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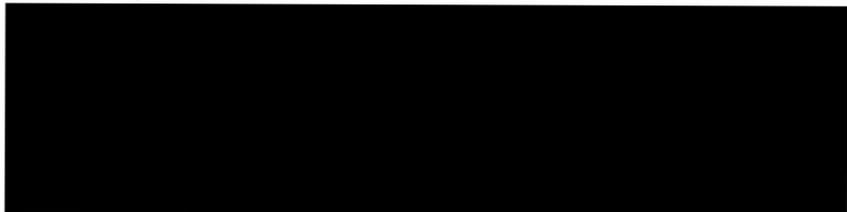
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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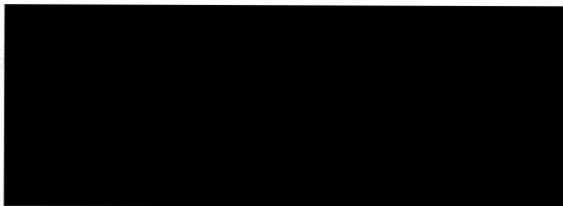


FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 03 2006
LIN 04 096 50032

IN RE: Petitioner: [Redacted]
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)

ON BEHALF OF PETITIONER:



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, Chief
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 (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks 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. The director determined the petitioner had not established that the beneficiary has earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel states: “[The beneficiary] meets the regulatory criteria required for approval of an employment based immigrant petition in the first preference 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 --

(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 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 the beneficiary has earned sustained national or international acclaim at the very top level.

This petition, filed on February 9, 2004, seeks to classify the beneficiary as an alien with extraordinary ability as a Medical Physicist. The beneficiary has been working in that capacity at University Hospitals of Cleveland (UHC) since September 2000. Prior to his employment with UHC, the beneficiary worked as a postdoctoral fellow and research associate at Case Western Reserve University (CWRU) from April 1997 to September 2000.

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 pertaining to 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 evidence showing that the beneficiary earned his Master's degree from the University of Sao Paulo and was honored as a "distinguished graduate." University study is not a field of endeavor, but, rather, training for future employment in a field of endeavor. Awards or degrees based on educational achievement at a given university are institutional or local in nature and do not constitute nationally or internationally recognized "awards for excellence in the field of endeavor."

The petitioner also submitted evidence showing that the beneficiary received a scholarship for his postdoctoral training at CWRU and two travel awards from the American Society for Photobiology in the amount of \$390 and \$400. We find no evidence indicating that the beneficiary's receipt of travel reimbursement and financial aid elevates him to the very top of his field. The director concluded that the beneficiary's postdoctoral training scholarship and reimbursement for travel expenses "fall substantially below the standard for a nationally or internationally recognized award. They . . . exclude the most eminent and established researchers already working in the field from consideration." We concur with the director's finding that the petitioner's evidence does not establish the beneficiary meets this criterion. On appeal, counsel does not challenge the director's finding.

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.

In order to demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. In addition, it is clear from the regulatory language that members must be selected at the national or international level, rather than the local or regional level. Finally, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The director's decision stated:

The record establishes that the beneficiary is a member of the American Society for Laser Medicine and Surgery (ASLMS), the American Association of Physicists in Medicine (AAPM), the American

Society for Photobiology (ASP), and the Brazilian Society of Physics (BSP). However, the record does not illustrate that any of these associations meet this criterion.

First, the bylaws for ASLMS indicate that the society is open to “[a]ny scientist, physician, or other health care professional, or any individual who is qualified and duly licensed to engage in clinical practice and is qualified and recognized in his or her respective field” and to “[a]ny individual who is recognized as being significantly involved with the laser industry.” From this, it is clear that any professional working in the field or who is qualified and licensed in the field is eligible for membership. While the petitioner highlighted the fact that applications for membership must be reviewed and evaluated by the Board of Directors of the ALSMS, this would be commensurate with most associations, as membership in any society must be reviewed before acceptance. There is nothing to indicate that this Board selects members on the basis of outstanding achievements or that the Board is composed of recognized national or international experts.

Second, the membership application for AAPM indicates that full membership is offered to scientists or engineers working in the field of medical physics, including medical engineering and bioengineering, who meet the training and experience requirements in the by-laws of the organization. These requirements are defined as possession of a Ph.D. or D.Sc. combined with one year of medical experience, or possession of an M.A. or M.S. combined with two years of medical experience. Clearly, this association does not require outstanding achievements of its members.

Third, the constitution of the ASP indicates that membership in the society is “open to persons who share the stated purpose of the Society and who have educational, research, or practical experience in photobiology or in an allied scientific field.” Again, there is nothing to indicate that the society requires outstanding achievements of its members as judged by recognized national or international experts in the field.

Finally, the statutes of the BSP indicate that the society is open to those who have graduated with a degree in physics, who are researchers in physics, who are professors of physics in intermediate schools or higher, or whose interest in the sciences makes them “desirable” as members. As with the above, there is nothing to illustrate that this society requires outstanding achievements of its members, or that the beneficiary was judged by recognized national or international experts.

Therefore, the record does not establish that the beneficiary meets this criterion.

We concur with the director’s finding that the petitioner’s evidence does not establish the beneficiary meets this criterion. On appeal, counsel does not challenge the director’s finding.

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.

In general, in order for published material to meet this criterion, it must be primarily about the beneficiary and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify

as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national or international level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.¹

Pages 4 and 5 of the director's decision include a detailed discussion of the materials submitted by the petitioner and the specific reasons those materials were not adequate to satisfy this criterion. We concur with the director's finding that the petitioner's evidence does not establish the beneficiary meets this criterion. On appeal, counsel does not challenge the director's findings relating to 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.

We concur with the director's finding that the beneficiary meets this criterion.

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

The petitioner submitted five letters of support limited to the beneficiary's current and former superiors from CWRU and UHC.

Professor and Chairman of the Department of Radiation Oncology at UHC's Ireland Cancer Center and the Department of Radiation Oncology at CWRU School of Medicine, states:

[The beneficiary] has several publications and presentations in photodynamic therapy which are of major significance. His work, "Phthalocyanine 4 (Pc-4) Photodynamic Therapy of Human OVCAR-3 Tumor Xenograft" published in *The Journal of Photochemistry and Photobiology* in 1999, 69(2):236-241 is ground breaking because it demonstrates that ovarian cancer in humans may be treated with PDT in the clinical environment. *The Journal of Photochemistry and Photobiology* is the pre-eminent scientific journal in the field.

Published and presented work, however, falls under the next criterion, a criterion that we find the evidence in this case adequately satisfies. To satisfy this criterion, the petitioner must show not only that the beneficiary's work was published or presented, but that it has "major significance" in the field. Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for published work and contributions of major significance, Citizenship and Immigration Services (CIS) clearly does not view the two as being interchangeable. If evidence sufficient to meet one criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three criteria would be meaningless.

¹ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, cannot serve to spread an individual's reputation outside of that county.

Professor of Radiation Oncology at CWRU and Director of the Physics and Dosimetry Section of the Department of Radiation Oncology at UHC, states:

Based on my experience, I believe [the beneficiary] has made original scientific research contributions that are substantially significance [sic] in Photodynamic Therapy (PDT). [The beneficiary] was the first scientist to study the biodistribution of Pc 4 in animal model. In this first of a kind study, [the beneficiary] discovered that the time window of 24-48 hours for Pc 4 is optimal for shining the red light with high PDT response. This is of major significance because it allows for the destruction of more tumor cells while preserving healthy normal tissue in the same area of the body. [The beneficiary's] work has in this regard brought significant advancement in the use of PDT therapy in cancer research.

In another study of major significance, [the beneficiary] compared Pc 4 injected with a standard vehicle (cremophore) with a Pc 4 attached in liposomes. Liposomes are the smallest artificial vesicles of spherical shape that can be produced from natural untoxic phospholipids and cholesterol, Liposomes can be used as drug carriers and loaded with a great variety of molecules, such as small drug molecules, proteins, nucleotides and even plasmids. This study showed that liposomes tend to attach to the malignant cell in more concentration than the standard vehicle improving the efficacy of the technique. This method substantially increases the effectiveness cancer treatment by PDT. Moreover, the PDT liposome method is expected to significantly reduce the cost of cancer treatment therapy because smaller amounts of PDT operate with the same efficiency of standard cancer therapy by PDT.

now Professor and Vice-Chairman, Radiation Oncology, The Brody School of Medicine, East Carolina University, states:

In the period of 1998 until the beginning of 2002, I had a faculty appointment at Case Western Reserve University

* * *

I am very familiar with the work of [the beneficiary] as I was his supervisor during the four years that I spent as a Physics Director in the Department of Radiation Oncology in Cleveland. I was also his supervisor in his medical physicist training-program, which he completed in June 2000.

The Hyperbaric Oxygen Therapy (HBO - a technique that the individual breathes 100% oxygen) has a long tradition in clinical medicine in anaerobic infections, ischemia complications, and several others. [The beneficiary] discovered in his Ph.D. thesis that increasing the oxygen supply into the tumor (living system) using HBO technique could enhance the PDT damage when compared with a control group (one atmosphere). . . . In addition, [the beneficiary's] thesis showed that PDT at those conditions stimulated a great percentage of a special kind of cellular death - apoptosis.

* * *

The importance of [the beneficiary's] interdisciplinary research highlights the synergism of both techniques (PDT and HBO) aiming to further PDT clinical applications in the area of treatment and diagnosis. [The beneficiary] is one of only a few medical physicists who have the ability to apply this expertise in multiple scientific disciplines in the furtherance of cutting edge cancer research. For example, [the beneficiary], was the first scientist to photograph the selective fluorescence coming from the specific tumor Walker-256, which is similar in structure to leukemia, with the first generation of photosensitizer (Hematoporphyrin Derivative - HpD) using a simple black night lamp and a commercial camera. . . . The results of his ground breaking work were presented at scientific and medical meetings

[REDACTED] now Helfaer Professor of Cancer Research, Vice Chair of Dermatology, University of Wisconsin, states:

I was Professor and Research Director in the Department of Dermatology at Case Western Reserve (CWRU) in Cleveland, Ohio, USA when I first met [the beneficiary].

* * *

I worked with [the beneficiary] in his postdoctoral fellowship as a principal investigator.

* * *

Photodynamic Therapy (PDT) is a relatively new multi-disciplinary cancer treatment modality based on the property that certain chemical compounds (called photosensitizer) absorb visible light and transfer the energy absorbed to the molecular oxygen present in the cell. After absorbing the energy, the molecular oxygen becomes reactive producing a cascade of events that kill the cell.

[The beneficiary's] ground breaking work in this area has demonstrated that the increasing of the molecular oxygen supply in the tumor tissue would improve the efficiency of the PDT technique. This could be done using a high-pressure oxygen chamber or hyperbaric chamber. Hyperbaric Oxygen therapy (HBO) is a mode of therapy in which the individual breathes 100% oxygen at pressures greater than normal atmospheric (sea level) pressure inside of a chamber. Microscopic analysis of [the beneficiary's] results showed a reduction of 25% of viable malignant cells, and a deeper treatment penetration of 36% after HBO-PDT, comparing with animals treated under one atmosphere (standard PDT). This was significant because the hyperbaric chamber increases the destruction of malignant cancer cells thereby increasing the probability of success cancer treatment and recovery.

* * *

In my laboratory, [the beneficiary] worked with a radio-labeled technique regarding the mechanism of transport and localization of ^{14}C -Pc 4 in normal and tumor tissue using Cremophor:Ethanol formulation (D12) and Liposome delivery (LIP). Dr. Colusi's experiment showed that cancer cells could be destroyed with medicine that acted quickly and efficiently. Moreover, [the beneficiary's]

experiment presents a significant breakthrough because until this experiment very little was known about Pc 4 biodistribution. This study showed that Pc 4, in liposome delivery, is more selective, effective, and can be injected in small amount compared with the standard delivery.

* * *

[The beneficiary] has continued his cutting edge work, and made novel discoveries regarding the cellular target of action and mechanisms of Photodynamic therapy in human ovarian carcinoma (OVCAR-3) tumor xenograft heterotransplanted subcutaneously in ethylic nude mice. Through this method, cancer researchers may observe the growth and development of a human tumor in laboratory mice. [The beneficiary] was the first one to show early apoptosis in this xenograft model, as revealed by Par cleavage, DNA fragmentation, and p21 over expression (all hallmarks of apoptosis). His work demonstrated that this particular drug was extremely effective in the successful treatment of human ovarian cancer.

While the petitioner's research is no doubt of value, it can be argued 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 Ph.D. thesis or published research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge or is one of several practitioners who collects data for a study designed by others has inherently made a contribution of major significance to the field as a whole.

Professor of Radiation Oncology, Biochemistry, Oncology and Environmental Health Sciences, CWRU, states:

Here at Case Western Reserve University, I lead a group of scientists and physicians that are developing photodynamic therapy (PDT) for the treatment of cancer. PDT is a relatively new cancer treatment employing a photosensitive dye that preferentially accumulates in tumors and visible light that activates the dye to destroy the tumor. Our group has been studying a class of dyes called phthalocyanines (Pc's) that have properties superior to other dyes used in PDT. One of our dyes, known as Pc 4, started Phase I clinical trial for metastatic cancer at University Hospitals of Cleveland, Ohio.

* * *

[The beneficiary] made critical contributions to the pre-clinical studies that were instrumental in obtaining approval for testing this therapy in patients. We were studying how rapidly Pc 4 would accumulate in a tumor when it was injected into an animal. [The beneficiary] studied the biodistribution of radioactively labeled Pc 4 in normal and tumor tissue, showing that 24-48 hours after Pc 4 is injected is the optimal time period to illuminate the tumor region to produce the best tumor response (highest probability of cure) while preserving the surrounding normal tissue. In addition, [the beneficiary's] work established that almost all of the injected Pc 4 is cleared from the body one week after its injection. These results are extremely important for the Pc 4 clinical trial.

* * *

[The beneficiary] made another of his critical contributions while studying what happens when human tumor cells grown in immune-deficient mice are treated with Pc 4-PDT. [The beneficiary] showed that Pc 4-PDT is effective against the human ovarian carcinoma (OVCAR-3) grown as xenografts in athymic nude mice. Within 15 minutes following PDT and during the course of tumor shrinkage, several hallmarks of apoptosis were evident. Until recently, no one had shown a response of ovarian carcinoma to Pc 4-PDT. Based upon this revolutionary discovery, [the beneficiary's] paper was published in *Photochemistry and Photobiology* . . . His pioneering paper has been cited in the literature as a reference paper for several other research programs.

The record, however, includes less than ten cites to this article, the majority of which are self-citations by the beneficiary's coauthors from CWRU (including [REDACTED]). We do not find that publication of original research findings is presumptive evidence of an original scientific contribution of major significance in the field. We must also consider the greater scientific community's reaction to those published findings. When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published work. Publication may serve as evidence of originality, but it is difficult to conclude that published findings are of major significance to the field if there is little or no evidence that researchers beyond the beneficiary's affiliated institutions have relied upon his findings. If a given article in a prestigious journal (such as the *Proceedings of the National Academy of Sciences of the U.S.A.*) attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the beneficiary himself has cited multiple sources in his own articles. Numerous independent citations would provide solid evidence that other researchers have been influenced by the petitioner's work and are familiar with it. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the greater field, then it is reasonable to conclude that the alien's work is not nationally or internationally acclaimed. In this case, the record lacks evidence that the beneficiary's published research has been frequently and widely cited by independent scientists, as would be expected of research that constitutes a contribution of major significance within the field.

In addressing the aforementioned letters of support, the director acknowledged that the beneficiary has made original scientific contributions as a medical physics researcher, but that it had not been established that those contributions were "recognized as having major significance to the field." The petitioner's field, like most science, is research-driven, and there would be little point in publishing or presenting research that did not add to the general pool of knowledge in the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. To be considered a contribution of major significance in the field of science, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the petitioner's work. The petitioner must demonstrate not only that the beneficiary has performed original research, but also that it has impacted the field such that it can be considered indicative of his sustained national or international acclaim.

The director decision further stated:

The record lacks any objective evidence that the beneficiary's contributions have had any impact on the field at large. All five of the witness letters submitted were from current or former colleagues of the beneficiary. While the beneficiary is clearly held in high esteem by these colleagues, there is nothing to suggest that those outside of the beneficiary's circle consider his work to be significant.

On appeal, counsel argues that the director erred by concluding that the testimony of the witnesses was "insufficient due to their professional proximity to [the beneficiary] and his work." With regard to the personal recommendation of individuals from institutions where the beneficiary has trained or worked, the source of the recommendations is a highly relevant consideration. These letters are not first-hand evidence that the beneficiary has earned sustained acclaim outside of his affiliated institutions. If the petitioner's reputation is limited to those institutions, then he has not achieved national or international acclaim regardless of the expertise of his witnesses.

Counsel cites the case of a shipping company executive, *Matter of [name not provided]*, EAC-99-001-50557, (AAO Oct. 1, 2002), whose appeal was sustained by the AAO. In that case, the AAO concluded that the testimony of various prominent witnesses was adequate to satisfy the criterion at 8 C.F.R. § 204.5(h)(3)(v). Unpublished appellate decisions have no force as precedent and thus are not binding with regard to unrelated proceedings. *See* 8 C.F.R. § 103.3(c), which indicates that only designated precedent decisions are binding on Citizenship and Immigration Services' officers. Therefore, counsel's attempt to apply findings from a non-precedential decision to the current case is flawed. In the matter cited, that petitioner submitted letters of support from individuals beyond his immediate employers attesting to his national impact on the Russian shipping industry, whereas in the present case the petitioner's witnesses are limited to individuals who worked with the beneficiary at CWRU and UHC.

Counsel further argues that "ignoring the testimonial letters of these extraordinary individuals because they currently collaborate or have previously collaborated with [the beneficiary] is wholly unsupported by the statute and regulations." The director, however, did not ignore the letters of support. In fact, the director's decision specifically acknowledged that the beneficiary has made contributions to his field. The director found that the record "lacked objective evidence" establishing that those contributions were of "major significance to the field." Letters from those close to the beneficiary certainly have value, for it is those individuals who have the most direct knowledge of the beneficiary's specific contributions to a given research project. It remains, however, that very often, the beneficiary's projects are also the projects of the witnesses, and no researcher is likely to view his or her own work as unimportant. These individuals became aware of the petitioner's research work because of their close contact with the petitioner; their statements do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we might expect with research findings that are of major significance to the field.

In the present matter, the statutory requirement that an alien have "sustained national or international acclaim" necessitates evidence of recognition beyond the alien's immediate circle of colleagues. While such evidence need not be in the form of letters from independent experts, the opinions of close colleagues alone cannot form the cornerstone of a successful claim of national or international acclaim. Without extensive documentation

showing that the beneficiary's work has been unusually influential or highly acclaimed throughout the greater field, we cannot conclude that he meets this criterion.

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

We agree with counsel that the petitioner's evidence is adequate to satisfy this second criterion.

The regulation at 8 C.F.R. § 204.5(h)(3), however, requires that at least three criteria must be fulfilled to establish the sustained national or international acclaim necessary to qualify as an alien of extraordinary ability.

On appeal, counsel states: "The director has already concluded that [the beneficiary] is a medical physicist of extraordinary ability by granting multiple petitions for O-1 nonimmigrant classification on his behalf."

Counsel cites material prepared by the California Service Center entitled "Critical Analysis of the Elements that make up E11 Statute" which states: "[C]lassification as an O-1 nonimmigrant in the category of extraordinary ability in the field of science, education, business or athletics is highly indicative that the alien is also classifiable as an E11 immigrant." However, this material goes on to state: "Since each petition must stand on its own, the petitioner and/or attorney cannot rely solely on the argument that the alien was previously approved for the comparable nonimmigrant classification." Counsel argues that "the Director clearly erred when she did not recognize that the Director's previous classification of [the beneficiary]-as an alien of extraordinary ability in the sciences was highly indicative that he is classifiable as an E11 immigrant." The analysis prepared by the California Service Center, however, is not binding on the AAO. Informational material prepared for adjudicators at one service center does not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although this material may be useful as an aid in interpreting the law, such material is not binding on any CIS officer as it merely indicates the writer's analysis of a particular issue.

Counsel also cites a memorandum issued by [REDACTED] Associate Director, Operations, CIS, "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Contest of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity" HQQPRD 72/11.3 (April 23, 2004). This memorandum, however, applies to nonimmigrant visa extensions of status rather than the immigrant visa classification sought by the petitioner.

While Citizenship and Immigration Services has approved two prior O-1 nonimmigrant visa petitions filed on behalf of the beneficiary, those prior approvals do not preclude CIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of beneficiary's qualifications).

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). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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).

Review of the record does not establish that the beneficiary has distinguished himself 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 is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at the national or international level. 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.

I