U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: EAC-02-020-51601 Office: Vermont Service Center Date: SEP 10 2003

IN RE: Petitioner:
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)

PUBLIC COPY

ON BEHALF OF PETITIONER:

[redacted]

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner seek to classify the beneficiary 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 that the record lacked "demonstrable and sufficient unequivocal evidence of extraordinary ability through pertinent extensive documentation, as it relates to the beneficiary as an individual."

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

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry 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 Bureau regulation at 8 C.F.R. § 204.5(h)(3) as follows.

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

(iv) 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 specialization for which classification is sought;

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

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

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

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

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as a senior executive responsible for marketing. 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, quoted above, 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.

On appeal, counsel asserts that the director improperly required evidence that the beneficiary's presence would prospectively benefit the United States. A careful reading of the director's decision reveals that the director did not require such evidence as a separate evidentiary requirement. Rather, at the bottom of page two, the director stated that the beneficiary's success in his field was insufficient to establish that he would benefit the United States prospectively. We concur. In most cases, it can be presumed that an alien with extraordinary ability in his field will prospectively benefit the United States. As "success" in the field is not necessarily at the level of the "sustained national acclaim" required of aliens with extraordinary ability, we must concur that evidence of mere success is insufficient evidence for this classification.

We acknowledge that the director's decision includes language that could be interpreted as applying an erroneous standard. Specifically, the director stated that meeting "some" of the regulatory criteria was

insufficient to demonstrate eligibility. First, the director did not state that meeting the requisite three criteria was insufficient. Regardless, we read the director's decision as stating that merely submitting evidence relating to the criteria is insufficient, and that the evidence must be indicative of or at least consistent with national or international acclaim. In addition, the director also stated: "Even if this is considered to be sustained national acclaim, it does not automatically establish that the beneficiary is, in fact, one of those few who are at the very top of their field of endeavor." It is not clear what "this" is in reference to. The previous sentence discussed the lack of evidence regarding the beneficiary's unique accomplishments in the field. If the director is implying that meeting one criterion is insufficient, we concur. If the director is implying that demonstrating national acclaim through meeting three criteria is insufficient, that statement is obviously in error. Nevertheless, as the director never found that the petitioner had demonstrated the beneficiary's national acclaim through meeting at least three criteria, this sentence is not reversible error.

Throughout the proceedings, counsel has asserted that the beneficiary meets exactly three of the regulatory criteria: contributions of major significance pursuant to 8 C.F.R. § 204.5(h)(3)(v), performing a leading or critical role for organizations or establishments with distinguished reputations pursuant to 8 C.F.R. § 204.5(h)(3)(viii), and evidence of a high salary/remuneration in relation to others in the field pursuant to 8 C.F.R. § 204.5(h)(3)(ix). Thus, if we find that the director correctly concluded that the beneficiary does not meet any one of those three claimed criteria, we must uphold the director's decision.

The petition was initially supported by reference letters from the beneficiary's immediate circle of colleagues and collaborators and evidence of the beneficiary's salary for F. Hoffmann-La Roche, Ltd., alleged by tax advisors at PricewaterhouseCoopers, Ltd., to be "above the average Swiss salary."

On January 11, 2002, the director issued a request for additional evidence. This notice addressed two of the three criteria claimed. Specifically, the director requested "evidence of how the beneficiary's salary compares with the well known and famous Professionals of the beneficiary's claimed caliber and expertise, demonstrated in magazines, on television, and through other media of today's world." The director also noted, "simply going on record noting the beneficiary's accomplishments and contributions as a member of his profession is not sufficient to demonstrate someone who has risen to the very top of the field of endeavor or shown to have received sustained national or international acclaim." In response, the petitioner submitted evidence of the average wage in the beneficiary's occupation and a breakdown of the beneficiary's compensation. The beneficiary's total compensation for 2002, $438,018, includes $217,910 of stock options. The petitioner also provided letters from independent medical and marketing professionals evaluating the beneficiary's credentials as provided to them. These references conclude that the beneficiary has made contributions to his employers and, according to some of the references, to the field. The references do not appear to have prior knowledge of the beneficiary due to his claimed "acclaim" in the field.

The director concluded:

> The evidence of record does not clearly establish that the beneficiary's contributions to his field of endeavor have been demonstrated to have had such a significant impact on his area of expertise as to elevate the individual to the very top of his field.
>
> Insufficient evidence has been submitted setting the beneficiary apart from other individuals to such an extent that his contributions are significantly greater than other qualified professionals working for different self-serving independent organizations/businesses.

On appeal, counsel argues that the beneficiary is "internationally recognized throughout the pharmaceutical industry for having developed innovative pharmaceutical marketing strategies resulting in the top sales promotion of some of the world's most widely marketed therapeutic drugs."

Initially, the petitioner asserted that the beneficiary's novel marketing strategy "was to incorporate the drug's medical capabilities in its marketing campaigns to physicians and healthcare companies." The petitioner continued, "he further required that the positive results of the drug's pharmacological and clinical studies were well documented and communicated effectively to healthcare professionals." As an example of a specific contribution, the petitioner references the beneficiary's recommendation, adopted by the petitioner, to expand the development of an injectable pen as an alternative to syringes, a move that has been copied by other companies. It is not clear that the other companies are copying the marketing strategy for the pen as opposed to the medical innovation of using an injectable pen as a delivery device for medicines. While the petitioner submitted Internet materials regarding the pen, none of these materials reference the significance of the marketing strategy for the pen. The petitioner claims that the beneficiary's medical background and "rare knowledge of foreign cultures" give the beneficiary an edge over others in the field. While this background may make the beneficiary a highly qualified employee, it is not clear that his background has garnered him national or international acclaim in the field.

In discussing the beneficiary's prior employment for F. Hoffman La Roche, Ltd., the petitioner discusses the beneficiary's marketing strategy for *Xenical*. The petitioner references a letter from the Vice Director of Strategic Marketing and Business Development for that company, Dr. Tea Freund, for the proposition that the beneficiary's "most noteworthy contribution to the field of Global Pharmaceutical Marketing in this regard is that his Global Strategic Lifecycle plan is now 'used by all countries, worldwide, to launch and market the brand.'" A reading of Dr. Freund's letter reveals that her discussion of the influence of the beneficiary's Global Strategic Lifecycle plan was limited to the plan designed specifically for *Xenical*. She asserts only that this plan was used "by all countries, worldwide, *to launch and market the brand*." (Emphasis added.) Thus, she does not indicate that the beneficiary has developed some type of generalized plan being adopted throughout the field for marketing pharmaceuticals.

In addition to the beneficiary's work on *Xenical*, Dr. Freund discusses the beneficiary's responsibilities at F. Hoffman La Roche, Ltd.

> During his tenure at Roche, [the beneficiary] was able to develop numerous relationships with international[ly] recognized leaders in the field of endocrinology, diabetes and obesity, the primary therapeutic areas for which he was responsible. He was primarily responsible for conceptualizing new clinical research in these fields. While the majority of this work is ongoing, [the beneficiary] was able to drive the publication of significant new data in internationally recognized, peer-reviewed journals. These publications were always conceptualized and written in collaboration with the experts in the field and it is the latter whom are cited as authors.

As evidence of the beneficiary's role in driving the publication of these articles, Dr. Freund references letters written by the medical researchers. One such researcher, Dr. Jean-Pierre Després, Chair Professor of Human Nutrition at Hôpital Laval in Quebec, states of his relationship with the beneficiary only that it "has been extremely productive and rewarding over the years." Dr. Després provides generalized praise of the beneficiary's contributions to specific marketing projects as opposed to the field as a whole. More specifically, Dr. Després states that the beneficiary's most notable contribution results from his marketing of *Xenical.*

> It was within this extraordinary capacity, that [the beneficiary] contributed his expertise by developing and managing extensive strategies to educate cardiologists, diabetologists, internal medicine specialists and primary care physicians on the diagnosis and treatment of obesity and its many complex complications. These efforts had a significant impact on the awareness of obesity as well as Xenical, which is now the leading drug therapy for obesity.

The record contains no independent confirmation from high level health agency officials confirming that the beneficiary's marketing strategy raised the medical profession's awareness of obesity, a health issue that receives considerable media attention. In addition, the record contains no evidence that educating those with the authority to prescribe medication as to the benefits of a prescription medication is a new marketing strategy for pharmaceutical companies.

Another endocrinology researcher, Dr. Gareth Williams at the University of Liverpool, asserts that he "had the opportunity to see the beneficiary in a number of settings that ranged from the design of clinical trials, to the detailed scientific analysis of the results of those trials, and the drawing up of ethical and rational guidelines for the use of this drug." Dr. Williams praises the beneficiary's knowledge of the clinical implications of drug research and the regulations in various countries. Dr. Williams concludes: "[The beneficiary] has also been a valuable opinion in putting together publications based on the multi-centre and multi-national trials which have evaluated the place of Orlistat [known under the brand name of *Xenical*] in the management of obesity in both non-diabetic and diabetic patients." Nothing in Dr. Williams' letter implies that the beneficiary has made a contribution of major significance to the field of pharmaceutical marketing as a whole.

Finally, Dr. Arya M. Sharma, a professor of medicine at Charité University in Berlin, indicates that he has collaborated with the beneficiary on organizing and conducting obesity and cardiology workshops and symposia with the goal of recruiting "key international experts" for discussing and implementing

research projects around the world. Once again, while Dr. Sharma praises the beneficiary's professionalism and talent, he does not explain how the beneficiary made a contribution of major significance to the field of pharmaceutical marketing. For example, Dr. Sharma does not indicate that the beneficiary's participation in organizing workshops and symposia is unusual for marketing executives or that this technique has gained the attention of other marketing executives and has changed the field of pharmaceutical marketing.

Vic Ackermann, former President and Chief Executive Officer of F. Hoffman La Roche, Ltd., asserts that the beneficiary's abilities at La Roche earned him a good reputation in the field. He further asserts that the beneficiary's arguments before the United Kingdom Health Authorities were responsible for adding *Xenical* to the list of fully reimbursed drugs while *Viagra*, developed by Pfizer and considered by the authorities at the same time, was not added to the list. While Mr. Ackermann's letter attests to the beneficiary's abilities in his profession, they do not reflect that the beneficiary has made a contribution of major significance to the field of pharmaceutical marketing.

Finally, Clive Lewis, an international pharmaceutical consultant with 30 years of marketing experience, provides praise of the beneficiary's skills and knowledge of the field, but provides no examples of how the beneficiary has contributed to the field as a field, as opposed to simply doing a good job for his employer.

As stated above, in response to the director's request for additional documentation, the petitioner submitted letters from independent witnesses. All four witnesses assert that their evaluation is based on a review of the beneficiary's credentials. Thus, it does not appear that these experts in the field were aware of the beneficiary's reputation prior to being contacted for a reference.

Dr. George M. Zinkhan, a marketing professor at the University of Georgia, asserts that the beneficiary has been "creative" and "has pioneered successful innovations." He further asserts that the beneficiary's "highly specialized combination of knowledge and extraordinary experience renders him at the very top of his field." Mr. Zinkhan does not, however, assert that he has incorporated the beneficiary's techniques into his own curriculum or otherwise explain how the beneficiary has contributed to the field of marketing.

Dr. Richard Staelin, a professor at the Fuque School of Business at Duke University, discusses the beneficiary's successful record of securing approval for drugs and marketing them, noting that the beneficiary's life cycle plan for *Xenical* is used worldwide to market that drug and that the use of the injectable pen has been adopted by other companies. Dr. Staelin does not indicate that the beneficiary's life cycle plan has been adopted by other companies in their marketing of their own drugs or that the injectable pen is being adopted due to its marketing as opposed to its technology. Dr. Staelin does assert that the beneficiary "performed a comparative analysis of generic biological drugs and chemical drugs which revealed that, although the biological drugs are less expensive to produce, they carry greater costs in the long run, due to higher expenses required to assess potentially detrimental side effects." Dr. Staelin asserts that these recommendations were adopted by the petitioner and Pfizer and presented to the FDA. The record does not include any letters from high level officials at the FDA confirming the significance of this study. Dr. Staelin concludes that the beneficiary's contributions

include his marketing of *Xenical* and his participation in the development of new research. Dr. Staelin does not explain how these activities have contributed to the field of marketing.

Dr. Mohanbir Sawhney, a professor at the Kellogg School of Management, and Dr. Pierre Bougnères, Head of Endocrinology at St. Vincent De Paul Hospital in Paris, provide similar information to that discussed above.

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. By definition, national acclaim requires that the beneficiary is known beyond his employers and collaborators. The record contains little objective evidence demonstrating that the beneficiary has any notoriety in the field based on his contributions to the field.

Finally, while not mentioned by the director in his final decision, the petitioner has not demonstrated that the beneficiary receives a significantly high salary or other remuneration in the field. While some of the independent references assert that the beneficiary's compensation from the petitioner is far above the industry average, Dr. Zinkhan asserts that the beneficiary compensation "is within the range expected for such an executive position in the pharmaceutical industry." Regardless, while the objective evidence submitted reveals that the beneficiary's *total compensation package* is worth more than the average *wage* for his position, he has not demonstrated that his total compensation package is significantly high even when compared with the total compensation packages of the most experienced and renowned marketing experts in the field.

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 beneficiary has distinguished himself as a senior director for marketing 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 beneficiary shows talent as a senior director for marketing, but is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established the beneficiary's 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.