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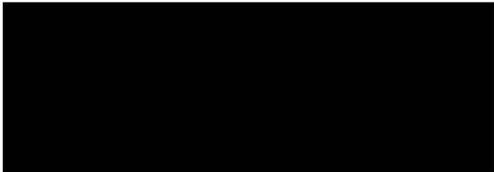
FILE: [redacted]  
SRC 04 090 52064

Office: TEXAS SERVICE CENTER Date: **FEB 21 2006**

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, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal.<sup>1</sup> The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification as an alien of extraordinary ability in the sciences pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined (1) the “evidence of record does not establish that the petitioner has met at least three of the necessary criteria,” (2) the record does not establish that the petitioner’s “continuation of his work in the United States will benefit the United States prospectively” and (3) the documentation “is not extensive and does not point to the [petitioner] as being within that small percentage at the very top of his field.”

On appeal, counsel notes that the director never requested evidence that the petitioner would prospectively benefit the United States, the regulations do not require specific evidence relating to that statutory provision and that the director’s decision merely states the regulations, the evidence submitted and a conclusion. For the reasons discussed below, we find that the director’s decision cannot be upheld because the director never requested any specific evidence or specified any deficiencies in the record such that the petitioner could file a meaningful response or appeal.

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.

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<sup>1</sup> The petitioner actually filed two appeals. The first appeal, SRC 05 130 50352, was filed April 6, 2005, requesting an additional 30 days in which to file a brief and/or additional evidence with the AAO. On May 2, 2005, counsel submitted a brief and additional evidence to the director, not the AAO. Despite the fact that the petitioner had already filed an appeal with the proper fee, the director rejected the brief as an appeal unaccompanied by the required fee. Thus, on May 10, 2005, the petitioner filed the brief with a second appeal, SRC 05 148 53984, with fee. This second appeal was not submitted within 33 days of the director’s decision and, thus, must be rejected as untimely. 8 C.F.R. § 103.3(a)(2)(i); 8 C.F.R. § 103.5a(b). The brief submitted with the second appeal, however, will be considered as the brief supplementing the initial appeal.

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). This petition seeks to classify the petitioner as an alien with extraordinary ability as an ophthalmic surgeon. 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 the following 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.

- (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.

Initially, the petitioner asserted that he met the criteria set forth at 8 C.F.R. §§ 204.5(h)(3)(iii), (v) and (ix). The evidence submitted, however, relates to additional criteria as well.

On November 15, 2004, the director advised the petitioner of the ten criteria and requested evidence that the petitioner meets at least three of those criteria. The request does not acknowledge the receipt of any evidence, explain why the evidence submitted is deficient, or request specific documentation that might address specific deficiencies found by the director. Thus, this request failed to provide the petitioner with any notice of any specific deficiencies in the record.

In response, the petitioner submitted additional evidence. In her final decision, the director acknowledged the new evidence submitted but concluded that it was not extensive, did not serve to meet three of the ten criteria, or establish that the petitioner's work would prospectively benefit the United States. Once again, the director has not advised the petitioner of any lacking evidence or deficiencies in the evidence submitted. As such, the petitioner was not afforded an opportunity to file a meaningful appeal that might address any deficiencies identified by the director.

Therefore, this matter will be remanded for issuance of a new request for additional evidence. In issuing this request, the director should consider the following guidance set forth in the February 16, 2005 Memorandum, Requests for Additional Evidence (RFE) and Notices of Intent to Deny (NOID) from William R. Yates, Associate Director, Operations:

A RFE is most appropriate when a particular piece or pieces of necessary evidence are missing, and the highest quality RFE is one that limits the request to the missing evidence. Generally it is unacceptable to issue a RFE for a broad range of evidence when, after review of the record so far, only a small number of types of evidence is still required. "Broad brush" RFEs tend to generate "broad brush" responses (and initial filings) that overburden our customers, over-document the file, and waste examination resources through the review of unnecessary, duplicative, or irrelevant documents. While it is sensible to use well articulated templates that set out an array of common components of RFEs for a particular case type, it is not normally appropriate to "dump" the entire template in a RFE; instead, the record must be examined for what is missing, and a limited, specific RFE should be sent, using the relevant portion from the template. The RFE should set forth what is required in a comprehensible manner so that the filer is sufficiently informed of what is required. If a filing is so lacking in initial evidence that a "wholesale" RFE from a template seems appropriate, an adjudicator should confirm this with a supervisor before doing so.

The new RFE shall raise the following issues: whether the awards submitted are local in nature, whether the membership letters that address the membership process sufficiently establish the membership requirements for the associations, whether the published materials appear in major media or are primarily about the petitioner and whether the record adequately documents the significantly high wages in the petitioner's occupation nationally. The director should also consider the evidence regarding the petitioner's contributions in the field in Brazil, his scholarly presentations and his roles for various entities in Brazil as they relate to the criteria at 8 C.F.R. §§ 204.5(h)(3)(v), (vi) and (viii). If the director identifies any deficiencies in this evidence, the director shall so advise the petitioner and allow an opportunity to submit evidence that may address those deficiencies.

Finally, while counsel is correct that the regulations do not specify any evidence that must be submitted to establish that the alien will prospectively benefit the United States, it is a statutory requirement and, in appropriate circumstances, may be raised. That said, it appears that the real issue is how the petitioner intends to continue working in his area of expertise. Instead of focusing on prospective national benefit, the director

shall consider whether the petitioner's statement that he intends to "work as a consulting ophthalmic surgeon, assisting US professionals in continuing research and innovations in eye surgery techniques," complies with the regulation at 8 C.F.R. § 204.5(h)(5), which requires detailed plans on how the alien intends to continue his work in the United States if letters from prospective employers or evidence of prearranged commitments are not submitted. If not, the petitioner should be advised of any deficiencies and afforded an opportunity to submit evidence that does comply with that provision. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.