

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

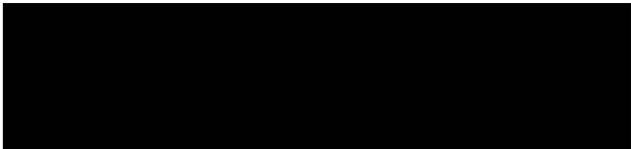
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B2



FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **MAY 22 2009**
SRC 07 185 51638

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.

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
John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in athletics. The director determined that the record did not establish that the petitioner had achieved the sustained national or international acclaim required for classification as an alien of extraordinary ability. The director also found the petitioner had not established that she is one of that small percentage who have risen to the very top of her field of endeavor. Finally, the director determined that the petitioner failed to establish that she is coming to the United States to work on her area of expertise.

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

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

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --

- (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
- (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

United States Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that she has sustained national or international acclaim at the very top level.

We note that although the record contains evidence of the petitioner's prior approval as an O-1 nonimmigrant, the prior approval does not preclude USCIS from denying a subsequently filed immigrant visa petition. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant

petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Each petition must be adjudicated on its own merits under the statutory provisions and regulations which apply. Thus, the petitioner's eligibility will be evaluated under the regulatory criteria relating to the immigrant classification as claimed by the petitioner.

This petition, filed on May 30, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a swimmer. Initially, the petitioner submitted swim meet results and a letter from the All-Russian Swimming Federation. In response to a Request for Evidence ("RFE") dated October 22, 2007, the petitioner submitted letters of recommendation, additional swimming meet results, news articles, and information about Federation Internationale de Natation ("FINA"). On appeal, although the petitioner submitted results from the 2008 Olympic Games and the 2008 Swimming World Cup with news articles about both events, she does not specifically dispute any of the director's specific findings. Instead, on the Form I-290B, counsel simply refers to an unpublished May 12, 2008 decision of the AAO and contends that the unpublished decision overrules the director's decision in this unassociated case. Counsel does not indicate that the facts of the previous case are analogous to the instant case or provide any further information to support a finding that the AAO's previous decision (which was, in fact, not sustained but remanded for further review by the director) has any relevance to the current case. Counsel submits additional documents in which he generally asserts that the director's decision in this case was "an unlawful act" by the adjudications officer who rendered the decision, which we note was signed on behalf of the director and not the officer individually. Counsel also discusses the petitions filed by several of his other clients, none of which are currently before us in this proceeding. Counsel requests that the AAO investigate a specific adjudications officer at the Service Center, but provides no authority suggesting that the AAO is an investigative body. As discussed, we are not persuaded by any of counsel's arguments or allegations on appeal. Thus, the sole issue this decision will decide is whether the record supports the petitioner's claims of eligibility for the benefit sought as of the date of filing, May 30, 2007.

The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien's receipt of a such an award, the regulation at 8 C.F.R. § 204.5(h)(3) outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R. § 204.5(h)(3). In determining

whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The petitioner has submitted evidence pertaining to the following criteria.¹

At the time of filing, the petitioner submitted a letter from the All-Russian Swimming Federation which stated that the petitioner has been a national champion and national record holder. The letter was accompanied by a list of dates, places, times and placement in competitions in which the petitioner has purportedly participated. The source of this list is not identified. It is noted that the list does not indicate the petitioner’s competition in any national competition held within Russia as claimed by the petitioner. 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)). Instead, the list indicates that out of 30 competitions, the petitioner finished in first place on only two occasions; for the 100 meter individual medley at the 2006 World Cups in New York and the Belo-Horizonte in 2006. Neither of these competitions appear to be Russian National competitions. The petitioner also submitted computer generated printouts listing individual competitions that the petitioner has competed in, including her times and placement in the competitions, including the FINA World Cup and the European Short Course Swimming Championship, but no documentary evidence to support the claim that the petitioner is a national champion in Russia.

In response to the director’s RFE counsel refers to the petitioner’s Russian National Championships and Russian National records and submits a letter from [REDACTED] Owner and Head Coach of the King Aquatic Club in Milton, Washington. [REDACTED] is also the swim coach for USA Swimming and the United States National Team coach. Like counsel, [REDACTED] asserts that the petitioner has been “the Russian National Champion, gold medal and national record holder from approximately 2003 until present.” Again, however, no documentary evidence of her finish at any Russian National Championship has been provided. As previously noted, simply going on record with no supporting evidence is not sufficient to establish the petitioner’s burden of proof. *Matter of Soffici* at 165. Moreover, while [REDACTED] further claims that the petitioner won gold and silver medals at Russian National Championships in the 200 IM and the 400 IM, he indicates that the competition took place in July 2007. Therefore, even if documentary evidence had been submitted to support counsel’s or [REDACTED]’s claims regarding the July 2007 competition, because the competition took place after the filing of the petition, the awards purportedly received by the petitioner cannot be considered in this proceeding. A petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12). A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, we concur with the director’s finding that the petitioner has failed to establish a one-time achievement.

¹ Only those criteria claimed to be applicable by the petitioner will be discussed, because neither the petitioner nor counsel claim to meet any of the remaining criteria and the record contains no evidence relevant to those criteria.

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

The record establishes that the petitioner has had top place finishes in several international competitions, including the 2004, 2005 and 2006 World Cups, the 2006 Belo-Horizonte, and the 2005 Mare Nostrum. Such evidence is sufficient to demonstrate the petitioner's eligibility for this criterion.

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

(ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields

In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, proficiency certifications, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The letter from the All Russian Swimming Federation states that the petitioner has been a member of the Russian national team for four years and further evidence shows that the petitioner continued to represent Russia through 2008. In this instance, we find that the petitioner's competition as part of the Russian National team qualifies her for this criterion. Accordingly, we withdraw the determination of the director on this issue and find that the petitioner has demonstrated eligibility under this criterion.

(iii) 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.²

² 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.

The petitioner submitted the following materials in support of the petition: “Four-time Olympic medalist Sandeno wins University Games gold,” published August 11, 2007 in the *Daily Times*; “Records fall as Americans make a big splash,” published August 11, 2007 in an unidentified publication; “A golden Kick,” published on August 11, 2007 in *The Nation*; “Five Records Shattered as USA Win 3 Golds,” published in *The Nation* after August 2007; a picture of the petitioner with a short caption dated July 1, 2007 on *US Presswire*; and “Hayden and Johns set meet records at Mel Zajac Jr. International/Bell Swimming Grand Prix” in 2007 appearing on the *Sport Research Intelligence sportive* website. In addition, on appeal, the petitioner submitted the following additional materials about her 2008 World Cup performance: [REDACTED] “Wins Gold at World Cup,” published November 12, 2008 on the King Aquatic Club (“Club”) website; [REDACTED] and [REDACTED] – swimmers of the World Cup Moscow meet” and the recap of events from the meet published on the FINA website.

This evidence is deficient for several reasons. First, except for the materials from the Club website, none of the preceding articles were primarily about the petitioner as required by the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(iii). Second, of the publications that were identified, the petitioner failed to submit evidence to establish that any of these publications are professional, major trade publications or other major media. We note that the majority of the petitioner’s materials come from websites. In today’s world, many news articles and printed materials, regardless of size and distribution, are posted on the Internet. To ignore this reality would be to render the “major media” requirement meaningless. We are not persuaded that international accessibility via the Internet by itself is a realistic indicator of whether a given publication is “major media.” The petitioner must still provide evidence, such as, a widespread distribution, readership, or overall interest in the publication in order to demonstrate that the publication is a professional or major trade publication or major media in order for us to credit these articles. Regarding the photograph the petitioner submitted, we further note that as this criterion specifically requires an author, title, and translation, the publication of photographs does not qualify the petitioner under this criterion. Finally, it does not appear that any of the above-listed articles or the articles submitted on appeal were published at the time of filing. Therefore, they may not be considered. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I. & N. Dec. at 49.

Accordingly, the petitioner has not established her eligibility under this criterion.

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

The letter from [REDACTED] recounts medals and races won by the petitioner and argues that the petitioner is an alien with extraordinary ability under this visa category. The letter from [REDACTED], a Ukrainian swimmer, also recounts the petitioner’s awards and states that the petitioner “possesses extraordinary athletic talent. She continuously growing her athletic potential and constantly improving her athletic achievements. She is extremely goal-focused, directed to the highest athletic results, and she is constantly growing her intellectual, technical and physical level.” The letter from [REDACTED], staff member of the Russian Federation Physical Education Ministry, states that the petitioner “has developed creative, exploratory approach to training process . . . and she thoughtfully [sic] introducing into her training new scientific developments in the fields of athletic swimming, physiology, psychology and other adjoining subject matters.” The letter submitted from [REDACTED], head coach of the University of Miami swimming and diving team, states that swimmers “who win at the National Championship level are the very best in their country.” These letters focus on awards and achievements that have already been addressed under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i). We emphasize that the regulatory criteria are separate and distinct from one another. Because separate criteria exist

for awards and original contributions of major significance in the field, 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 addition, the above letters are all from the petitioner's immediate circle of colleagues. While such letters are important in providing details about the petitioner's role in various competitions and teams, they cannot by themselves establish the petitioner's acclaim beyond her immediate circle of colleagues. The ten regulatory criteria at 8 C.F.R. § 204.5(h)(3) reflect the statutory demand for "extensive documentation" in section 203(b)(1)(A)(i) of the Act. Opinions from witnesses whom the petitioner has selected do not represent extensive documentation. Independent evidence that already existed prior to the preparation of the visa petition package carries greater weight than new materials prepared especially for submission with the petition. 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 original contributions of major significance that one would expect of a swimmer who has sustained national or international acclaim.

Without extensive documentation showing that the petitioner's work has been unusually influential, highly acclaimed throughout her field, or has otherwise risen to the level of original contributions of major significance, the petitioner has failed to establish that she meets this criterion.

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

The petitioner asserts eligibility under this criterion by virtue of her participation on the Russian National team at various international swim meets. The petitioner's membership on the national team has already been addressed under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ii). We again emphasize that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for a petitioner's membership in associations requiring outstanding achievement and a petitioner's leading or critical role for organizations and establishments that have a distinguished reputation, USCIS clearly does not view these criteria as being interchangeable. In this instance, at the time of filing the petition, the petitioner had failed to distinguish herself from other members of the team such that her performance can be said to have been leading or critical for her team.

Accordingly, the petitioner has not demonstrated eligibility under this criterion.

In addition, the director determined that the petitioner failed to establish that she seeks to continue work in her area of expertise in the United States. See section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the petitioner detailing plans on how she intends to continue her work in the United States. On the Form I-140, the petitioner failed to provide any information in Part 6, "Basic information about the proposed employment." Further, with her initial submission, the petitioner submitted no personal statement, no letters from prospective employers, contracts, or other information detailing her plans in the United States. Despite the director's specific request for evidence that the petitioner seeks to continue work in her area of expertise in the RFE, the petitioner failed to submit any probative evidence in response to the director's request. Similarly, on appeal, even with the director's specific finding on this issue, the petitioner submitted no evidence. Accordingly, we concur with the director's determination that the petitioner has failed to establish that she will continue work in her area of

expertise in the United States.

Finally, beyond the director's decision, we find the petitioner has failed to establish that her entry into the United States will substantially benefit prospectively the United States. In his "Second Emergency Motion," a document submitted by counsel subsequent to the appeal, counsel argues that it is USCIS policy to not require evidence regarding this benefit. Counsel cites to a letter written by ██████████ Chief, Immigration Branch, Adjudications in 1995, published in 72 No. 12 *Interpreter Releases*, 443. First, letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Contrary to counsel's assertion, letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

Moreover, it appears that counsel has taken the language of the letter out of context and inappropriately applied it to the instant case. Although the letter does initially acknowledge that the regulations do not require a petitioner to submit evidence to show that he or she will substantially benefit the United States, the letter goes on to state that "Congress did not intend for aliens of extraordinary ability to immigrate to the United States and remain idle" and that the language in section 203(b)(1)(A)(iii) cannot be "written off." The letter concludes that "ordinarily the 'substantial benefit' criterion is met through satisfying the other statutory requirements, however, there may be very rare instances where an extraordinary alien's admission may be damaging or detrimental to the interests of the United States. In this instance, the petitioner has failed to establish that she meets three of the ten criterion and, in addition, that she seeks to enter the United States to continue work in her area of extraordinary ability. Given her failure to satisfy any of the statutory requirements, the petitioner's substantial benefit cannot be automatically assumed. As indicated above, the petitioner has failed to provide any description of her future plans in the United States. Given her failure to provide any details about her future prospects, opportunities, plans or intent, it is unclear how she will substantially benefit prospectively the United States. Moreover, it is unclear how, in her current position as a member of the Russian National team, that she will substantially benefit prospectively the United States by training for and competing with a foreign national team. For this additional reason, the petition may not be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g., *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his or her field. The evidence in this case indicates that the petitioner has enjoyed moderate success as a swimmer on the Russian national swim team. However, the record does not establish that the petitioner achieved sustained national or international

acclaim so as to place her at the very top of her field; that she seeks to enter the United States to continue work in competitive swimming, and if so, for whom; or that her entry into the United States will substantially benefit prospectively the United States. She is thus ineligible for classification as an alien with extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), and her petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed. This decision is rendered without prejudice to the filing of a new petition with the requisite “extensive documentation” required by section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A).

ORDER: The appeal is dismissed.