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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:
SRC 08 015 52830

JUL 20 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in athletics. The director determined that the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. More specifically, the director found that the petitioner had failed to demonstrate receipt of a major, internationally recognized award, or that he meets 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 expertise in the United States.

On appeal, counsel argues that the petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and that he will continue to work in his area of extraordinary ability in the United States. In his supplemental brief pertaining to the instant appeal, counsel references prior AAO decisions for a previous Form I-140, Immigrant Petition for Alien Worker, filed by the petitioner on February 2, 2006, EAC 06 092 52754, stating that “all of the articles and letters attached hereto have been submitted to USCIS [U.S. Citizenship and Immigration Services] in support of his I-140 petitions.” The initial Form I-140 petition, EAC 06 092 52754, and the appellate and certification proceedings relating to the revocation of the approval of that petition have been incorporated into the record of proceeding now before the AAO.¹

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

¹ The initial Form I-140 petition, EAC 06 092 52754, was initially approved by the Director, Texas Service Center, on September 18, 2006. Subsequently, the director issued a notice of intent to revoke (NOIR) the approval of the petition. In a September 13, 2007 Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The petitioner filed an appeal with the AAO, which remanded the matter to the director for further action and consideration in a decision dated May 12, 2008. The director again served the petitioner with a NOIR, and ultimately revoked the approval of the petition on July 24, 2008. On August 27, 2008, the AAO affirmed the decision of the director on certification finding that the petitioner met only two of the regulatory criteria, three of which are required to establish eligibility. 8 C.F.R. § 204.5(h)(3). The AAO also affirmed the director’s findings that the petitioner had not submitted clear evidence that he would continue to work in his area of expertise in the United States and had not demonstrated that his participation in his sport would substantially benefit prospectively the United States.

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.

USCIS 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). It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition, filed on October 1, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a swimmer. 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. 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 under 8 C.F.R. § 204.5(h)(3).²

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 Meter Individual Medley at the European Championships. The petitioner also submitted results from the National Spring Championships in Indianapolis (2003) reflecting that he placed third in the 200 Meter Individual Medley. While the preceding competitive achievements can serve to meet this criterion, there is no evidence showing the petitioner’s receipt of nationally or

² The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

internationally recognized prizes or awards in the four years preceding the petitioner's filing date. Accordingly, the petitioner has not demonstrated that his national or international acclaim as a competitive swimmer has been sustained. 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 preceding evidence is not consistent with sustained national or international acclaim as of the date of filing of this petition and, thus, is insufficient to meet this criterion without additional evidence under this criterion or other criteria documenting the petitioner's more recent acclaim as a swimmer.³

On appeal, counsel states that the petitioner received a bronze medal in the 400 Individual Medley at the 2002 and 2004 South Eastern Conference (SEC) championships, but these awards reflect regional recognition at the collegiate level rather than nationally or internationally recognized prizes or awards. Further, the record does not include evidence from the SEC documenting or verifying the petitioner's receipt of the bronze medals. 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)). A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). In this instance, the petitioner has not overcome the absence of primary and secondary evidence demonstrating that he received the preceding bronze medals from the SEC. Even if we were to accept the petitioner's 2004 South Eastern Conference bronze medal as qualifying evidence for this criterion, which we do not, it was received more than three years prior to the petition's filing date and therefore is not indicative of sustained acclaim at the time of filing.

In light of the above, the petitioner has not established that he meets this criterion with evidence proximate to the date of filing.

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 an August 28, 2007 letter from the Secretary General of the Hungarian Swimming Association listing the petitioner's achievements and stating that he participated in three Olympic Games (1996, 2000, and 2004) as a member of the Hungarian national swim team.⁴ The

³ With regard to the petitioner's I-140 petition filed on February 2, 2006, the AAO's May 12, 2008 and August 27, 2008 decisions concluded that the preceding awards, in conjunction with the petitioner's 2004 Hungarian Olympic team participation, met this criterion as the later achievement had occurred within eighteen months of the initial petition's filing date. The petition relating to the instant appeal, however, was filed on October 1, 2007, more than three years after the petitioner's last significant competitive achievement of competing in Athens as a member of the Hungarian Olympic team in August 2004.

⁴ 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

letter further states that the petitioner “is a member of the Hungarian National Swimming Team” and that he is “preparing” for the “2008 Olympic Games.”⁵ Despite the comment from the Secretary General indicating that the petitioner was a member of the national team in 2007, there is no evidence (such as official swim meet results) showing that the petitioner has competed for the Hungarian team at swimming events subsequent to 2004. In fact, the Secretary General’s letter does not mention a single swimming achievement of the petitioner subsequent to 2004. While membership on an Olympic team can serve to meet this criterion, we note that the record lacks supporting evidence showing the petitioner’s participation in competition for the Hungarian national team in the three years preceding the petition’s filing date. As previously noted, the statute and regulations require the petitioner to demonstrate that his national or international acclaim as a competitive swimmer has been sustained. 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 preceding evidence is not consistent with sustained national or international acclaim as of the date of filing of this petition and, thus, is insufficient to meet this criterion without additional evidence under this criterion or other criteria documenting the petitioner’s more recent acclaim as a swimmer.⁶

In light of the above, the petitioner has not established that he meets this criterion with evidence proximate to the date of filing.

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

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.

⁵ The record, however, which was last supplemented by the petitioner on appeal in June 2009, does not include evidence showing that the petitioner participated in the 2008 Olympic Games as a member of the Hungarian national swim team. Rather, the record includes a May 12, 2008 letter from the petitioner stating: “Because I have been suffering from a shoulder injury, . . . I decided to focus on my 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 that my Olympic preparation could not be continued Because my injuries prevent me from swimming as much as it is necessary for my Olympic preparation”

⁶ With regard to the petitioner’s I-140 petition filed on February 2, 2006, the AAO’s May 12, 2008 and August 27, 2008 decisions concluded that the petitioner’s 2004 Hungarian Olympic team participation met this criterion as it had occurred within eighteen months of the initial petition’s filing date. The petition relating to the instant appeal, however, was filed on October 1, 2007, more than three years after the petitioner’s achievement of competing for the Hungarian Olympic team in August 2004.

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.⁷

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>. 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 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.

On appeal, the petitioner submits a July 19, 2000 article in *Hungarian Success Sports* entitled “Swimming.” This three-page article includes one sentence about the petitioner’s receipt of a gold medal in 400 Meter Individual Medley at the European Championships in 2000. This article is about Hungarian swimming in general rather than being about the petitioner. The plain language of this regulatory criterion, however, requires that the published material be “about the alien.” The petitioner also submits a July 11, 2000 four-sentence piece and photograph of him in *Nemzeti Sport* entitled “Golden Days All Over Europe.” The brief piece also mentions the achievements of several other athletes and includes their photographs as well. In addition, the petitioner submits a July 12, 2000 interview of the petitioner in *Nemzeti Sport* entitled “[The petitioner]: The Consistent Golden Man.” The petitioner’s appellate submission also includes a July 11, 2000 article about him in *Nepszava* entitled “A Surprise Bomb’s After Shakes.” However, there is no evidence (such as circulation statistics) showing that the preceding publications qualify as professional or major trade publication or some other form of major media. Further, we cannot ignore the lack of articles about the petitioner in major publications from 2001 through the petition’s filing date. As previously noted, the statute and regulations require the petitioner to demonstrate that he has national or international acclaim

⁷ 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.

and that it has been sustained. 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).

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.

On appeal, counsel states: "In the year 2000, [the petitioner] won the gold medal in the 400 Meter Individual Medley at the European Championships. This was an original contribution of major significance."

Counsel cites the July 19, 2000 article in *Hungarian Success Sports* entitled "Swimming" which states: "In addition to [redacted] usual gold medals, this year [the petitioner] won the gold in 400 Individual Medley, and earned the first gold medal for Hungary after 7 years of gold medal freeze since the 1993 Championships after [redacted] and [redacted] successes." The article further states:

The most gold medals were collected in the European Championships. Hungary won no less than 58 gold medals, 50 of which were earned in individual events, 4 in relays, and 4 in long distance swimming Out of the 50 gold medals, almost half, exactly 24 were won by three swimmers: [redacted] won 9, [redacted] won 8 and [redacted] won 7 gold medals.

In addition, the article in *Nepszava* entitled "A Surprise Bomb's After Shakes" notes that [redacted] a Hungarian male swimmer, won a gold medal in the individual medley at the 1996 Olympics.

Given the individual medley gold medalists from Hungary that preceded him, we find no evidence to support counsel's argument that the petitioner's achievement "was completely original." Further, the petitioner's gold medal in the 400 Meter Individual Medley at the 2000 European Championships has already been addressed under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i). Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for awards and original contributions of major significance, USCIS clearly does not view these 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. In this case, there is no evidence establishing that the petitioner has made original athletic contributions of major significance in the field. Further, we cannot ignore the lack of achievements for this criterion from 2001 through the petition's filing date. As previously noted, the statute and regulations require the petitioner to demonstrate that his national or international acclaim has been sustained. 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).

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.

The record includes adequate documentation (such as published material) to demonstrate that the Hungarian national team has a distinguished reputation in the sport of swimming. With regard to the petitioner's leading or critical role for the team, the petitioner submits a September 17, 2008 letter from [REDACTED] Head Coach of the Hungarian National Swim Team, stating:

[The petitioner] always stood out as a leader of the team which only increased when he won the European Championship and permanently joined the best individual medley swimmers of Hungary and of Europe. With his European gold medal [the petitioner] continued the Hungarian line of world class individual medley swimmers which [REDACTED] left off seven years ago.

[The petitioner's] work ethic and results in 2000 encouraged everyone in the national team to follow him and train harder Further, [the petitioner's] determination to continuously improve made veterans such as former European Champion and Olympic silver medalist [REDACTED] continue swimming at the age of 33. [The petitioner] became a role model for younger athletes, especially those are in individual medley. [The petitioner] also mentored [REDACTED], who is a world champion and Olympic silver medalist individual medley swimmer when he became a young member of the team in 1999. Without his mentoring he would not have become the swimmer he is today.

After recovering from his injuries and a knee surgery, [the petitioner] is expected to continue his leading role in the Hungarian swimming team as he continues to train in America for the Short Course U.S. Nationals and next year's World Cup events. I predict that his extraordinary work ethic combined with his world class skills and international experiences will bring him back to the top of the field.

[REDACTED]'s letter only mentions the petitioner's 2000 European Championships gold medal and "results in 2000" in discussing the petitioner's competitive achievements for the national team. 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, also submitted the August 28, 2007 letter from the Secretary General of the Hungarian Swimming Association stating the petitioner "has been a valuable member of the Hungarian National Swimming Team since 1995." The preceding 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] and [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. at 158, 165. 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 sustained national or international acclaim. While all team members certainly play a vital role in a 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.

With regard to [REDACTED]'s comments that the petitioner's "determination to continuously improve" influenced [REDACTED] to continue swimming and that the petitioner's mentoring helped [REDACTED]

in his swimming career, the evidence of record does not establish that the success of these Hungarian swimmers was primarily attributable to the petitioner's influence rather than their own competitive talents or guidance from their swim coaches who directly supervised their athletic training. We note that the petitioner submitted a July 29, 2008 letter from [REDACTED], Head Swimming Coach during the four years the petitioner attended the University of South Carolina (USC), indicating that the petitioner competed and trained there from 2001 to 2004. The documentation submitted by the petitioner, however, does not specify the dates when he trained at the same facilities as his fellow Hungarians [REDACTED] and [REDACTED]. Even if the petitioner were to submit substantive evidence reflecting his significant influence upon two of the Hungarian national team's swimmers in 2000, the opinions expressed by [REDACTED] and the other documentation in the record is not sufficient to demonstrate that the petitioner's role was leading or critical and indicative of sustained national or international acclaim.

We cannot ignore [REDACTED]'s final statement predicting that the petitioner's "extraordinary work ethic combined with his world class skills and international experiences *will bring him back to the top of the field.*" [Emphasis added.] This statement indicates that the petitioner is no longer among that "small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The highly restrictive visa classification sought by the petitioner is intended for aliens who have sustained acclaim at the very top of their respective fields, rather than for individuals attempting to re-establish themselves at some unspecified future time.

The petitioner also submits 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."⁸ 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, USCIS clearly does not view the three criteria as being interchangeable. As previously discussed, 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). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19

⁸ According to his letter,

coaching expertise is diving rather than swimming.

I&N Dec. 791, 795 (Commr. 1988). USCIS, however, 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; USCIS 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.

Finally, we note that the record does not include evidence showing the petitioner's successful participation in competition for the Hungarian national team in the three years preceding the petition's filing date. As previously noted, the statute and regulations require the petitioner to demonstrate that his national or international acclaim as a competitive swimmer has been sustained. *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 preceding evidence submitted by the petitioner is not consistent with sustained national or international acclaim as of the date of filing of this petition and, thus, is insufficient to meet this criterion without additional evidence under this criterion or other criteria documenting the petitioner's more recent acclaim as a competitive swimmer.

In light of the above, the petitioner has not established that he meets this criterion with evidence of his leading or critical role for the Hungarian national team proximate to the date of filing.

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

The petitioner submitted letters from the Office of Student and Financial Aid at USC reflecting that he 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] 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."

On appeal, the petitioner submits a September 19, 2008 letter from [REDACTED] Executive Director, College Swimming Coaches of America, stating:

Even the world's most elite swimmers, some of whom are ranked first globally in their events, generally cannot make as much money with sponsorships as they receive when they accept a full scholarship from an American university. By receiving a full scholarship at a state university, for instance at USC (University of South Carolina), they actually receive

education, lodging, books, etc., in the amount of approximately \$17,000 - \$24,000.00 per year until they complete their degrees. [The petitioner] completed 4.5 years at South Carolina from January 9, 2001 to May 7, 2005 (see [the petitioner's] I-20 highlighted amount).

In other words, while all but the half dozen or so most outstanding swimmers in the world find it difficult to make a living out of sponsorships, if they are good enough in the water and sufficiently adept academically, they can accept a full scholarship and actually receive over \$100,000.00 worth of a first-rate college education.

* * *

For international world-class swimmers, receiving a “full ride” is the best payoff for their years of dedication and outstanding results

The petitioner also submits a June 2, 2009 letter from [REDACTED], Director of Research, College Swimming Coaches of America, stating:

In terms of scholarships to Division I schools in the United States “in relation to others in the field,” [the petitioner] received the exact same amount of remuneration during his career at USC as all of the other decorated, world class swimmers who received an NCAA full scholarship. By receiving a full ride, [the petitioner] earned the highest possible remuneration, because there is no higher compensation that a scholarship NCAA swimmer can receive.

Counsel argues that the petitioner meets this criterion by receiving an athletic scholarship from USC and that “[t]here is no higher compensation that an NCAA scholarship swimmer (or any other NCAA athlete, for that matter) can receive.” The plain language of this regulatory criterion requires the petitioner to submit evidence showing that he has earned “a high salary or other significantly high remuneration for services, in relation to others in the field.” The petitioner cannot artificially restrict his field to only swimmers in the NCAA Division I program. A collegiate scholarship represents funding to pursue educational studies rather than a salary or remuneration for services. Further, there is no evidence comparing the dollar amount of the petitioner’s total scholarship to the amounts received by other collegiate swimmers. In addition, we cannot conclude that receipt of a “grant-in-aid” limited to college 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). USCIS 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 60899.⁹

⁹ 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

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.”

In this instance, there is no evidence establishing that top swimmers’ remuneration is limited to collegiate scholarships rather than paid endorsements or some other form of compensation. For example, the letter from [REDACTED] indicates that top swimmers such as [REDACTED] and [REDACTED] receive sponsorships. As discussed, 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 appropriate basis for comparison showing that his remuneration was significantly high in relation to others in his field. Further, we cannot ignore that the petitioner’s collegiate scholarship terminated in the Spring of 2005. There is no evidence showing that the petitioner has received a high salary or other significantly high remuneration as a swimmer subsequent to May 2005. As previously noted, the statute and regulations require the petitioner to demonstrate that his national or international acclaim as a competitive swimmer has been sustained. *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 preceding evidence submitted by the petitioner is not consistent with sustained national or international acclaim as of the date of filing of this petition and, thus, is insufficient to meet this criterion without additional evidence under this criterion or other criteria documenting the petitioner’s more recent acclaim as a competitive swimmer.

In light of the above, the petitioner has not established that he meets this criterion with evidence demonstrating that he has commanded a high salary or other significantly high remuneration as a swimmer proximate to the date of filing.

In this case, we concur with the director’s determination that the petitioner has failed to demonstrate receipt of a major, internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the national or international acclaim necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3). Further, there is no evidence showing that the petitioner’s national or international acclaim as a swimmer has been sustained. *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). Specifically, the record does not include evidence of his nationally or internationally acclaimed achievements and recognition in competitive swimming subsequent to 2004.

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 USCIS’ interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

On appeal, counsel argues that the petitioner's 2000 European Championship Gold Medal in the 400 Individual Medley, 2000 U.S. Open Silver Medal in the 400 Individual Medley, 2002 European Championship Silver Medal in the 400 Individual Medley, 2002 Hungarian Swimmer of the Year Award, 12 Hungarian Championship titles, and top ten world ranking listed in the August 28, 2007 letter from the Secretary General of the Hungarian Swimming Association are comparable evidence of the petitioner's extraordinary ability pursuant to 8 C.F.R. § 204.5(h)(4). Counsel further states that that the petitioner received bronze medals in the 400 Individual Medley at the 2002 and 2004 SEC championships. Without documentary evidence from the SEC 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).

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 evidence 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). Where an alien is simply unable to meet three of the regulatory 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. Nevertheless, the petitioner's prizes and awards identified by counsel and listed in the August 28, 2007 letter from the Secretary General of the Hungarian Swimming Association have already been addressed under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i). For example, the petitioner's bronze medals in the 400 Individual Medley at the 2002 and 2004 SEC championships reflect regional recognition at the collegiate level rather than national or international recognition at the very top level of the sport. Further, with regard to the petitioner's top ten world ranking, there is no evidence showing that the petitioner has occupied such a ranking since his 10th place finish in the 400 Meter Individual Medley at the 2000 Olympic Games in Sydney. In this case, the documentation that the petitioner requests evaluation of as comparable evidence does not establish that his national or international acclaim has been sustained during the three years preceding the petition's October 1, 2007 filing date. 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 petitioner has not submitted comparable evidence of achievements and recognition indicative of sustained national or international acclaim in competitive swimming proximate to the date of filing.

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 October 1, 2007, lists the petitioner's occupation as "Swimmer."

The petitioner initially submitted an August 20, 2007 letter from [REDACTED], Head Coach of the USC Swimming and Diving Team, stating that the petitioner was "continuing his preparation for the 2008 Olympics." The record also includes a May 12, 2008 letter from the petitioner stating:

After graduation I stayed in Columbia, South Carolina to train for . . . the 2008 Olympics.

* * *

Because I have been suffering from a shoulder injury, . . . 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 that my Olympic preparation could not be continued

The petitioner's appellate submission includes an October 15, 2008 letter from him stating:

After the series of unfortunate injuries and surgeries of the past few years I can finally say that my knee surgery of July 25, 2008 proved to be a success, so now I am happy to announce that I will be able to continue swimming. After my recovery and rehab I began to practice with the university's swim team every morning (Monday through Saturday) from 5:45 a.m. to 8:00 a.m. and with the club team in the afternoons (every day except Wednesday) from 6:00 p.m. to 8:00 p.m.

* * *

My short term goals include the participation in the U.S. Short Course Nationals in December. My long term plans include the preparation for the 2010 European Championship held in Budapest Hungary, and possibly achieving my old-time dreams of participating in my fourth Olympic Games in 2012.

The petitioner's letter was accompanied by a swimming event schedule for the 2009-2010 seasons. The petitioner also submits a March 20, 2009 letter from USC Head Swimming Coach, stating:

I am writing this letter to confirm that [the petitioner] is preparing for his future swim meets with me. The three-time Olympian and European Champion [the petitioner] is practicing with the university's swim team under my supervision every morning (Monday through Saturday) from 5:45 a.m. to 8:00 a.m. and with the club team in the afternoons (every day except Wednesday) from 6:00 p.m. to 8:00 p.m. [The petitioner] is currently preparing for 2009 Swimming World Cup events and 2010 European Championship held in Hungary. Our long-term goal is to participate in the 2012 Olympic Games.

The documentation submitted on appeal indicates that the petitioner intends to continue his participation in swim competitions at the national and international level. Accordingly, we withdraw the director's finding that the petitioner has not submitted clear evidence that he would continue to work in his area of expertise in the United States. 8 C.F.R. § 204.5(h)(5).

Beyond the director's decision, we find the petitioner has failed to establish that his entry into the United States will substantially benefit prospectively the United States. As discussed above, the

petitioner has failed to establish his national or international acclaim as a swimmer has been sustained. Given his failure to satisfy the statutory and regulatory requirements for this classification, the petitioner's substantial benefit to the United States cannot be automatically assumed. In this case, it is unclear how the petitioner, as a member of the Hungarian national team, will substantially benefit prospectively the United States by competing on behalf of the Hungarian national team at international swimming events. On appeal, counsel states that "world class swimmers add to the fabric of this country's identity and its cultural norms." Further, the March 20, 2009 letter from [REDACTED] states:

I am honored to have [the petitioner] training with us as he is the best swimmer USC ever had, and a great leader who always encouraged his teammates. [The petitioner] is not only the most experienced world-class swimmer in South Carolina but he . . . also possesses special leadership qualities; [the petitioner] is able to inspire his teammates and encourage swimmers to work harder and achieve more

We note that the petitioner's career as a collegiate swimmer for USC has long since ended. While the petitioner may continue to inspire current university and club team members by training alongside them at USC's aquatic facilities, the proposed benefit of his training with a few dozen swimmers in South Carolina would be so attenuated at the national level as to be negligible. Accordingly, the petitioner has not established that his training in this country will substantially benefit prospectively 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. Further, the evidence is not persuasive that the petitioner's entry into the United States will substantially benefit prospectively the United States. Therefore, the petitioner has not established eligibility pursuant to sections 203(b)(1)(A)(i) and (iii) 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.