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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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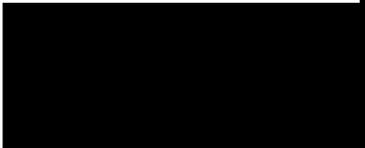


File: WAC-99-226-52978 Office: California Service Center Date: **MAR 27 2001**

IN RE: Petitioner:
Beneficiary:

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

IN BEHALF OF PETITIONER:



Public Copy

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INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Unit

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner in this matter is a pharmaceutical company. The beneficiary is a biochemist. The petitioner seeks O-1 classification of the beneficiary, pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the "Act"), as an alien with extraordinary ability in science, in order to employ her in the United States for a period of three years.

The director denied the petition finding that the petitioner failed to establish that the beneficiary met the regulatory standard for an alien with extraordinary ability in science necessary for O-1 classification.

On appeal, counsel for the petitioner argued that the director erred in interpreting the regulations. Counsel argued that the beneficiary qualifies for O-1 classification based on her unique knowledge of mass spectrometry and proteomics. Counsel further argued that the beneficiary has demonstrated the requisite sustained national and international acclaim to qualify for the benefit sought.

Section 101(a)(15)(O)(i) of the Immigration and Nationality Act (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 of extraordinary ability.

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.

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.

(C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's

occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

8 C.F.R. 214.2(o)(5)(i)(A) requires, in pertinent part:

Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for O-1 or O-2 classification can be approved.

The beneficiary is a native and citizen of Germany currently in the United States in J-1 classification as a post-doctoral fellow at the University of California-San Francisco.

The determination of "extraordinary ability" for the purpose of this type of visa petition proceeding is necessarily a subjective one. The director found the beneficiary ineligible for O-1 classification based on a finding that the documentation submitted was insufficient to demonstrate the sustained acclaim in the field of biochemistry required by the Act and that the documentation was insufficient to show that she is "at the very top" of her field pursuant to 8 C.F.R. 214.2(o)(3)(ii).

The center director fully reviewed the documentation furnished and found it insufficient to establish that the beneficiary was recognized as one of the top researchers in biochemistry or biomedical research. Counsel argued on appeal that the documentation should be reviewed in light of the beneficiary's specialized area of biomedical research utilizing new techniques in mass spectrometry in analyzing specific disease processes. Quoting a letter of reference, counsel argued that the beneficiary, "is one of a very few number of scientists in the world that have extensive training in the application of mass spectrometry to proteomics, one of the fastest growing areas of biomedical research." After careful review of the record, it must be concluded that the petitioner has failed to overcome the director's objections.

The *extraordinary ability* provisions of this visa classification are intended to be highly restrictive. The pertinent regulations specifically state that O-1 classification is available only to a "small percentage" of scientists who have risen to the "very top" of their field of endeavor. Being one of small number of scientists working in a given area of specialization is not the same as being one of the small number of scientists recognized as being at the very top of the field of endeavor. Scarcity of the skill is not a determinative factor in this type of proceeding.

In order to establish eligibility for extraordinary ability the statute requires proof of "sustained" national or international

acclaim and a demonstration 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.

Nor is the record persuasive in demonstrating that the beneficiary met at least three of the criteria at 8 C.F.R. 214.2(o)(3)(iii)(B). It must be noted that these provisions are only documentary requirements and merely addressing them does not establish eligibility for the benefit sought.

As noted by the director, the beneficiary's resume reflects eight publications, only two of which reflect the beneficiary as primary author. The publications are evidence of original research and may be considered to address one of the criteria. The receipt of fellowships may also be considered to address the criteria of having received professional awards. However, post-doctoral fellowships are not given substantial weight as nationally or internationally recognized awards for excellence in the field contemplated by the regulation.

The record is insufficient to show that the beneficiary has satisfied three or more of the requisite criteria. The record does not show that the beneficiary has been employed in a critical capacity for organizations with a distinguished reputation or that she has commanded a high salary. The beneficiary has studied at distinguished universities but has not been employed in a critical capacity as contemplated by the regulations.

Therefore, it must be concluded that the petitioner has failed to overcome the director's objection.

The denial of this petition is without prejudice to the beneficiary pursuing any other immigration benefit for which she may be eligible.

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.