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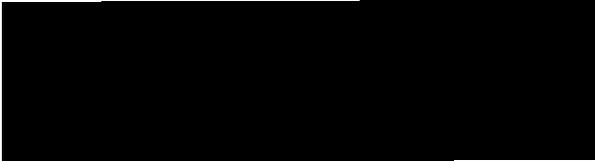
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FILE: WAC 05 259 53159 Office: CALIFORNIA SERVICE CENTER Date: JAN 25 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as 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 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 Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a “medical practice/research center.” 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 researcher. The director determined that the petitioner had not established that it employed at least three full-time researchers in addition to the beneficiary.

On appeal, counsel asserted that the director’s interpretation is not supported by the relevant law or regulations. Counsel indicated that he would submit a brief and/or additional materials within 30 days. Counsel dated the appeal September 11, 2006. As of January 5, 2007, this office had received nothing further. Thus, on that date, this office advised counsel by facsimile that we had received nothing further and afforded five days to resubmit any previously submitted materials. As of this date, more than five days later, this office has received nothing further. As such, the appeal will be adjudicated based on counsel’s assertions on the Form I-290B, Notice of Appeal. For the reasons discussed below, we uphold the director’s basis of denial. Moreover, the petitioner has not established that the beneficiary is recognized internationally as outstanding in his academic field, as required for classification as an outstanding researcher. More specifically, as will be discussed below, the beneficiary’s documented accomplishments in the field are minimal and the record does not reflect any recognition of these accomplishments beyond his own colleagues.

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.

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

(iii) 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.

As used in this section, the term "academic field," means a body of specialized knowledge offered for study at an accredited United States university or institution of higher education. 8 C.F.R. § 204.5(i)(2). In this case, the beneficiary's academic field is molecular genetics. The beneficiary holds a Bachelor of Science degree in Bioengineering from Arizona State University, awarded in May 1998. The petitioner completed an additional four semesters at Arizona State University, but the record lacks any evidence that this work led to a graduate (or lesser) degree.

#### **Petitioner as a Qualifying Employer**

The first issue to be determined in this matter is whether the petitioner has established that it was a qualifying employer as of the petition's filing date of September 29, 2005.

In response to the director's request for evidence of "persons employed in full-time research positions," the petitioner submitted an organizational chart listing the principal investigator/medical director and two additional researchers including the beneficiary.

The director found that the information presented was not adequate to demonstrate that the petitioner employed at least three full-time researchers in addition to the beneficiary. On appeal, counsel notes that the relevant law and regulations do not explicitly address whether the beneficiary is one of the three full-time researchers or not.

Section 203(b)(1)(B)(iii)(III) of the Act, 8 U.S.C. § 1153(b)(1)(B)(iii)(III), directs that an alien may qualify as a priority worker based on an offer of employment from a private research department, division, or institute, only "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." The requirement of three full-time research employees is also set forth in 8 C.F.R. § 204.5(i)(3)(C)(iii). The petitioner contends that it has met this requirement, with the intended alien beneficiary qualifying as one of its full-time research employees. The alien beneficiary is currently employed in a nonimmigrant classification.

As noted by counsel, neither the statute nor the legislative history clearly indicates whether the alien beneficiary can himself be the third full time research employee for purposes of a private entity's eligibility to file a visa petition under § 203(b)(1)(B). H. Rep. 101-723(I), 1990 USCCAN 6710, 6739 indicates that a private employer is eligible to file this petition "if there are at least three persons employed full-time in research." Like the statute itself, however, the legislative history neither endorses nor forecloses the petitioner's argument. Nor does the issue appear to have arisen during the rulemaking process. See 56 Fed. Reg. 30,703 (July 5, 1991) (proposed rule) and 60,897 (November 29, 1991) (final rule).

Where statutory language is ambiguous, however, the agency charged with enforcing the statute is permitted to interpret that language. *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Arizona State Bd. For Charter Schools v. U.S. Dep't of Educ.*, 464 F. 3d 1003, 1006-97 (9<sup>th</sup> Cir. 2006). Thus, counsel's implication that we are precluded from reaching an unfavorable interpretation simply because the statute and regulations are silent on this issue is not persuasive.

We concur with the director's reasonable interpretation of the statute and regulations on this issue. As noted by the director, section 203(b)(1)(B)(iii)(III) of the Act, 8 U.S.C. § 1153(b)(1)(B)(iii)(III), requires that "the alien seeks to enter the United States" to work for "a department, division, or institute of a private employer" that "employs at least 3 persons full-time in research activities." The phrases "seeks to enter" and "employs at least 3 persons" are both in the present tense. If an alien researcher is currently outside the United States, and intends to enter the United States with an immigrant visa, then the prospective employer must already employ at least three full-time researchers in the relevant department, division, or institute. In such a case, the three researchers

obviously do not include the alien. Thus, the statutory construction demonstrates that the alien seeks to become the fourth researcher in a company that already employs three *other* researchers. In instances where the alien is already in the United States as a nonimmigrant, and the alien has joined *two* other researchers to become the *third* researcher, then the employer does not satisfy the statutory construction.

There is no regulatory or statutory justification for the arbitrary assumption that a company too small to petition for a worker who is still overseas can, nevertheless, petition for that same worker if the worker is already in the United States as a nonimmigrant. Therefore, we concur with the director's finding that the position held by the alien beneficiary shall not be counted as one of the three persons involved full-time in research activities, even if the alien beneficiary is lawfully employed in a nonimmigrant classification. The apparent purpose of 203(b)(1)(B)(iii)(III) is to limit this immigrant visa classification to well-established research institutes. If the employment of a nonimmigrant alien, by definition temporary, can be counted toward this requirement then it would appear that hiring three nonimmigrant aliens could make all three of them eligible. This result would, with little effort, render the three employees requirement meaningless.<sup>1</sup>

### **Beneficiary's Eligibility as an Outstanding Researcher**

The regulation at 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. More specifically, outstanding professors and researchers should stand apart in the academic community through eminence and distinction based on international recognition. The regulation at issue provides criteria to be used in evaluating whether a professor or researcher is deemed outstanding. 56 Fed. Reg. 30703, 30705 (July 5, 1991). As stated above, the beneficiary's only completed degree is a Bachelor of Science degree. While the absence of an advanced degree does not preclude eligibility, we note that advanced degrees are commonplace in the field. The petitioner bears a heavy burden of establishing that the beneficiary compares with internationally recognized researchers in the field, including those with advanced degrees. The record, however, lacks evidence of any recognition beyond the beneficiary's immediate circle of colleagues. The evidence submitted will be discussed in more detail below as it relates to the various regulatory criteria.

The petitioner claims to have satisfied the following criteria.<sup>2</sup>

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<sup>1</sup> Granted, for at least some nonimmigrant classifications, the position itself need not be temporary, but the alien must be coming temporarily to the United States.

<sup>2</sup> The petitioner does not claim that the beneficiary meets any criteria not discussed in this decision and the record contains no evidence relating to the omitted criteria.

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

It is significant that the *proposed* regulation relating to this classification would have required evidence of a major *international* award. The final rule removed the requirement that the award be "international," but left the word "major." The commentary states: "The word "international" has been removed in order to accommodate the *possibility* that an alien might be recognized internationally as outstanding for having received a major award that is not international." (Emphasis added.) 56 Fed. Reg. 60897-01, 60899 (November 29, 1991.)

Thus, the standard for this criterion is very high. The rule recognizes only the "possibility" that a *major* award that is not international would qualify. Significantly, even lesser international awards cannot serve to meet this criterion given the continued use of the word "major" in the final rule. *Cf.* 8 C.F.R. § 204.5(h)(3)(i) (allowing for "lesser" nationally or internationally recognized awards for a separate classification than the one sought in this matter).

Neither counsel nor the petitioner has asserted that the beneficiary meets this criterion. Nevertheless, we acknowledge that in response to the director's request for additional evidence, the petitioner submitted Exhibit aa, entitled "Beneficiary's Internationally Recognized Work in the Field and Awards." The exhibit, however, contains no awards. The remaining evidence in that exhibit will be discussed where appropriate below.

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

The petitioner submitted evidence that the beneficiary is an *associate* member of Sigma Xi based on his "potential for becoming a research scientist." Counsel notes that Sigma Xi boasts several members who are Nobel Laureates. At issue, however, are the requirements for the level of membership held by the beneficiary. Nominations for *associate* membership do not involve a finding that the nominee has made noteworthy achievements as required for full membership. We are not persuaded that demonstrating the potential to become a research scientist is an outstanding achievement. Regardless, the petitioner has not established that Sigma Xi interprets noteworthy achievements as ones generally considered outstanding in the field. For example, advanced degrees and published articles are common in the field and do not constitute outstanding achievements.

The petitioner also submitted evidence that the beneficiary is a member of the Biomedical Engineering Society. The Internet materials about this society, provided by the petitioner, reflects that members must have a degree in biomedical engineering or a related field and experience in the field. Applicants must be sponsored by current members. None of these requirements constitute outstanding achievements.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

*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 submitted evidence that the beneficiary has been cited twice and that a database of fly genes includes the beneficiary's abstracts as references. Articles which cite the beneficiary's work are primarily about the author's own work, not the beneficiary. As such, they cannot be considered published material about the beneficiary. Moreover, a database of articles relating to a certain topic is also not published materials about the work of the authors whose articles are listed.

The petitioner also submitted an article in *Research*, a magazine profiling research at Arizona State University published by that institution. The article is about the university's strategies in promoting research among undergraduates. The beneficiary's work is mentioned as an example of undergraduate research, but is not the focus of the article. A second article, posted on Arizona State University's website, is about an upcoming symposium that will include presentation by undergraduates at the university. The beneficiary's work is mentioned as an example of the work being performed by undergraduates. Even if we considered these articles to be "about" the beneficiary's work, the evidence submitted to meet a given criterion must be indicative of or at least consistent with international recognition. The submitted articles, published in a school magazine where the beneficiary was a student and on the same university's website, are not indicative of any recognition beyond that school.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

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

As stated above, the beneficiary obtained his Bachelor of Science from Arizona State University in 1998 and took an additional four semesters of courses after that date which did not lead to another degree. In 2002, he began working for the petitioning research center.

Obviously, the petitioner cannot satisfy this criterion simply by listing the beneficiary's past projects and demonstrating that the beneficiary's work was "original" in that it did not merely duplicate prior research. Research work that is unoriginal would be unlikely to secure the beneficiary a master's degree, let alone classification as an outstanding researcher. Because the goal of the regulatory criteria is to demonstrate that the beneficiary has won international recognition as an outstanding researcher, it stands to reason that the beneficiary's research contributions have won comparable recognition. To argue that all original research is, by definition, "outstanding" is to weaken that adjective beyond any useful meaning, and to presume that most research is "unoriginal."

Initially, the petitioner referenced two citations and the listing of the beneficiary's work on a database of work relating to fly genes as evidence to meet this criterion. This level of citation is far below the

wide and frequent level of citation that can be expected of a researcher whose contributions have garnered international recognition. The petitioner also noted the beneficiary's contribution to the "Ask a Biologist" website designed by Arizona State University. The beneficiary, however, is credited as a programmer. Computer programming is not the beneficiary's academic field in which he claims to be an outstanding researcher. Rather, his degree is in bioengineering and he performs genetic research. In response to the director's request for additional evidence, the petitioner submitted reference letters.

At Arizona State University, the beneficiary worked in the laboratory of Dr. [REDACTED] Professor Emeritus of Biology. Dr. [REDACTED] asserts that the beneficiary was one of her top undergraduate students. At issue, however, is not whether the beneficiary compares well with other undergraduate students but whether he is internationally recognized as an outstanding researcher. Dr. [REDACTED] asserts that the beneficiary cloned and characterized a gene mutation in a fly, *Drosophila melanogaster*, selected and maintained wild-type and mutant strains of the same fly and applied molecular techniques to chromosomes, gene cloning, vector manipulation and mutagenesis. Dr. [REDACTED] does not explain, however, how this work has been recognized as significant in the field. We acknowledge that this work has been published, is listed in a database of gene research on flies and has been cited twice. Two citations, however, are not significant and the petitioner has not explained the significance of inclusion in the fly gene database. If all similar research is indexed in this database, its inclusion is not indicative that the research has been recognized as unusually significant in the field. Moreover, Dr. [REDACTED] acknowledges that this work was performed in a different academic department than the beneficiary's actual field of study, bioengineering, which is the subject of the beneficiary's degree.

Dr. [REDACTED] the beneficiary's supervisor at the petitioning research center, asserts that the beneficiary performs diagnostic and research work in molecular genetics at the center and successfully initiated and completed an experimental therapeutics program using a mouse model of [REDACTED] disease. Dr. [REDACTED] further praises the beneficiary's work in developing a clinical database and maintaining the computer databases. Dr. [REDACTED] does not explain how the beneficiary's research has impacted the field or how his database work demonstrates international recognition or even ability as a genetics researcher.

The petitioner also submitted a letter from Dr. [REDACTED] a senior biologist at the National Institute of Neurological Disorders and Stroke, National Institute of Health (NIH) and former laboratory supervisor at the petitioning research center. Dr. [REDACTED] asserts that he worked with the beneficiary at the petitioning research center and that he had a favorable impression of the beneficiary's work. Dr. [REDACTED] continues:

During [a] short period of time, [the beneficiary has] made significant contributions in neuromuscular research [by] studying inherited neuromuscular diseases such as Charcot-Marie-tooth disease, proximal myopathies and spastic paraplegia just to name a few. There is no treatment available for these genetic diseases, from which thousands of people suffer in the USA. Only animal models will ultimately provide therapeutic means.

Dr. [REDACTED] does not identify a single contribution or explain how it impacted the field. Simply working in an important area of research does not create a presumption that the researcher has made contributions consistent with international recognition to that area of research. Dr. [REDACTED] further asserts that the beneficiary has authored “several” published articles, which attest to his qualifications and research and academic “potential.” The record, however, contains only two abstracts published as of the date of filing and unpublished manuscripts.

Dr. [REDACTED] Head of the Clinical Neurogenetics Unit at NIH, indicates that he has collaborated with the beneficiary. Dr. [REDACTED] asserts, in a letter dated October 24, 2005, that the beneficiary is pursuing his Ph.D. although the petitioner has asserted that the beneficiary stopped pursuing this degree in 1999. While Dr. [REDACTED] asserts that the beneficiary’s experience working with fly genes “served him well,” Dr. [REDACTED] does not assert that the work itself was particularly influential. Dr. [REDACTED] provides the following information regarding the beneficiary’s work for the petitioner:

[The beneficiary’s] efforts resulted in discovery of novel SPG6 and NIPA1 gene mutations, and a genetic cause of nemaline myopathy in the Old Order Amish population living in the mid-Western states of the US. [The beneficiary’s] current research is concentrated on development of an animal model of desmin myopathy, a fatal disease known to affect a number of large American families. He also succeeded in adapting methods for the detection of gene expression.

Finally, Dr. [REDACTED] praises the beneficiary’s skills and expertise. The record lacks evidence that any of the work discussed by Dr. [REDACTED] had been published as of the date of filing and, thus, disseminated in the field. The record lacks any evidence that this work has influenced the field to any degree or that it has garnered the beneficiary any international recognition.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien’s eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the most persuasive. The record lacks letters from independent experts. Even the letters

provided include no language suggesting that the beneficiary enjoys international recognition in the field as an outstanding researcher. Objective evidence that might corroborate any claims of international recognition, such as but not limited to widespread and frequent citation, is absent.

While the beneficiary'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 thesis or research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. The record does not establish that the beneficiary's work has garnered any notable recognition at the international level or even that it has had significant international exposure.

*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 the beneficiary has authored two published abstracts in 1997 and 1998. In addition, the petitioner submitted a list of abstracts posted on Arizona State University's website, which includes one by the beneficiary. The printout is not clear, however, as to whether these abstracts were actually published or merely presented at a university event. While the petitioner also submitted a manuscript authored by the beneficiary, we cannot consider any manuscripts not yet published as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

It is our position that publication of scholarly articles is not automatically evidence of international recognition; we must consider the research community's reaction to those articles. As discussed above, the beneficiary's work has only been minimally cited. As such, we are not persuaded that his publication record is sufficiently consistent with international recognition in order to meet this criterion.

The petitioner has shown that the beneficiary is a competent researcher, who has won the respect of his collaborators, employers, and mentors. The record, however, stops far 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.