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Citizenship and Immigration Services

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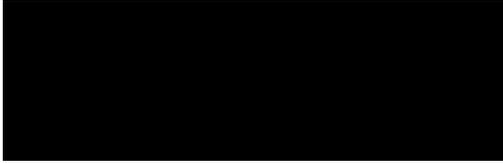
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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, 3/F

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Washington, DC 20536



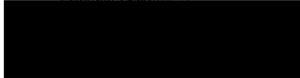
File: WAC-02-145-53478

Office: California Service Center

Date:

NOV 18 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a biopharmaceutical research and development firm. It seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary permanently in the United States as a research scientist. The director determined that the petitioner had not established the significance of the beneficiary's research, or that the beneficiary is recognized internationally as outstanding in his academic field, as required for classification as an outstanding researcher.

On appeal, counsel submitted a full brief but indicated that he would submit a brief and/or additional evidence to this office within 30 days. Counsel dated the appeal March 20, 2003. As of this date, more than seven months later, this office has received nothing further. As such, the appeal will be adjudicated on the evidence of record. Counsel's appellate arguments will be considered below.

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):

(B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if --

- (i) the alien is recognized internationally as outstanding in a specific academic area,
- (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
- (iii) the alien seeks to enter the United States --
 - (I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
 - (II) for a comparable position with a university or institution of higher education to conduct research in the area, or
 - (III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented

accomplishments in an academic field.

8 C.F.R. § 204.5(i)(3) states that a petition for an outstanding professor or researcher must be accompanied by:

(ii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of letter(s) from former or current employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien.

This petition was filed on March 26, 2002, to classify the beneficiary as an outstanding researcher in the field of chemistry. The director did not contest that the beneficiary had at least three years of research experience in his field as of that date.

8 C.F.R. 204.5(i)(3)(iii) provides that a petition must be accompanied by:

An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:

- (A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;
- (B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or
- (C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

The director did not contest that the petitioner had submitted a job offer for a permanent position. While the record contains letters from the petitioner to the Service, we note that the record does not contain the original job offer letter from the petitioner to the beneficiary. Counsel states on appeal that the petitioner should be afforded the opportunity to rebut any grounds of ineligibility not addressed by the director. As we concur with the director's basis of denial, however, we need not remand the matter back to the director to afford the petitioner another opportunity to supplement the record regarding this additional ground of ineligibility.

8 C.F.R. § 204.5(i)(3)(i) states that a petition for an outstanding professor or researcher must be accompanied by “[e]vidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition.” The regulation lists six criteria, of which the petitioner must satisfy at least two. It is important to note here that the controlling purpose of the regulation is to establish international recognition, and any evidence submitted to meet these criteria must therefore be to some extent indicative of international recognition. The petitioner claims to have satisfied the following criteria.

Documentation of the alien’s receipt of major prizes or awards for outstanding achievement in the academic field

The petitioner relies on the beneficiary’s research grants from the Canadian Institute of Health Research (CIHR) (formerly the Medical Research Council of Canada) and the B.C. Lung Association to meet this criterion. Initially, the petitioner submitted one of the beneficiary’s articles acknowledging that the research reported in the article was funded by grants to one of the beneficiary’s co-authors from the above sources. In response to the director’s request for additional evidence, the petitioner submitted a letter to Dr. Helen Mary Burt, one of the beneficiary’s co-authors on a different article, asserting that her grant was one of 349 out of 1074 grant proposals approved by the Medical Research Council of Canada. The petitioner also submitted the peer review process for grant proposals submitted to the CIHR.

The director concluded that research grants are not awards or prizes as they serve to fund future work as opposed to recognizing past achievement. On appeal, counsel argues that grants “receive these types of highly competitive awards only after demonstrating that they are outstanding in their field.” Counsel quotes the materials on the peer review process for grant proposals submitted to CIHR stating that the intent of CIHR is to “fund the best health research in Canada.”

The grant application in the file funding the beneficiary’s research published in 2000 was filed by and awarded to Dr. Burt in 1997, when the beneficiary was still a doctoral student. The other article by the beneficiary indicates that the grant funding that research was awarded to another co-author, Dr. Vincent Duranio, also in 1997. While we recognize the collaborative nature of research, the record contains no indication that the beneficiary’s accomplishments were considered when the grant proposals were submitted.

Regardless, we concur with the director that research 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.

Documentation of the alien’s membership in associations in the academic field which require outstanding achievements of their members

The petitioner submitted evidence of the beneficiary's membership in the American Association for Cancer Research (AACR) and the American Association for the Advancement of Science (AAAS). In response to the director's request for the requirements for membership, counsel no longer argues that the beneficiary's membership in the AAAS qualifies. The petitioner submits materials regarding the AACR which indicates that active membership is open to investigators "who have conducted two years of research resulting in peer-reviewed publications relevant to cancer or in an area of biomedical science related to cancer *or* who have made substantial contributions to cancer research in an administrative or educational capacity." (Emphasis added.) The petitioner also submitted the membership application, which indicates that two peer-reviewed reprints must accompany the application and that two current members must support the application.

The director concluded that the petitioner had not established that the AACR was an organization that only permits a limited number of individuals to join. On appeal, counsel quotes the requirements for active membership quoted above.

Conducting at least two years of research that results in two peer-reviewed articles and obtaining two recommendations are not outstanding achievements in the field. Thus, we concur with the director.

Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation

The petitioner did not initially claim that the beneficiary meets this criterion. In response to the director's request for additional documentation, counsel asserts that the beneficiary's research "has been written about by others in professional publications in the academic field." Counsel provides two lists of ten articles each. The petitioner submitted the results of an index search in support of these lists. The first ten articles are all self-citations by Dr. Duranio. Of the second set of ten articles, three are self-citations by Dr. Duranio and Dr. Burt. Thus, the beneficiary has been cited in seven articles authored by independent researchers. The petitioner also submitted several of the articles that cite the beneficiary. Many report their own research results. A few of the articles are review articles that review the latest research in the field. In these review articles, the beneficiary is cited in support of one of several new advances. None of the articles focuses exclusively on the beneficiary's results.

The director stated that a beneficiary cannot meet this criterion simply by having his name appear in print and concluded that the articles citing the beneficiary's work were not "about" the beneficiary or his work. On appeal, counsel asserts that the director's conclusion constitutes "reversible error" because it contradicts a 1992 opinion from Acting Assistant Commissioner Lawrence J. Weinig. The opinion reads, "entries (particularly a goodly number) in a citation index which cite the alien's work as authoritative in the field . . . would more than likely be solid pieces of evidence."

Mr. Weinig also states, however, that the evidence must be evaluated, not simply tallied. We do not find that seven independent citations constitute "a goodly number." Regardless, research articles which cite the beneficiary's work are primarily about the author's own work, not the beneficiary. The review

articles in the record report on the advances in several areas of research and do not focus on the beneficiary's research any more than the other numerous results reported. As such, they cannot be considered published material about the beneficiary. Therefore, we concur with the director that the beneficiary does not meet the plain language requirements of this criterion.

Evidence of the alien's original scientific or scholarly research contributions to the academic field

The petitioner did not initially claim that the beneficiary met this criterion. In response to the director's request for additional documentation, counsel asserted that the beneficiary's abstracts, poster presentations, and patents serve to meet this criterion. The petitioner submitted the abstracts, poster presentations, information about the conferences where they were presented, and reference letters.

The director concluded that the petitioner had not established that the beneficiary was recognized as an inventor on the two patents of record, that presentations at conferences are expected in the field, and that the reference letters did not establish that the beneficiary is recognized internationally. On appeal, counsel once again references Mr. Weinig's memorandum that opines "peer-reviewed presentations at academic symposia" are "solid pieces of evidence." Counsel further argues that research is collaborative and that the beneficiary's contribution to patented techniques should be considered.

Counsel's legal arguments are not persuasive. While peer-reviewed presentations are certainly evidence to be considered, we cannot ignore that presenting one's work is inherent to the field of research. Mr. Weinig further lists "testimony from other scholars on how the alien has contributed to the academic field," as evidence to be considered. It can be expected that a researcher with international recognition attempting to meet this criterion would be able to produce both objective evidence of his contributions as well as independent evaluations as to the significance of those contributions. Further, as stated above, Mr. Weinig asserts that any evidence must be evaluated, not simply counted. Finally, while we acknowledge the collaborative nature of scientific research, the evidence must still establish that the beneficiary enjoys international recognition. It remains to evaluate the evidence as to whether it is consistent with or indicative of international recognition.

Dr. Steven Pelech, President and Chief Scientific Officer of Kinexus Bioinformatics, discusses his collaboration with the beneficiary at the University of British Columbia. Dr. Pelech asserts that the beneficiary "was able to identify several protein kinases that participate within the signaling pathways that are critical for the actions of this important cytokine." While Dr. Pelech asserts that this research was well received at conferences, he does not provide any examples of how these discoveries have changed the field.

The remaining letters from the beneficiary's colleagues provide general descriptions of the areas in which the beneficiary has worked and general praise of his professionalism and talents. None of

the letters explain how the beneficiary's work has made a significant impact on the field, e.g. that his work is internationally considered to have made a contribution to the field beyond the typical new results reported in every peer-reviewed journal article. Moreover, letters from the beneficiary's collaborators and immediate colleagues are important in providing details about the beneficiary's role in various projects, but cannot by themselves establish the beneficiary's international recognition. The record contains no evaluations of the beneficiary's work by independent experts in the field.

In support of counsel's claim that the beneficiary contributed to patented research, the petitioner submitted a letter from Dr. Steven K. Yoshinaga, a former Research Scientist and Research Project Team Leader at the petitioning research firm. Dr. Yoshinaga states that his laboratory discovered a new regulatory pathway for the activation of T-cells. Subsequently, the research team found that a protein could inhibit growth and promote regression of several tumors in mice. Dr. Yoshinaga asserts that the latter research was recently accepted for publication and that the beneficiary's name will appear as a co-author. Dr. Yoshinaga continues that "one of the studies is part of two published patent applications." Dr. Yoshinaga concludes that the beneficiary "primarily conducted these anti-tumor studies" and that he "demonstrated that the protein has robust anti-tumor activity that provides the foundation for using such an approach in human anti-cancer therapeutics." Patent application WO 00/46240 A3, with "priority data" dated February and March 1999, lists only Dr. Yoshinaga as the inventor. Patent application WO 02/44364 A2, with "priority data" dated November 2000, lists five inventors, none of whom are the beneficiary.

We concur with the director that the patent applications do not establish that the beneficiary has made contributions of major significance in the field. While we recognize that research is collaborative, we note that the normal process in the field for assigning credit also recognizes the collaborative nature of research. Multiple authors can be listed for a publication and multiple inventors can be listed on a patent application. The absence of the beneficiary's name from the list of inventors contradicts the claim that the beneficiary was significantly involved in developing the innovation for which patent protection is being sought. Moreover, the petitioner cannot demonstrate that the beneficiary has international recognition relying on official materials that do not name the beneficiary. No one who did not know of the beneficiary would learn of his work by examining the patent application.

Finally, this office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp., supra*, at 221 n. 7. Thus, a patent is certainly not prima facie evidence of a contribution of such significance that it is consistent with international recognition. Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* The pending patent is assigned to the petitioner. The record does not indicate that the petitioner has licensed or marketed the technology or other evidence of any interest the technology has generated. Thus, the impact of the technology is not documented in the record.

Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field

The petitioner submitted evidence that he has authored two published articles and several one-paragraph abstracts. The director noted that publication is routine in the field of scientific research and that the beneficiary was not the first author of either published article and concluded that the beneficiary did not meet this criterion.

On appeal, counsel asserts that anyone listed as an author for a published article must have made a significant contribution to the article. Counsel relies on the ethical guidelines of the American Chemical Society for this assertion. Counsel further quotes a non-precedent decision from this office that recognized the collaborative nature of research.

We concur with counsel that co-authored articles can establish an alien's eligibility under this criterion. As implied in the portion of our decision quoted by counsel, however, the petitioner must still establish, through citation evidence or otherwise, that the alien's publication history sets him apart from others in the field. 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 international recognition; we must consider the research community's reaction to those articles.

The record contains evidence that seven independent experts have cited the beneficiary's work. This number of citations is not evidence that the beneficiary's work is widely cited. Self-citations, while a normal and expected practice, are not evidence of international recognition.

The petitioner has shown that the beneficiary is a talented and prolific researcher, who has won the respect of his collaborators, employers, and mentors, while securing some degree of international exposure for his work. The record, however, stops short of elevating the beneficiary to an international reputation as an outstanding researcher or professor. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.