alien's "I-485 application had been approved." In the present matter, unlike *Peng*, the petitioner received no official communication, either verbal or written, indicating that CIS had adjusted his status to that of a lawful permanent resident. For example, according to the August 1, 2007 sworn deposition of the interviewing officer, she never stated to the petitioner during his interview that he had adjusted status to that of a lawful permanent resident. Further, at the May 24, 2007 interview and thereafter, the petitioner received no documentation issued or endorsed by CIS to show his admission for lawful permanent residence. An approval stamp on the Form I-485 is merely an internal process and does not constitute conference of lawful permanent resident status to an alien in the same manner as receipt of an I-551 or other official notification.

The regulation at 8 C.F.R. § 103.2(b)(17) provides, in pertinent part:

The status of an applicant or petitioner who claims that he or she is a permanent resident of the United States or was formerly a permanent resident of the United States will be verified from official Department records. These records include alien and other files, arrival manifests, arrival records, Department index cards, Immigrant Identification Cards, Certificates of Registry, Declarations of Intention issued after July 1, 1929, Permanent Resident Cards (Form I-551), Alien Registration Receipt Cards (Form I-151), other registration receipt forms (Forms AR-3, AR-3a, and AR-103, provided that such forms were issued or endorsed to show admission for permanent residence), passports, and reentry permits. An official record of a Department index card must bear a designated immigrant visa symbol and must have been prepared by an authorized official of the Department in

the course of processing immigrant admissions or adjustments to permanent resident status. Other cards, certificates, declarations, permits, and passports must have been issued or endorsed to show admission for permanent residence.

In this instance, the petitioner has not submitted evidence of any official records identified above establishing his lawful admission for permanent residence. An obliterated stamp on the petitioner's Form I-485 does not show CIS' official issuance or endorsement of the petitioner's lawful admission for permanent residence.

Validity of the Notice of Certification

Counsel asserts that "the Notice of Certification should be stricken and the case either approved herewith or sent to another adjudication officer and another Service Center." First, CIS is statutorily prohibited from providing a petitioner with multiple adjudications of a single petition based on a single fee. The initial filing fee for the Form I-140 petition covered the cost of the director's adjudication of the I-140 petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, CIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that CIS recover all direct and indirect costs of providing a good, resource, or service.¹ If the petitioner now seeks a second service center adjudication, then he must file a separate Form I-140 petition requesting the new adjudication. Further, the AAO's January 18, 2008 remand order specifically instructed the director, in the event that his decision was adverse to the petitioner, to certify the case to the AAO for review. We note that one of the cases referenced by counsel on appeal, *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir.), upheld the district court's injunction against a remand order by the National Labor Relations Board, finding that a remand for proceedings that are "repetitive, purposeless and oppressive" can represent an unreasonable delay. As counsel repeatedly asserts that there have already been unreasonable delays in this matter and has sought a Writ of Mandamus to compel final action, the appropriate remedy to counsel's request is the appeal process itself.

Counsel also asserts the Notice of Certification should be stricken because the director did not discuss or address the expert opinion letters attesting to the petitioner's abilities. The director's decision, however, listed these letters among the evidence submitted in response to the NOIR and then discussed them in the context of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). For example, the director discussed the letters from [REDACTED], [REDACTED], and [REDACTED]. While expert opinion letters can provide useful information about an alien's qualifications or help in assigning weight to certain evidence, such letters are not a substitute for objective evidence of the alien's achievements and recognition as required by the statute and regulations. As stated in the director's notice of certification, the nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Further, the classification sought 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), and 8 C.F.R. § 204.5(h)(3). The commentary for the proposed regulations implementing the statute provide that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications.

¹ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html>.

56 Fed. Reg. 30703, 30704 (July 5, 1991). While expert opinion letters may place the evidence for the regulatory criteria in context, they cannot serve as primary evidence of the achievement required by each criterion.²

The expert opinion letters submitted by the petitioner will be further addressed below.

Statutory and Regulatory Evidentiary Requirements

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

Citizenship and Immigration Services (CIS) 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 earned sustained national or international acclaim at the very top level.

As discussed, the petitioner seeks classification as an alien with extraordinary ability as a swimmer. At the time of filing, the petitioner was a student at the University of Florida and a member of its men's varsity swim team. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or

² The only regulatory criterion for which letters are specifically relevant is the criterion relating to the alien's leading or critical role for an entity with a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii). The first issue is the role the alien fulfilled. According to 8 C.F.R. § 204.5(g) letters from employers are acceptable evidence of experience. We note, however, that an alien would also need to submit objective evidence of the reputation of the organization to satisfy the specific requirement of 8 C.F.R. § 204.5(h)(3)(viii).

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. 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 has submitted evidence pertaining to 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 submitted results from the 9th FINA (Federation Internationale de Natation) World Swimming Championships (2001) indicating that he placed 34th in the 100 meter breaststroke, 30th in the 200 meter breaststroke, and 32nd in the 50 meter breaststroke. While these results show that the petitioner competed internationally against top competitors in three breaststroke events, they are not tantamount to internationally recognized prizes or awards.

The petitioner also submitted evidence showing, *inter alia*, that he was elected athlete of the year by the Suriname Sport Journalist Association in 2001, won Surinamese national championships in breaststroke and individual medley events from 1997 to 2004, and holds several Surinamese national swimming records. In addition, letters of support from swimming experts confirm the significance of the petitioner's competitive recognition in Suriname. As such, the petitioner has established that he meets this single 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.

On certification, counsel asserts that the petitioner meets this criterion through his membership on the Bolles School swim team, University of Florida swim team, and in the Surinamese Swimming Association (SSA).

With regard to the petitioner's membership on the Bolles School swim team and the University of Florida swim team, a high school or collegiate varsity athletic team is not an association. Further, we cannot conclude that simply earning a spot to compete for these teams is tantamount to outstanding achievements. We note that the Bolles School swim team competes in a high school league and that the University of Florida swim team competes in the Southeastern Conference (SEC) as a National Collegiate Athletic Association (NCAA) division one team. Selection for a team that competes at the high school or collegiate level is not 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 60899.³ Likewise, it does not follow that a swimmer who earns the right to compete for a successful division one NCAA team or high school team 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.”

The petitioner submitted a February 8, 2008 letter from [REDACTED] Head Men’s and Women’s Swimming Coach, University of Florida, stating:

It is my expert opinion that the athletes that I have coached at the University of Florida who have won their home country National Championships in swimming, and have competed for me at the NCAA level, have proven and documented membership in and are performing a leading and critical role for organizations and/or associations that require outstanding achievements of their members.

The record, however, includes no evidence showing that winning one’s “home country National Championships in swimming” is a requirement for earning a spot on the University of Florida men’s swim team. For example, according to the University of Florida 2002-2003 Swimming & Diving media guide submitted by the petitioner, out of the eight incoming freshmen swimmers accepted for the team that season, not a single individual was identified as having won a national championship. The biographic profiles for these newer team members demonstrate their success in state high school championships and participation in age-group events such as the “Junior Olympics” and “Junior Nationals,” but none of the incoming freshman had won victories in top non-age restricted swimming competitions such as the U.S. Senior Nationals. We acknowledge that the University of Florida recruits talented young swimmers from the United States and abroad, but the evidence submitted by the petitioner does not demonstrate that the team requires outstanding achievements of members in the same manner as an Olympic team, for example.

The petitioner submitted a February 11, 2008 letter from [REDACTED] President, SSA, stating that the petitioner has been “a long time member.” [REDACTED] further states that the SSA “has called upon [the petitioner] to represent Suriname in several high caliber international swim meets.” The petitioner also submitted an April 21, 2008 letter from [REDACTED], Associate Head Swimming Coach, University of Florida, and Suriname Olympic gold medalist (1988), stating that the SSA is the “top authority” for

³ 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 [REDACTED] ability with that of all the hockey players at all levels of play; but rather, [REDACTED] 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.

participation in international swimming events and that it “requires outstanding achievements of its members.” [REDACTED] does not specifically identify the SSA’s membership requirements and there is no documentary evidence to support his latter assertion. 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)). While the petitioner has represented Suriname in international competition at the junior and senior level, there is no evidence that membership in the SSA requires outstanding achievement.⁴ The record includes no evidence (such as membership bylaws or official admission requirements) showing that the SSA requires outstanding achievements of its members, as judged by recognized national or international experts in the petitioner’s sport.

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

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

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*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.⁵

The petitioner submitted articles printed in Dutch entitled “Peregrinos del mar,” “Goede prestaties [the petitioner] in VS,” and “[The petitioner] naar WK-zwemmen.” Pursuant to 8 C.F.R. § 103.2(b)(3), any document containing foreign language submitted to CIS shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English. The preceding articles were unaccompanied by certified, complete English language translations as required by the regulation 8 C.F.R. § 103.2(b)(3) and the plain language of this criterion. The petitioner also submitted an English language article entitled “Shane Viera Cops Gold and Silver,” but this article was primarily about a swim meet at the Homestretch Avenue pool rather than the petitioner. Further, the publication name, its date, and the author of the article were not identified as required by this regulatory criterion. Finally, there is no evidence (such as circulation statistics) showing that the preceding four articles were published in professional or major trade publications or some other form of major media.

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

⁴ For example, there is no evidence that swimmers who do not compete at the international level are excluded from membership in the SSA.

⁵ 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.

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

The petitioner submitted a February 26, 2008 letter from [REDACTED] Head Swimming and Diving Coach, University of Miami, stating: “[The petitioner] meets criteri[on] 5 by his coaching of World Champion and World record holder, [REDACTED]

The record includes a February 23, 2008 letter from [REDACTED] stating:

I train and swim at the Swim Gym, Miami, Florida. I hold and have broken several world records in swimming. [The petitioner] coached and trained me for swimming competitions from May, 2007 to September, 2007. Thanks to him and my hard work I performed to the best of my ability at the World Games in Shanghai, China in October 2007.

The petitioner also submitted an August 6, 2007 letter from [REDACTED] Special Olympics Dade County, Swimming Coordinator Volunteer, stating: “[The petitioner] is part of the staff at the Swim Gym Team and very successfully helped [REDACTED] to break four Down Syndrome World Records during the summer and to be fully prepared to compete in October in the World Games.” [REDACTED] letter was accompanied by swimming records going back to 2000 reflecting that [REDACTED] had established himself as a “Disability American Record” and “Down Syndrome Long Course World Record” holder long before his four months under the petitioner’s tutelage in 2007. Further, the petitioner’s coaching of [REDACTED] in 2007 occurred subsequent to the petition’s filing date. A petitioner, however, 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). Accordingly, the AAO will not consider this evidence in this proceeding.

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

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

On certification, counsel asserts that the petitioner meets this criterion through his membership on the Bolles School swim team, University of Florida swim team, and in the Surinamese Swimming Association. We note that counsel has previously asserted that these same memberships satisfy the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ii). 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 memberships and performing in a leading or critical role for distinguished organizations, CIS clearly does not view the two 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).

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.

With regard to the Bolles School swim team, the April 21, 2008 letter from _____ states:

In 1997, [the petitioner] played a leading and critical role for Bolles School, Jacksonville, Florida[,] as a member of their National Championship swim team. Also, he played a leading and critical role for the Bolles School as a member of the 200 yard medley relay that set a National [high school] record in that event. The Bolles School is an association, organization and establishment that has a distinguished reputation as judged by experts in the field of swimming. In 1984, I was a student at the Bolles School and I know of my own personal knowledge the top swimmers with international potential are accepted into their program.

The petitioner submitted team photographs showing that he was a member of the Bolles School swim team,⁶ but there is no documentary evidence in support of _____ comments that the team won a national championship in 1997 or that the petitioner's medley relay team set a national record. As discussed previously, 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. at 158, 165 (citing *Matter of Treasure Craft of California*, 14 I&N at 190). The petitioner's evidence is not sufficient to show that this high school team had a distinguished national or international reputation during his enrollment. For example, there is no documentation showing the team's competitive record at national or international swim meets or other official statistics measuring its performance in relation to other teams outside of Florida. Regarding the petitioner's role for the Bolles School swim team, the record lacks evidence showing that his role as team member was leading or critical. For instance, there is no evidence for the seasons he competed comparing his results to those of the other members of the team (such as a tally of individual first place finishes or points earned). Without objective evidence showing that the petitioner's competitive achievements differentiated him from those of his team members, we cannot conclude that his role for the team was leading or critical. Finally, the petitioner has not established that competing for a high school team is evidence that he "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).

The record adequately establishes that the University of Florida men's swimming team has a distinguished reputation. For example, according to the team's 2002-2003 media guide, the men's team finished in the top ten at the NCAA championships in the three seasons preceding the petition's filing date. The February 8, 2008 letter from _____ states: "Any swimmer that competes at the University of Florida on a full sports scholarship, meets this criteri[on]." The record, however, does not establish that the petitioner's role was leading or critical for the team. The 2002-2003 media guide lists thirty swimmers and two divers on the varsity men's team roster. This documentation demonstrates that the petitioner competed for the team in individual swimming events and as a member of the medley relay team. The petitioner's senior profile identifies his best times and indicates that he specialized in breaststroke events and the individual medley. According to the media guide, team members _____ posted faster times in the 100

⁶ One of these team photographs identifies the Bolles School as "1997 STATE AAAA BOYS SWIM TEAM CHAMPIONS" and "DISTRICT CHAMPIONS."

and 200 meter breaststroke events. [REDACTED] also posted a faster time in the 200 meter breaststroke event. In the 200 meter individual medley, the petitioner's times were bested by team members [REDACTED] and [REDACTED]

Page 36 of the media guide contains a section entitled "2002-2003 Men's Swimming & Diving Outlook." This section states:

The freestyle events will again be the strength of the Gator squad.

* * *

The breast event is one of the more unsettled events as the Gators entered preseason practice. Florida doesn't return much experience, but a host of young swimmers will vie for the starting spot.

"This event tends to be one of our weaker ones," [REDACTED] said. "We need someone to step up right away. I think that can happen with the young guys that we have brought in to compete in the event."

* * *

The individual medley was also hurt by graduation following last season, but Troy believes that some newcomers could step in right away and fill the gap. Freshman [REDACTED] have had training in the event.

While all team members certainly play a vital role in swimming competition, the contents of the media guide and the other evidence of record do not establish that the petitioner's role was leading or critical within the team. The evidence submitted by the petitioner does not demonstrate how the petitioner's role significantly differentiated him from the other members of the men's team, including those who swam freestyle, backstroke, and butterfly events, or indicate how his role was leading or critical for the team as a whole. For example, there is no indication that the petitioner led the University of Florida men's team in first place finishes or points earned during any of the years he competed.

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

In this case, we concur with the director's finding that the petitioner has failed to demonstrate receipt of a major, internationally recognized award, or that he meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3).

On certification, counsel argues that the expert opinion letters submitted by the petitioner should be considered as comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). These letters have already been addressed under the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *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.⁷

The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten criteria "do not readily apply to the beneficiary's occupation." The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, the petitioner has submitted evidence specifically addressing five of the ten criteria at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to meet three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

Finally, 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." Part 5 of the Form I-140 petition lists the petitioner's occupation as "Swimmer." Part 6, "Basic information about the proposed employment," lists the petitioner's "Job title" as "Swimmer" and the "Nontechnical description of job" as "Swimmer."⁸

In response to the director's request for evidence of his plans for work in the United States, the petitioner submitted a September 28, 2003 letter stating:

It is my [in]tention to attend medical school after I graduate from the University of Florida in May of 2004. I will be graduating with a Bachelor's degree in Zoology (Pre-med). I have already taken the first step of the medical school application process by taking the MCAT (Medical College Admissions Test) on August 16, 2003 and am currently waiting for my results. After completion of my medical education I plan to pursue a career with a specialization in pediatrics. . . . I want a position that . . . allows for me to gradually be able to open a private pediatric office.

⁷ While the regulation at 8 C.F.R. § 204.5(h)(4) permits "comparable evidence" where the ten criteria do not "readily apply" to the alien's occupation, the regulation neither states nor implies that expert opinion letters attesting to the alien's standing in the field are "comparable" to the strict documentation requirements in the regulations setting forth the ten criteria.

⁸ With regard to competitive swimming, there is no evidence that the petitioner has competed in a FINA, USA Swimming, or NCAA sanctioned event since 2004. We acknowledge the petitioner's submission of evidence showing that he registered to swim in the Miami Mile on September 30, 2007 and competed in the Flowers 14th Sea Swim (placing 11th) in 2006, but neither competition involved the petitioner swimming the breaststroke or the individual medley, the events for which he earned national recognition in Suriname.

I am currently on the University of Florida men's varsity swim team and am training for the 2004 NCAA swimming championships as well as the 2004 Olympics.

The petitioner's statement that he intends to "pursue a career with a specialization in pediatrics" is not clear evidence that he will continue work in his area of expertise.

The petitioner also submitted an October 3, 2003 letter from [REDACTED] Director, SwimAmerica of Gainesville, Florida, stating: "[The petitioner] spent many hours the past two summers volunteering his time teaching many children to swim for my swim lesson program" An October 6, 2003 letter from [REDACTED]

Coordinator, Carse Complex, Swimming Offices, University of Florida, states: "[The petitioner] worked for the Gator Swim Camp during the summer of 2003 as a camp counselor/coach. [The petitioner] was one of the coaches responsible for approximately 20 swimmers who traveled to our camp from Brazil." Neither letter discusses an intention to employ the petitioner as a coach or swim instructor in the future. Further, 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), and 8 C.F.R. § 204.5(h)(5). 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 an instructor or coach are not 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." For example, the record includes no evidence showing the petitioner's nationally or internationally acclaimed coaching achievements as of September 11, 2002. 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.

The record includes a copy of the petitioner's 2004 U.S. income tax return identifying his "occupation" as "Medical Assistant." Further, a June 4, 2007 letter from the North Florida Regional Medical Center states that the petitioner worked there as an Operating Room Technician from July 26, 2004 through August 18, 2005." Finally, the record includes the petitioner's academic record from St. Matthew's University School of Medicine indicating that he was a student there from Fall 2005 through Spring 2007.

In response to the director's notice of intent to revoke, the petitioner submitted an August 9, 2007 letter stating: "As a future healthcare professional I should not only promote health, but also set an example with my swimming background to care for patients and coach and train competitive swimmers. I have accepted a permanent coach position with the Swim Gym Aquatics, Inc. swim school." The record includes a June 21,

2007 letter from [REDACTED] Head Swim Coach, Swim Gym Aquatics, Inc., and a June 15, 2007 pay statement reflecting the petitioner's employment "as an assistant swim coach."

On certification, counsel argues that the petitioner will continue work in his area of expertise as a swim coach. Counsel cites 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 stated that she intended to work in an unrelated occupation such as a healthcare professional. 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.

According to Parts 5 and 6 of the Form I-140 petition and the initial supporting documentation, the petitioner seeks extraordinary ability classification as a "Swimmer," not as a coach. Aside from our finding that coaching is not the petitioner's area of expertise, the request that he also be considered as a coach based on his 2007 employment 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). Further, the petitioner continues to assert that he will work as a "future healthcare professional." In this case, the petitioner's signed statements, his 2004 U.S. income tax return identifying his "occupation" as "Medical Assistant," the June 4, 2007 letter from the North Florida Regional Medical Center stating that the petitioner worked as an Operating Room Technician in 2004 and 2005, and his academic record showing that he was a student at St. Matthew's University School of Medicine from Fall 2005 through Spring 2007 are not "clear evidence" that he will continue work in his area of expertise in the United States.

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 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. 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 April 14, 2008 is affirmed. The approval of the petition remains revoked.