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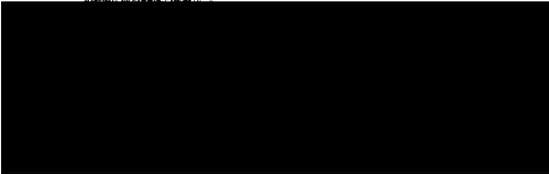
FILE: SRC 04 060 51451 Office: TEXAS SERVICE CENTER Date: MAY 17 2005

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

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.

*Mari Johnson*

*R* Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the nonimmigrant visa petition in a decision dated March 23, 2004 and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private physicians group. The beneficiary is a physician. The petitioner seeks O-1 classification of the beneficiary, under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in pathology. The petitioner seeks to employ the beneficiary temporarily in the United States for a period of three years as director of gastrointestinal pathology.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary satisfied any of the criteria set out in the regulation at 8 C.F.R. § 214.2(o)(iii).

On appeal, the petitioner submits a brief and additional evidence.

The record consists of a petition with supporting documentation, a request for additional documentation and the petitioner's reply, the director's decision, an appeal, a brief, and additional documentation.

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

The issue raised by the director in this proceeding is whether the petitioner has shown that the beneficiary qualifies for classification as an alien with extraordinary ability in pathology as defined by the statute and the regulations.

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part:

*Extraordinary ability in the field of science, education, business, or athletics* means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) states, in pertinent part, that:

*Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business, or athletics.* An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

(A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or

(B) At least three of the following forms of documentation:

(1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

- (2) 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;
- (3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
- (4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
- (5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
- (6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
- (7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
- (8) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

The beneficiary in this matter is a 38-year old native and citizen of India. The record reflects that he received his bachelor of medicine and surgery at the [REDACTED] in 1989. He received a medical degree at the same institution in 1993. He completed a gastrointestinal pathology fellowship at the Department of Pathology, [REDACTED] Medical Center, [REDACTED] in 2002. He spent the next two years at the [REDACTED] M.D. Anderson Cancer Center, Houston, Texas. Although the petitioner failed to indicate the date and manner of the beneficiary's last entry into the United States, it appears that he entered in J-1 classification as an exchange visitor and that he is subject to the two-year foreign residency requirement.

After reviewing the evidence submitted in support of the petition, the director found the beneficiary ineligible for O-1 classification based on finding that the petitioner failed to establish that the beneficiary meets the requirements of Title 8, Code of Federal Regulations, Part 214.2(o)(3), *supra*.

On appeal, the petitioner asserts that the beneficiary fulfills the statutory requirements required for classification as an alien of extraordinary ability.

There is no evidence that the beneficiary has received a major, internationally recognized award equivalent to that listed at 8 C.F.R. § 214.2(o)(3)(iii)(A). Neither is the record persuasive in demonstrating that the beneficiary has met at least three of the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

*Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor.*

The petitioner asserts that the beneficiary satisfies criterion number one because he has received the following honors, distinctions and awards:

- He ranked in the top 2% out of 25,000 candidates to be admitted to the [REDACTED]
- He graduated in the top of his class at medical school.
- He received [REDACTED]
- He was offered a prestigious position as consultant pathologist with [REDACTED]

This criterion requires nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

AAO notes the emphasis placed by the petitioner on the beneficiary's specialized training, including his class rank and selection for highly competitive training programs at leading institutions. AAO acknowledges that the petitioner's rationale for seeking to employ the beneficiary is readily apparent. However, unlike recruiting and hiring decisions, eligibility for this visa classification is not based on a beneficiary's performance during preparatory specialized training, or in having specific professional competencies, however superb they may be, but rather hinges on the beneficiary's level of acclaim and recognition in the actual field. The context is thus much broader than an evaluation for suitability for a particular position. In any case, academic awards received while preparing for the vocation fall substantially short of constituting a national or international prize or award for recognition in the field.

The beneficiary received a [REDACTED] which is a research grant. Research grants simply fund a scientist's work. 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 is not an award to honor or recognize past achievement.

The petitioner failed to demonstrate that these were awards for excellence in the field of endeavor. The beneficiary does not satisfy this criterion.

*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.*

For criterion number two, while the beneficiary is a member of the [REDACTED] (AMDA), [REDACTED]

[REDACTED] the American Society of Cytopathology, the American College of Medical Quality, the American Association of Cancer Research, the College of American Pathology, and the American Registry of Outstanding Professionals, among others, there is insufficient evidence that these are associations which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines. The beneficiary does not satisfy this criterion.

*Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date and author of such published material, and any necessary translations.*

For criterion number three, the petitioner submitted two newspaper articles about the detection of plague in India. Because the petitioner failed to submit certified translations of the articles, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. The beneficiary does not satisfy this criterion.

*Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought.*

For criterion number four, the petitioner asserts that the beneficiary satisfies criterion number four by virtue of his role in the classroom as a teacher. In the capacity of a teacher, the beneficiary was not judging the work of experienced professionals in the field, but was evaluating his students. The beneficiary's work evaluating others in this capacity is not indicative of the beneficiary's sustained acclaim. He evaluated the work of others as an integral part of his job. The evidence is insufficient to establish that the beneficiary satisfies this criterion.

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

For criterion number five, while the beneficiary has published results of his research, the record does not show that his research is considered of "major significance" in the field. By definition, all professional research must be original and significant in order to warrant publication in a professional journal. The record does not show that the beneficiary's research is of major significance in relation to other similar work being performed. The petitioner provided CIS with ten testimonials about the value of the beneficiary's skill and work. One wrote that the beneficiary's "has risen to the very top [of his field]. Otherwise, his employer would not have offered him a directorship position." Another wrote that the beneficiary "is one of the very few clinicians . . . that hold dual clinical and research skills in . . . pathology." One wrote that the beneficiary made a significant contribution by detecting the first case of the plague in the city of ██████████ 1994. Another wrote: "[I]n collaboration with the ██████████ [the beneficiary] established the criteria to study fresh gastrointestinal specimens under the confocal microscope." Another said that the beneficiary played a critical role in the Federal Drug Administration Phase III drug trial of a new proton pump-inhibitor drug, Lanzoprazole, and that over 12 million prescriptions have been written for this drug. Counsel for the petitioner states that the beneficiary plays a vital role in the advancement of cancer medicine.

In review, the testimonials fail to specifically state the beneficiary's contribution(s) to his field of endeavor. Many of the testimonials' authors speak of the beneficiary's training and experience, noting the shortage of physician-scientists in the United States. The O-1 visa classification was not created for the purpose of meeting labor shortages.

The evidence is insufficient to establish that the beneficiary has made an original contribution of major significance in comparison to the work of others in the field. In review, the evidence fails to show that

beneficiary has sustained national or international acclaim and recognition for major achievements in the field of pathology. The beneficiary does not satisfy this criterion.

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

For criterion number six, the beneficiary has published two articles and numerous abstracts as of the date of the filing of the instant petition. On appeal, the petitioner indicated that the beneficiary recently submitted a manuscript for possible publication. The AAO will only consider those articles that had been published as of the date of the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner submitted evidence of the "impact factor" of one publication that published an article co-authored by the beneficiary. The petitioner asserts that because this publication has a high impact factor, the beneficiary's article had a significant impact on their readership. A more significant measure is the citation history of each of the author's articles. In the instant case, the petitioner provided evidence that the beneficiary's articles have been cited three times, including one self-citation. In the absence of a more extensive publication and citation history, the evidence is insufficient to establish that the beneficiary satisfies this criterion.

*Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation.*

The petitioner states that the beneficiary has played leadership roles as a teacher, clinician, supervisor, and researcher at distinguished institutions including the [REDACTED] the [REDACTED] and the [REDACTED] the [REDACTED] and the [REDACTED].

The beneficiary has been employed as a fellow while in the United States. While employment with such institutions is evidence of a degree of recognition, such staff or assistant positions are not considered employment in a "critical or essential capacity."

The petitioner failed to establish that the beneficiary has been employed in a critical or essential capacity either in the U.S. or abroad. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The beneficiary does not satisfy this criterion.

*Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.*

The petitioner submitted no evidence of the beneficiary's past wages. The petitioner failed to indicate the proffered wage on the Form I-129 petition. In response to the director's request for additional evidence, the petitioner indicated that it proposed to pay the beneficiary \$150,000 for his first year, \$175,000 for his second, and \$200,000 for the third year, after which he would assume an ownership interest in the petitioning organization. In the absence of wage surveys, Citizenship and Immigration Services (CIS) cannot evaluate the proffered wage. To evaluate whether the salary is high, CIS needs to compare it to the median and highest wages offered nationwide to pathologists. The petitioner failed to establish that the beneficiary satisfies this

criterion.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for extraordinary ability, the statute requires evidence of "sustained national or international acclaim" and evidence that the alien's achievements have been recognized in the field of endeavor through "extensive documentation." The petitioner has not established that the beneficiary's abilities have been so recognized. In order to establish eligibility for O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of his field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary's achievements have not yet risen to this level.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.