



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF M-S-

DATE: SEPT. 27, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a competitive swimmer, seeks classification as an individual of extraordinary ability in athletics. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied petition, concluding that the Petitioner had satisfied only one of ten initial evidentiary criteria, of which he must meet at least three. The Director further found that the Petitioner did not establish that he is coming to the United States to continue work in his area of extraordinary ability.

On appeal, the Petitioner submits a brief in which he claims that he meets four criteria. The Petitioner argues that the Director's decision contained clear errors and improperly applied the law and U.S. Citizenship and Immigration Services (USCIS) policy.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(1)(A) of the Act describes qualified immigrants for this classification as follows:

- (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.

The term “extraordinary ability” refers only to those individuals in “that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth two options for satisfying this classification’s initial evidence requirements. First, a petitioner can demonstrate a one-time achievement that is a major, internationally recognized award. Alternatively, he or she must provide documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i)-(x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the “truth is to be determined not by the quantity of evidence alone but by its quality,” as well as the principle that we examine “each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.” *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

## II. ANALYSIS

The Petitioner, a competitive swimmer, concedes that the record does not establish that he has received a major, internationally recognized award pursuant to 8 C.F.R. § 204.5(h)(3).<sup>1</sup> The Petitioner must therefore demonstrate his eligibility under at least three of the criteria listed at 8 C.F.R. §§ 204.5(h)(3)(i)-(x).

The Director found that the Petitioner had documented his receipt of lesser nationally or internationally recognized awards, but had not satisfied the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii), the published material criterion at 8 C.F.R. § 204.5(h)(3)(iii), or the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii). On appeal, he asserts that he has satisfied all four of the claimed criteria. We have reviewed the entire record of proceedings, and it does not support a finding that the Petitioner meets the requirements of at least three criteria.

### A. Evidentiary Criteria

*Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.* 8 C.F.R. § 204.5(h)(3)(i).

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<sup>1</sup> The Petitioner initially claimed that his gold medal at the 2010 [redacted] series in [redacted] qualified as a major, internationally-recognized award, while also claiming that this award is a lesser internationally recognized award that satisfies the criterion at 8 C.F.R. § 204.5(h)(3)(i). The Petitioner did not pursue this claim when responding to the Director’s request for evidence (RFE) or on appeal. We agree with the Director’s determination that the referenced award does not satisfy the one-time achievement criterion at 8 CFR 204.5(h)(3).

We agree with the Director's determination that the Petitioner submitted documentation that satisfies this evidentiary criterion. Specifically, the Petitioner has documented his receipt of the following awards in men's 100 meter and 200 meter breaststroke events: (1) a bronze medal at the [redacted] [redacted] (2009); (2) a gold medal at the 2010 [redacted] [redacted] 2010); and (3) a gold medal at the [redacted]s (2013). In addition, the record includes evidence demonstrating the national or international recognition of these awards.

*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. 8 C.F.R. § 204.5(h)(3)(ii).*

We disagree with the Director's determination that the Petitioner submitted "no evidence" to meet this criterion. The Director noted that "membership on a swimming team" does not satisfy the plain language of the regulation and did not further address this criterion.

The Petitioner claims that he meets this criterion based on his membership on "multiple" All-Russian [redacted] Teams. He submitted a letter from [redacted] First Vice President of the [redacted] who states that the Petitioner was selected to represent Russia at the [redacted], the [redacted], and the [redacted] "among other elite international competitions." [redacted] explains that "such competitions have very strict qualifying times and only two (2) swimmers per country may compete in each event."

The record does not contain supporting evidence to corroborate [redacted]'s claim that the Petitioner was a member of the Russian [redacted] selected for a [redacted] event, as the Petitioner has not submitted any results or other evidence of his participation in such event(s). Further, the record does not support [redacted]'s claim that the [redacted] is a competition in which each country sends its elite [redacted] of only two swimmers to compete in each event. Of the 30 swimmers who competed alongside the Petitioner in the men's 200 meter breaststroke event at the 2010 [redacted] meet in [redacted], we note that 22 were Russian. The Petitioner submitted published materials from [redacted] which indicate that participating national swim federations are "encouraged to" invite top athletes such as Olympic and world championship medalists, enter "national stars" within the Host Country meet," and to "use its best efforts to ensure the attendance of top swimmers in all other Meets." The entry requirements for the event therefore do not appear to strictly limit participation to members of a top national team and there is insufficient evidence to establish that the Petitioner's participation in the 2010 [redacted] was as a member of the Russian [redacted].

However, we find that the Petitioner has sufficiently documented his membership on the Russian [redacted] that competed at the 2009 [redacted], and that membership on this team required outstanding achievements as judged by national experts. He has therefore satisfied 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. 8 C.F.R. § 204.5(h)(3)(iii).

The Director found that the Petitioner did not satisfy this criterion, and we agree with that determination. Although the Petitioner submitted several online articles published by *Swimming World Magazine*, *Swim Swam*, and several Russian-language publications, the Director noted that the articles only mention the results of his competitions.

On appeal, the Petitioner contends that the Director's finding was in error because some of the submitted articles mention his name in their titles and are "clearly about him." The articles at issue include an article titled [REDACTED] [REDACTED] published by ITAR-TASS, described as "the leading state news agency in Russia." The article is three sentences in length and states that the Petitioner "became the champion of Russia swimming at a distance of [REDACTED]" It includes his time and the names and times of the second and third place finishers in this event. There is no author's name provided and therefore, this article does not satisfy the plain language of the regulation.

Another article is titled "[REDACTED]" and was published by *RSport*, which is described as a Russian national news and media website. The article states that the Petitioner won the gold medal in the event, states his time, and names the second and third-place finishers. A third article that mentioned the Petitioner in its title was published by Russian national news and media outlet *Sportbox.Ru* and is titled "[REDACTED] [REDACTED]" This article, which is also about the 2013 Russian [REDACTED] championships, mentions that the Petitioner presented "the main sensation" of the event's final day by defeating "one of the leaders of the [REDACTED]" in the finals of the men's [REDACTED] The article mentions 10 other swimmers who competed in events on the same day, and lists the results of 11 events.

Finally, the record contains an article titled "[REDACTED] [REDACTED]" published by *Swimming World Magazine*. The body of the article summarizes the women's and men's results for the [REDACTED] Championship meet held in [REDACTED] 2016, and includes one sentence about the [REDACTED] event that the Petitioner won, noting that he set a new record time in the finals.

Despite mentioning the Petitioner's name in their titles, these articles simply report the results of the 2013 [REDACTED] Championships (or an individual event in this meet) or the 2016 [REDACTED] championship, and are not about the Petitioner. Articles that are not about the Petitioner do not meet this regulatory criterion. See, e.g., *Negro-Plumpe v. Okin*, 2:07-CV-00820 at \*1, \*7 (D. Nev. Sept. 2008) (upholding a finding that articles about a show are not about the actor).

The Petitioner submitted multiple online articles published by *Swim Swam*, but these articles only report the results of swim meets in which the Petitioner's collegiate team, [REDACTED] University, competed, and, for the reasons already discussed, are not about the Petitioner, even if they briefly mention him and his individual results. Similarly, another article published by *Swimming World Magazine*, titled "[REDACTED]" lists the

event results for one day of the multiple-day competition, which included the results of the Petitioner's gold medal event, but it is not about the Petitioner.<sup>2</sup>

In addition, the Petitioner provided excerpts from and links to online articles published on [redacted] University's athletics website which discuss the Petitioner's performance in various events, his qualification for the [redacted] Nationals, and his selection as an [redacted] Athlete of the Week. The Petitioner did not provide complete documentation that included the full articles or the names of the authors. Even if these relevant factors were included, the record does not establish that this college athletics website qualifies as major media.

Finally, the Petitioner submitted European rankings published by Swim Rankings (www.swimrankings.net) which indicate that he was ranked fourth in Europe in the [redacted] (short course) event for the 2010 season, and 11<sup>th</sup> in the [redacted] (long course) event in the 2013 season. These published rankings do not satisfy the plain language of the regulation as they are not "articles about the Petitioner."

For the reasons outlined above, the Petitioner has not satisfied the requirements of this criterion.

*Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

The Petitioner asserts that performed in a leading or critical role for the [redacted] [redacted] noting that he "exceeded expectations by winning prestigious international medals and setting new athletic standards for his country." The Petitioner further claimed that his "Top 5 rank in the World and his medals at major international competitions not only elevated the [redacted] [redacted] national and international standing, but also helped it reach its ultimate goal; producing elite swimmers."<sup>3</sup> In general, a leading role is evidenced from the role itself, while a critical role is one in which a petitioner was responsible for the success or standing of the organization.

As noted, the Petitioner submitted a letter from [redacted] of the [redacted]; however, that letter does not address how the Petitioner has performed a leading or critical role for that organization, and as such falls short of providing probative information that specifically addresses how the Petitioner's role for the organization, or for the Russian [redacted] was critical or leading. In fact [redacted]'s letter does not specifically speak to the significance of the Petitioner's role with the organization. Rather, he states that the Petitioner "successfully represented his country of Russia" and notes some of his achievements in international competition.

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<sup>2</sup> It should be noted that in the event the submissions from these two swimming magazines otherwise met the regulatory requirements, the information in the record regarding their circulation is insufficient to establish that they constitute major media. The documentation provided is from the publications themselves (their websites, specifically) rather than published circulation statistics from an official or independent website or other publicly available source. We need not rely on the self-promotional material of the publisher. *See Braga v. Poulos*, No. CV 06-5105 SJO FMOX, 2007 WL 9229758, at \*7 (C.D. Cal. July 6, 2007) *aff'd*, 317 F. App'x 680 (9th Cir. 2009) (concluding that we did not have to rely on a company's self-serving assertions on the cover of a magazine as to the magazine's status as major media).

<sup>3</sup> The Petitioner submitted a ranking of the top times in the men's [redacted] (short course) for the 2009 competition season. The Petitioner ranked fifth based on the time he recorded in his bronze medal finish at the European championships; another Russian swimmer ranked second.

The Petitioner's awards or rankings in events specific to him alone do not demonstrate that he performed a leading or critical role; additional probative, corroborating evidence must also be part of the record. The Petitioner must provide specifics relating to how his role was critical to the organization as a whole. *See Noroozi v. Napolitano*, 905 F.Supp.2d 535, 545 (S.D.N.Y. 2012). The letter from the [redacted] does not provide the required specifics.

We note that the Petitioner initially claimed that he performed in a leading and critical role for [redacted] University, but did not pursue this claim when responding to the RFE or on appeal. The Petitioner provided evidence that he had set new school records in two swimming events during his attendance there as a student. He further claimed that "his performances have been responsible for [redacted]'s victories against dominant swimming institutions, and his individual performances have elevated the standing of the [redacted] Swimming & Diving Team, and the [redacted] University (as a whole)." However, the Petitioner did not offer letters from coaches or other representatives of the university or its swim team to support a claim that he held a leading or critical role.

The Petitioner did not submit evidence demonstrating that [redacted] University or its swim team has a distinguished reputation. Further, he has not indicated where his position fits in the organization's overall hierarchy or shown how his membership on the team was reflective of a leading or critical role. The record does not include evidence, for example, differentiating his role as a swimmer from that of the other team members. The record reflects that the Petitioner won medals at [redacted] championship events, represented the school at the [redacted] Nationals, and qualified for the [redacted] championships. However, this evidence is not sufficient to demonstrate that he served in a leading or critical role. The Petitioner did not provide sufficient evidence indicating that his swimming results impacted [redacted] University's standing in the sport beyond those of his fellow teammates and competitors.

## B. Summary

The Petitioner is not eligible because he has not submitted the required initial evidence of either a qualifying one-time achievement or documents that meet at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)-(x). Thus, we do not need to fully address the totality of the materials in a final merits determination. *Kazarian*, 596 F.3d at 119-20. Nevertheless, we advise that we have reviewed the record in the aggregate, and conclude that it does not support a finding that the Petitioner has established the level of expertise required for the classification sought.

We acknowledge that the Petitioner refers to our non-precedent decision in which we sustained the appeal of a competitive swimmer seeking classification as an alien of extraordinary ability. The Petitioner asserts that the facts presented here are similar. The referenced decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. USCIS must decide each case on its own facts with regard to the sufficiency of the evidence presented. *Matter of Frentescu*, 18 I&N Dec. 244, 246 (BIA 1982); *Matter of Serna*, 16 I&N Dec. 643, 645 (BIA 1978).

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top. 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. Comm’r. 1994). Here, the Petitioner has not shown that the significance of his athletic accomplishments is indicative of the required sustained national or international acclaim or that it is consistent with a “career of acclaimed work in the field” as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and he is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

In addition, as the Petitioner has not established his extraordinary ability under section 203(b)(1)(A)(i) of the Act, we need not determine whether he is coming to “continue work in the area of extraordinary ability” under section 203(b)(1)(A)(ii) and will not address the Directors’ separate finding with respect to that issue.

### III. CONCLUSION

The Petitioner has not shown that he qualifies for classification as an individual of extraordinary ability under section 203(b)(1)(A) of the Act. The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of M-S-*, ID# 5131379 (AAO Sept. 27, 2019)