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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



18 JUN 2008

File: WAC-01-052-53376

Office: California Service Center

Date:

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations 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 the sciences. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

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

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(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 to the United States will substantially benefit prospectively the United States.

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 Service regulation at 8 C.F.R. 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a scientist. 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, international 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. The petitioner has submitted evidence which, he claims, meets the following criteria.

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

The petitioner submitted several exhibits but failed to explain which exhibits were submitted as evidence of awards. The director considered the petitioner's research grant from the Department of Defense and noted that, unlike awards such as the Nobel Prize which recognize past achievements, grants are awarded based on proposals for future research. As a substantial amount of research is funded by grants, the director concluded that research grants are not evidence that the recipients are among the very few at the top of the field. On appeal, counsel states:

Department of Defense grants, contrary to what the Acting Director opines, are only granted to a very small percentage of applicants, and that fact alone is evidence of the high regard afforded [the petitioner] in the scientific world.

Counsel mischaracterizes the director's concerns. The director never stated that Department of Defense research grants are not competitive or that the money from such grants is abundant. Rather, the director's concern focused on the nature of grants in general, specifically that they are not awarded in recognition for past accomplishments, but in anticipation that the funding will produce results in the future. In his letter submitted on appeal, [REDACTED] an associate professor at the [REDACTED] asserts that past achievements are considered when evaluating grant proposals. Obviously, the past achievements of the principal investigator are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and not to honor or recognize past achievement. Moreover, the petitioner's proposal for the grant indicates that it was a "Postdoctoral Traineeship Award." As such, the top experts in the field did not compete for this research grant and, thus, the approval of the petitioner's proposal cannot be considered evidence of his national acclaim as one of the very few at the top of his field.

On his resume under "honors," the petitioner indicates that he graduated first in his graduate school at [REDACTED] in 1990 and that he received a Ph.D. degree "with special honors" from the University of Karlsruhe in 1998. Under "scholarships/fellowships" the petitioner indicates that he received a National Merit Scholarship in 1982 based on his academic performance in high school.

Academic study is not a field of endeavor, but training for a future field of endeavor. As such, awards for academic work, scholarships based on previous academic achievement and class ranking cannot be considered awards in a field of endeavor. Moreover, only students compete for such awards. As the petitioner did not compete with national or international experienced experts in the field, the awards cannot be considered evidence of the petitioner's national or international acclaim.

The petitioner also listed two postdoctoral fellowships and a postgraduate fellowship. Once again, postgraduate and postdoctoral fellowships are essentially entry-level positions for newly graduated

degree holders. The most experienced experts in the field do not compete for these positions. As such, they cannot demonstrate national acclaim as one of the very few at the top of the field.

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 director concluded that the record did not contain any evidence of memberships which could meet this criterion and counsel does not challenge that conclusion on appeal.

Published materials 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.

The director concluded that the brief reviews of the petitioner's work in *Nature* and *Science* were insufficient to meet this criterion. Counsel does not challenge this conclusion on appeal. We concur with the director as the articles were not primarily about the petitioner and did not mention him by name. The record also contains evidence that the petitioner's articles have been cited. Articles which cite the petitioner's work are primarily about the author's own work, not the petitioner. As such, they cannot be considered published material about the petitioner.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The petitioner submitted two letters from the Association for International Cancer Research (AICR) requesting that the petitioner review grant applications. The first letter reflects that [REDACTED] recommended the petitioner to AICR. The petitioner lists [REDACTED] of the Institute of Genetics at Forschungszentrum Karlsruhe where the petitioner obtained his Ph.D., on his Curriculum Vitae as a reference.

In his request for additional documentation, the director specifically requested evidence regarding the significance of the work judged and the criteria used for selecting referees. In response, the petitioner submitted information printed from AICR's website, www.aicr.org, which provides that "research grants are determined by the Scientific Advisory Committee, composed of eminent cancer researchers." The director concluded that the petitioner had not established the significance of the work he reviewed or the criteria used for selection of referees. Counsel fails to address this concern on appeal and the petitioner submits no new documentation relating to this criterion. The petitioner has not established that being requested to review two grants made him a member of the Scientific Advisory Committee. Being referred to the committee as a referee by one's own colleague is not evidence of national or international acclaim.

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

The petitioner submitted an unsigned letter from Ingrid O'Sullivan at the European Bioinformatics Institute advising Satish Gupta that his submission to the Nucleotide Sequence Database would be held confidential until publication. The petitioner claims to have isolated the gene sequence to which the letter refers and is named on the attachment.

The petitioner also submitted a United States patent application and German patent documentation. The petitioner failed to submit certified translations of any of the German documentation. As such, the petitioner has not established that the German government actually issued a patent to the petitioner. The mere act of applying for a patent is not evidence of a contribution of major significance. Moreover, patents are issued based on originality, not significance. Even if the petitioner has been issued a patent, the patent is not evidence that the invention is a contribution of major significance.

The petitioner also submits letters of support. [REDACTED] associate scientific director for research and training at the Burnham Institute where the petitioner is employed, asserts that the petitioner is one of the most gifted postdoctoral researchers at the Institute, a "top scientist with tremendous potential for future research," and "a leader in his research field." She asserts that the petitioner is a key member of one of the Institute's laboratories and that he has "contributed to several important discoveries." She concludes that the petitioner's work is "in the National interest of the United States," a factor relevant to a lesser classification than that sought by the petitioner. It is noted that [REDACTED] has published over 160 papers and has received the Shea Award for Scientific Excellence, the Smith Kline Bio-Science Laboratories Distinguished Scientist Award, and a Prize in Biochemical Analysis from the German Society for clinical Chemistry. While these achievements reflect well on [REDACTED] they do not bolster the petitioner's case. Rather, they reflect that the highest level in the petitioner's field is well above the level he has reached.

[REDACTED] in whose laboratory the petitioner works at the Burnham Institute, writes:

Retinoids, a group of vitamin A derivatives, are well known for their chemopreventive and therapeutic effect on a large variety of cancer in animal[s]. However, application of retinoids in human cancer patients has been hampered by their toxicity and retinoid resistance observed in patients with advanced cancer. After he joined my laboratory, [the petitioner] conducted several critical experiments to help illustrate that loss of a protein called COUP-TF contributes significantly to retinoid resistance in human cancer cells. This finding provides an excellent opportunity to restore [the] therapeutic effect of retinoids in cancer cells, and will benefit many cancer patients who are being treated with retinoids. . . .

Our laboratory is also developing a new generation of compounds for cancer prevention and treatment. We have recently identified a group of compounds, which are more potent than most of the currently used chemotherapeutic agents. These compounds restrict tumor growth through programmed cell death, a new way to eliminate cancer cells. However, the mechanism by which these compounds induce cancer cell death is currently unknown, which has hindered the development

of more effective and selective analogs for the treatment of cancer. We found that a protein called TR3 is required for these compounds to exert their anti-cancer effect. [The petitioner] has contributed significantly to our study of the molecular mechanism by which these compounds function. By using different approaches, we recently demonstrated that TR3-induced cancer cell death is mediated by its targeting to mitochondria, an intracellular organelle crucial for initiating cell death. This finding establishes a new mechanism for inducing cell death. It is a “break-through” type of work, and re-direct[s] our thinking regarding [the] mechanism of nuclear transcriptional factors. It opens many exciting research directions and provides a molecular basis for design and development of more potent compounds for prevention and treatment of cancer.

_____ further asserts that the petitioner would serve the national interest and that there are no available U.S. researchers with the petitioner’s combination of skills. These considerations are not relevant to the classification sought by the petitioner.¹ In a new letter submitted on appeal, _____ states that prior to the petitioner’s work, no one knew why dioxins were toxic or what levels were safe. The petitioner’s work demonstrated why dioxins are carcinogenic and immune suppressants.

_____ a principal investigator at the Burnham Institute, provides general praise of the petitioner and states:

Retinoids acting on retinoic acid receptors have a distinct effect on human breast cancer cells, and this presents a new approach to cancer treatment. The interesting feature is that [the petitioner] uses newly discovered retinoids as drugs that selectively kill breast cancer cells and leave normal cells intact. This principle has received considerable attention in this field, as well as recognition from the U.S. Army Breast Cancer Research Program.

On appeal, counsel asserts that the director failed to consider a letter from _____. The record includes a letter from _____. He states:

[The petitioner] plays an integral role as a member for a research team at our Institute which is devoted to finding new ways of combating cancer, especially breast cancer. He has performed well-respected work on the interactions of dioxins and other pollutant carcinogens on gene expression in breast cancer. [The petitioner] has also helped to uncover new mechanisms by which the cellular receptors related to the vitamin D receptor family suppress tumor cell survival and growth. These contributions are paving the way for eventual clinical trial, where the important findings made by [the petitioner] can be translated into new and more effective therapies for patients suffering from cancer. Without his dedicated

¹ The lack of available workers with similar skills is never relevant to non-labor certification petitions as this question falls under the jurisdiction of the Department of Labor.

contributions, intellectual input, and technical expertise, these efforts would be severely debilitated.

As noted by counsel [REDACTED] has published 500 articles and 50 book chapters. The Institute for Scientific Information ranked him as the top cited scientist in the world. These accomplishments reflect well [REDACTED] abilities. They do not bolster the petitioner's case, however. Rather, they reflect that the highest level in his field is far above the level he has reached.

Moreover, the above letters are all from the petitioner's collaborators and immediate colleagues. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's national or international acclaim.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to present some benefit if it is to receive funding and attention from the scientific community. The record reflects that the petitioner's colleagues think that the petitioner's work has potential and, as discussed below, prestigious journals have taken note of the petitioner's work. The record does not establish, however, that the petitioner's work represented a groundbreaking advance in cancer research. Specifically, the record does not reflect that the petitioner's work has led to clinical trials or that it has attracted the attention of the pharmaceutical industry. The record does not establish that, at this point, the petitioner has made a contribution of major significance to the field.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The petitioner submitted evidence that, as of the date of filing, he has authored 11 published articles and two abstracts, including an article in *Science*. While the director stated in his request for additional documentation that the petitioner had met this criterion, in his final decision the director essentially concluded that since publication is inherent to the research occupation, this criterion is not applicable to researchers. On appeal, the petitioner submits a new article which counsel asserts, "was previously unavailable." The article was not available at the time of filing because it was published almost a year later. As such, it is not evidence of the petitioner's eligibility at the time of filing. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

We agree that publication is inherent to the field. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career."

The fact that publication is inherent to the field of research, however, does not prevent a researcher from meeting this criterion. Rather, the above report reinforces the Service's position that publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles.

The petitioner submitted two on-line reviews of his *Science* article, one at www.nature.com and one at www.sciencemag.org. The "Editor's Choice" section of *Science* published a brief review of the petitioner's article which appeared in *Molecular Cell Biology*. The record contains evidence that, at the time of filing, nine articles had cited the petitioner's 1999 article in *Genes of Development*, one of which was a self-cite by a co-author. Thirteen articles had cited the petitioner's 1995 article in *Reproduction Fertility and Development*, nine of which are self-cites by a co-author. Thirteen articles cite the petitioner's 1996 article in *Biology of Reproduction*, three of which are self-cites by a co-author. Sixteen articles cite the petitioner's 1996 article in *Experimental Cell Research*, one of which is a self-cite by the petitioner.

The petitioner also submitted several e-mail messages regarding his article in *Science*. Most of the messages are addressed [REDACTED] and involve technical questions or suggestions for possible future collaborations. The messages addressed to the petitioner appear to be from friends, one of whom admits to not having read the article.

The reviews, citations, and e-mail traffic suggests that the petitioner's work is sparking interest. The record does not reflect, however, the type of extensive citation indicative of sustained national or international acclaim.

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

The petitioner's references assert that he plays an important role in his laboratory at the Burnham Institute. In response to the director's request for additional documentation, the petitioner submitted information regarding the Institute. While the Burnham Institute may have a distinguished reputation, we cannot conclude that every postdoctoral researcher who plays an important role in a distinguished institution's laboratory plays a leading or critical role for the Institution as a whole. It is noted that the Institute has 250 Ph.D. employees including 42 faculty who "lead the research effort, which includes training of Ph.D. students and postdoctoral students."

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a cancer researcher 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. The evidence indicates that the petitioner shows talent as a cancer researcher, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the

petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The 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.

ORDER: The appeal is dismissed.