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U.S. Citizenship and Immigration Services

**PUBLIC COPY**

MAR 29 2004

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.

Mari Johnson

for 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 does not contest any of the director's conclusions on the merits. Rather, counsel asserts that the director did not have the authority to review the evidence and was bound by a determination on a nonimmigrant visa petition filed in behalf of the petitioner in a similar classification. Thus, we will focus on this issue. We note that the petitioner has had ample notice of and opportunity to respond to the director's concerns regarding the deficiencies in the record. Thus, we need not consider any such attempts to address these concerns as part of any future motion that may be filed. *See 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 in the Citizenship and Immigration Services (CIS) 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.

It should be reiterated, however, that the petitioner must show that the beneficiary has sustained national or international acclaim at the very top level.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as an assistant professor of plastic 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, 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.

Initially, the petitioner submitted:

1. Best resident presentation and research paper awards;
2. Evidence of his membership with the Royal Australasian College of Surgeons (RACS) based on examination scores;
3. Evidence that he was invited to review articles for *Plastic and Reconstructive Surgery* and a letter affirming that as a professor, the petitioner reviewed the work of his students;
4. Reference letters from colleagues and independent reviews of the petitioner's credentials, most of which are based on information provided to the reviewers;
5. Evidence of the petitioner's articles, an invitation to write an introductory discussion originally issued to Dr. Hani S. Matloub at the petitioner's university and forwarded to him, an invitation from the director of

the petitioner's department inviting him to help prepare a text book, and confirmation that the petitioner had prepared another book chapter;

6. Letters attesting to the "critical" nature of the petitioner's assistant professor position; and
7. A letter attesting to the petitioner's salary of $180,000.

In response to the director's request for additional documentation, counsel merely asserted that the petitioner's extraordinary ability had already been determined in relation to an earlier nonimmigrant visa petition and should not be readjudicated. Neither counsel nor the petitioner submitted any evidence to address the director's concerns.

The director rejected the argument that approval of a nonimmigrant visa petition in behalf of the petitioner mandates approval of his immigrant visa petition in a similar classification. While the director concluded that if the record contained the actual book chapter the petitioner is alleged to have authored he might meet the scholarly articles criterion, the director also concluded that the petitioner had not submitted sufficient evidence to meet any of the other criteria claimed. Specifically, the director concluded that the awards were not sufficiently competitive, that RACS membership was not limited to those with outstanding achievements but included 90 percent of all surgeons in Australia, that reviewing articles and evaluating one's own students is typical and not indicative of national or international acclaim, that the reference letters did not sufficiently establish the significance of the petitioner's completed discoveries, that an "assistant professor" position is not a leading or critical role for a university as a whole, and that the petitioner had not established that $180,000 was comparable with the highest salaries in the field.

On appeal, counsel fails to address any of the director's concerns with the evidence submitted and the petitioner submits no new documentation to overcome those concerns. Rather, the sole basis of the appeal is essentially that the director had no authority to review the evidence on its merits but was bound by a previous determination on a nonimmigrant petition approved in behalf of the petitioner.

Counsel bases his arguments on the principles of estoppel and res judicata. The Administrative Appeals Office (AAO), like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of Citizenship and Immigration Services (CIS) from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Res judicata and estoppel are equitable forms of relief that are available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 103.1(f)(3)(E)(iii)(as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable claims.

Assuming arguendo that the AAO could adjudicate a claim of equitable relief, counsel's assertions are not persuasive. Counsel correctly notes that the regulations relating to the nonimmigrant classification for which the petitioner was approved and the immigrant classification he now seeks list the same evidentiary requirements. In response to the director's request for additional documentation, counsel relied on *Matter of McMullen,* 17 I&N Dec. 542 (BIA 1980), *Matter of Perez-Valle*, 17 I&N Dec. 581 (BIA 1980), *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984), and *In re Mario Salvador Ruiz-Massieu*, 22 I&N Dec. 833 (BIA 1999). While the cases rely on the following test for res judicata determinations – identical parties, a valid final judgment upon the merits, and identical issues – the cases all deal with administrative adjudication of immigration matters already determined in federal court or on issues specifically delegated to other government agencies. Specifically, *McMullen* held that

decisions made in judicial extradition proceedings were not res judicata in deportation proceedings because the parties were different. *Matter of Perez-Valle* involved an acquittal in criminal court. *Matter of Fedorenko* rejected an administrative readjudication of an issue already decided by the Supreme Court of the United States. Finally, *In re Mario Salvador Ruiz-Massieu* held that an immigration judge could not require the Citizenship and Immigration Services (CIS) to show the reasonableness of the Department of State's determination that an alien's presence in the United States was detrimental to U.S. foreign policy because that determination had been specifically delegated by Congress to the Department of State.

The petitioner also submitted a January 13, 1989 telex issued by James A. Puleo, Assistant Commissioner for Adjudications, to all field officers. The telex relates to determinations of whether a position was managerial in the context of immigrant visas after the positions were already deemed managerial at the nonimmigrant stage. While the telex notes the importance of consistency, it permits denial of the immigrant petition where a review of the nonimmigrant petition reveals that the approval was "gross error." The petitioner provides no evidence that similar guidance has been issued relating to nonimmigrant and immigrant determinations of extraordinary ability.

The director rejected counsel's arguments, concluding that there had been no final judgment in the instant matter, the nonimmigrant visa decision was not analogous to court litigation or administrative court orders, and the parties were not the same. The director relied on *Matter of Khan*, 14 I&N Dec. 397 (BIA 1973) for the proposition that prior approvals were not binding on CIS.

On appeal, counsel asserts that the director erred in relying on *Matter of Khan* because that case involved an admission of an alien as an accompanying son of an immigrant who was deceased, a "clear error of law" not present in the instant matter. Rather, noting that the nonimmigrant visa petition approved in behalf of the petitioner has not been revoked, counsel argues that the discrepancy between the nonimmigrant and immigrant decisions relating to the instant petitioner is a matter of opinion.

We do not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each case must decided on a case-by-case basis on the evidence of record. The nonimmigrant visa could have been issued based on different evidence or in error. CIS is not bound to treat acknowledged past errors as binding. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 517-518 (1994); *Chief Probation Officers of Cal. v. Shalala*, 118 F.3d 1327 (9th Cir. 1997); *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084 (6th Cir. 1987) *cert. denied* 485 U.S. 1008 (1988). We will discuss the issue of error in the nonimmigrant adjudication below.

We will now review both the concepts of estoppel and res judicata. According to Black's Law Dictionary 571 (7th ed. 1999), estoppel is "a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." Contrary to counsel's assertion that estoppel applies to government agencies, the federal courts have not applied this principal to administrative decisions. As stated in *Matter of Tuakoi*, 19 I&N Dec. 341 (1985):

> It has not been determined that estoppel will lie against the Government in immigration cases. *See INS v. Miranda*, 459 U.S. 14 (1982) (per curiam); *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308 (1961); but see *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). Even if we assume that estoppel would apply to the Government in some cases, the respondent here has failed to show the elements necessary for equitable estoppel. In order to show estoppel, the respondent would have to prove affirmative misconduct on the part of the Government or its agent, that he

> reasonably relied on the action or representation of the Government, and that he was prejudiced thereby. *Heckler v. Community Health Services of Crawford County, Inc., supra*, at 59.

The Board provided several examples where affirmative conduct had been ruled out, citing *Matter of Tayabji*, 19 I&N Dec. 264 (BIA 1985) (a district director's approval of an alien's application for a waiver under section 212(e) of the Act, 8 U.S.C. § 1182(e) (1982), in excess of his authority); *Matter of Morales*, 15 I&N Dec. 411 (BIA 1975) (the Service's erroneous approval of a visa petition); *Matter of Polanco*, 14 I&N Dec. 483 (BIA 1973), and *Matter of Khan, supra*, (immigration inspectors' admission of inadmissible aliens).

In his response to the director's request for additional documentation, counsel acknowledges in passing that res judicata only results from fully litigated issues. Nevertheless, counsel asserts that CIS could have questioned the petitioner's eligibility when reviewing the nonimmigrant visa petition. Counsel, however, has provided no examples of Service Center decisions being considered formal, fully litigated judicial or administrative law court decisions such that res judicata would apply. A decision's preclusive effect should turn on whether it was reached in an adjudicative proceeding where the parties had an effective opportunity to present their positions. That is ordinarily the case in an exclusion or deportation proceeding. On the other hand, the simple admission of an alien after routine inspection, for example, is an informal, non-adjudicatory decision that may properly be challenged in deportation proceedings under INA § 241(a). *See Alarcon-Baylon v. Brownell*, 250 F.2d 45 (5th Cir. 1957) (excludable despite visa); *Mannerfrid v. Brownell*, 238 F.2d 32 (D.C. Cir. 1956) (previous grant of reexamination may be disregarded); *Flynn v. Ward*, 95 F.2d 742 (1st Cir. 1938) (prior admission as citizen by immigration inspectors at border entitled to no res judicata effect); *Matter of S-*, 9 I&N Dec. 688 (BIA 1962) (excludable although returning on alien registration card issued without warning of possible excludability and accepted on prior return). *Cf. Rafeedie v. INS*, 880 F.2d 506, 520, (D.C. Cir. 1989) (subjected to exclusion proceedings despite reentry permit; declaratory and injunctive relief granted alien on other, constitutional grounds). We find that the nonimmigrant visa approval is significantly more akin to these types of adjudications than the formal judicial decisions considered by the Board of Immigration Appeals in the cases cited by counsel.

Counsel's reliance on the fact that the nonimmigrant visa petition has not been revoked is not persuasive. The very fact that nonimmigrant visas can be revoked pursuant to 8 C.F.R. § 214.2(o)(8)(iii)(*5*) suggests that the approval of nonimmigrant visas is not an unalterable, unreviewable decision subject to res judicata. Decisions subject to res judicata may not be revisited or reopened at all. Moreover, the petitioner in this case has been afforded all the process that is required in revocation proceedings. Specifically, the director issued a request for additional documentation advising the petitioner of the deficiencies in the record and allowing more than 30 days (12 weeks were granted) to respond. In addition, the petitioner had the opportunity to appeal the director's adverse decision to this office.

Finally, if res judicata resulted from prior nonimmigrant approvals, CIS's policy of denying managerial immigrant visa petitions only upon a showing of gross error in the approval of the nonimmigrant visa petition relating to the same issue would be problematic as the policy does not preclude CIS from reviewing the evidence. Assuming CIS had instituted a similar policy with the extraordinary ability nonimmigrant and immigrant classifications, and the petitioner has provided no evidence that that is the case, the director would not have been precluded from reviewing the evidence at all. Rather, he would have been required to review the nonimmigrant visa petition for gross error before determining that the immigrant visa petition was not approvable.

It is counsel's position that the instant immigrant visa petition includes all the evidence submitted in support of the nonimmigrant visa petition. We do not find that the petitioner's eligibility is a matter of opinion. Either the petitioner meets three of the regulatory criteria or he does not. Neither counsel nor the petitioner have even attempted to address the deficiencies identified by the director or explain why the director's analysis was an error of law. We find that the director's concerns were valid and sufficiently communicated to the petitioner in both the request for additional evidence and the final decision. The evidence submitted to meet the criteria must be evaluated as to whether it is indicative of or uniquely consistent with national or international acclaim. The record does not adequately establish that the best paper awards are awards for which the most experienced experts in the field aspire to win, that RACS membership is exclusive, that participating in the common practice of article review and the inherent job duty of evaluating one's own students is noteworthy, that as of the date of filing the petitioner had already made recognized contributions that had had a major impact on the field, that he had played a leading role for the Medical College of Wisconsin, or that he had commanded a salary comparable with the most acclaimed members of the field. As the evidence falls far short of establishing the petitioner's eligibility, we find no fault in the director's decision despite the nonimmigrant visa approval in a similar classification.

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 plastic surgery professor 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. Therefore, the petitioner has not established his eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

Regardless of the res judicata and estoppel claims, the AAO is not bound by the director's approval of the beneficiary's previous nonimmigrant petition The director's decision does not indicate whether he reviewed the prior approval of the nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The record of proceeding does not contain copies of the nonimmigrant visa petition that the petitioner claims was previously approved. It is must be emphasized that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). As the director properly reviewed the record before him, it was impracticable for the director to provide the petitioner with an explanation as to why the prior approvals were erroneous, as counsel suggests. However, based on the evidence submitted in the current petition, the AAO suggests that the director may reasonably review the previous nonimmigrant petitions for possible revocation.

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 (Comm. 1988). As stated above, it would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engineering Ltd. v. Montgomery, supra.*

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).

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.