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U.S. Citizenship and Immigration Services

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JUN 01 2004

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska 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 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.

On appeal, counsel's sole argument is that the denial of the immigrant visa on behalf of the petitioner after Citizenship and Immigration Services (CIS) (and its predecessor agency) approved four nonimmigrant visas for the petitioner in a similar classification is inconsistent. Counsel notes that the regulations for the two classifications "mirror" each other.

We do not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each case must be decided on a case-by-case basis based on the evidence of record. The nonimmigrant visas could have issued based on different evidence or in error. CIS is not bound to treat acknowledged past errors as binding. *See Chief Probation Officers of Cal. v. Shalala*, 118 F.3d 1327 (9th Cir. 1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 517-518 (1994); *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084 (6th Cir. 1987).

We note that in both the director's request for additional evidence and his final decision, the director clearly advised the petitioner of the absence of documentation to meet certain elements of the various criteria the petitioner claims to meet. For example, the petitioner has been placed on notice that his only award not limited by age is not in the record. Yet, the petitioner has declined to submit evidence of this award or its significance. In addition, the petitioner was advised that the letters lacked accompanying curriculum vitae, were general and did not identify any specific contributions. Yet, the petitioner has declined to submit more detailed letters along with the curriculum vitae of the authors. Further, the petitioner was advised that the record lacked evidence that set his articles apart from others in the field. Yet, he has declined to submit such evidence, such as information from a citation index reflecting that the articles have been widely cited. Finally, the director has advised the petitioner that the record lacked evidence establishing his roles for Duke University and the University of Minnesota. We note that the record contains no evidence from the latter institution even confirming his employment there. Yet, the petitioner has declined to submit such evidence. For the reasons discussed below, we concur with the director's concerns and find that the petitioner's failure to address these concerns precludes a finding of eligibility regardless of any previous findings in nonimmigrant proceedings.

Further, as the petitioner has been placed on notice regarding the absent documentation, we need not consider such documentation should it be submitted with any future motion to reopen or reconsider. *Matter of Soriano* 19 I&N Dec. 764 (BIA 1988).

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 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 an assistant professor in cardiothoracic surgery. 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 that, 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 claims to meet this criterion based on his receipt of Young Investigator Awards from the American College of Chest Physicians in 1994, 1996, and 1997. The petitioner also claims to have received the Thoracic Surgery Directors Award from the Society of Thoracic Surgeons in 1997. Finally, the petitioner notes his receipt of a research grant in 1999.

The director concluded that the record did not include evidence of all of the above awards or evidence that they are nationally recognized prizes or awards for excellence. We concur with the director's concerns.

Competition for young investigator awards is limited by age. Experienced experts in the field are not competing for these awards. Thus, they cannot establish that a petitioner is one of the very few at the top of his field.

Regarding the petitioner's research grants, such grants simply fund a scientist's work. Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere. 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.

Finally, as stated by the director on two occasions, the petitioner's 1997 Thoracic Surgery Directors Award from the Society of Thoracic Surgeons is not in the record. Thus, we must concur with the director's determination that the petitioner has not established that he won this award.

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

The petitioner listed seven professional society memberships on his curriculum vitae. He does not claim to meet this criterion, however, and submits no evidence of his membership or the requirements for membership in these associations. Thus, we concur with the director that the petitioner does not meet this criterion.

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 indicated on his curriculum vitae that he is a reviewer for six medical journals. While one of the petitioner's references repeats this claim, he makes clear that he is simply reviewing the petitioner's credentials. He does not indicate that he has any first hand knowledge of the petitioner's reviewing history.

While the petitioner has never claimed to meet this criterion, we will discuss the evidence. We cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field; not every peer reviewer enjoys sustained national or international acclaim. Without evidence that sets the petitioner apart from others in his field, such as evidence that he has reviewed an unusually large number of articles, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, we cannot conclude that the petitioner meets this criterion.

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

The director determined that the letters submitted to meet this criterion, written in general terms, were unsupported by other evidence. For the reasons discussed below, we find that the letters themselves fail to identify specific contributions or explain how they have changed the field such that they can be considered contributions of major significance. As we look at the letters themselves, we must keep in mind that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any research, in order to be accepted for publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who is published or is working with a government grant has made a contribution of major significance.

In his own letter, the petitioner claims to have made original contributions in the following areas: the effect of brain death on cardiopulmonary function; the effect of brain death of a heart donor on the subsequent function of the transplanted organ and the preservation of grafts; the development of better techniques for orthotopic cardiac transplantation; and molecular biologic engineering and *in vivo* gene transfer techniques to improve the functioning of a transplanted heart. The petitioner submitted five letters from other members of his profession.

Dr. formerly a visiting professor at Duke University where he first met the petitioner, makes general assertions that the petitioner has contributed to the field without specifically identifying any contributions or explaining how they have changed the field. Rather, Dr. references the goals of the petitioner's work, improving the function of transplanted hearts, and notes that the petitioner's current employer, the University of Minnesota, has a long history of contributing to the field. Dr. asserts that the petitioner's mentor is a leader in the field, but does not provide similar accolades regarding the petitioner himself. In fact, Dr. specifies that the petitioner's mentor will assist the petitioner "as he develops his academic career."

Dr. a cardiac surgeon at Wake Forest University Medical School who previously collaborated with the petitioner, provides general assertions that the petitioner has contributed to the field. While Dr. also discusses the details of the petitioner's current work and the results he hopes to achieve, Dr. does not indicate that the petitioner's current work is already considered in the field to be a contribution of major significance.

Dr. the Cardiac Surgeon in Charge at the Johns Hopkins University School of Medicine, asserts that he is "familiar" with the petitioner's work at Duke University Medical School and that he has heard the petitioner speak at national meetings, including at sessions where Dr. was a moderator. Dr. asserts that the petitioner's work on the affect of brain death on organs "represented novel contributions to our scientific knowledge." While Dr. asserts that this research was published and was the basis for one of the petitioner's Young Investigator awards, he does not explain how it changed the field of organ transplants. Dr. continues that the petitioner's research with right ventricular dysfunction seen with transplantation resulted in important findings. Finally, Dr. asserts that the petitioner is evaluating off-pump coronary artery bypass surgery and the efficacy of an anti-inflammatory drug following single lung transplantation. Dr. fails to explain how this work has already impacted the field.

Dr. Chair of the Department of Surgery at the Heart Center in Charlottesville, Virginia, focuses on the petitioner's bioengineering efforts. Dr. asserts: "What makes it so intriguing is that if [the petitioner] is successful, he will be able to treat heart attack victims by direct injection of these cells and prevent them from death, the need for surgery, and hopefully, prolong functional living." Dr. then states that to his knowledge, the petitioner is "one of three people in the world who is working in this area." While Dr. discusses the importance of the petitioner's goals, he does not explain how the petitioner has already made a contribution of major significance to the field of medicine. Specifically, he does not provide examples of other hospitals or research laboratories that have adopted practices based on the petitioner's results.

Dr. Chairman of the Department of Surgery at the Medical University of South Carolina, simply reiterates the petitioner's education, employment, and publication history. He concludes only that the petitioner "has great potential as an academic cardiothoracic surgeon."

While Dr. does not claim to have collaborated with the petitioner, he does not explain how he came to know of the petitioner's work. Dr. specifically asserts that his letter is based on a review of the petitioner's credentials. Letters from members of the petitioner's field who have never heard of the petitioner prior to being requested for a letter and are simply basing their opinions upon a review of the petitioner's credentials do not establish the petitioner's national or international acclaim. The most persuasive letters are

from members of the profession outside the petitioner's immediate circle of colleagues who are familiar with the petitioner's work based on his reputation in the field.

Moreover, the opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim. Evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce unsolicited materials reflecting that acclaim.

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

The record supports the petitioner's claim to have authored more than 50 published articles. 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 are 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." This report reinforces CIS'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.

In his request for additional documentation and in his final decision, the director noted the lack of evidence that sets the petitioner's articles apart from others in the field. While we question the director's concern that the record lacks evidence that the articles were published in peer-reviewed journals, we find that the record remains absent evidence of the influence of the articles themselves. For example, the record contains no evidence that the petitioner's articles have been widely cited, or even cited at all.

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

The petitioner's curriculum vitae indicates that he was Chief Resident in General and Cardiothoracic Surgery and in Cardiothoracic Surgery at Duke University during the late 1990's. As of August 1999, the petitioner has worked as an assistant professor of surgery at the University of Minnesota. While the petitioner's references confirm these claims, only D[redacted]a former visiting professor at Duke University, and Dr.[redacted]who received training at Duke University, appear to have any first hand knowledge of the petitioner's position at Duke University. None of the references appear to have any first hand knowledge of his position at the University of Minnesota. The director concluded that the record lacked evidence that the petitioner's roles were leading or critical.

We have already considered above the petitioner's alleged contributions while working at these institutions. What is relevant to this criterion is the nature of the position the petitioner was hired to fill. According to the Webster's Ninth New Collegiate Dictionary 1003 (1990), a residency is "a period of advanced training in a medical specialty." While Duke University and the University of Minnesota may have distinguished reputations, we cannot conclude that every chief resident or assistant professor plays a leading or critical role for the

university as a whole. We note that some of the petitioner's references chair their departments, suggesting that the top of the petitioner's field is significantly higher than the level he has attained.

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 an assistant professor in cardiothoracic surgery 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 an assistant professor in cardiothoracic surgery, 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.