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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

PUBLIC COPY

File: EAC-99-186-50522 Office: Vermont Service Center Date: OCT 02 2001

IN RE: Petitioner:
Beneficiary: [redacted]

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)

IN BEHALF OF PETITIONER: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

Myra L. Rosenberg

for Robert P. Wiemann, Acting Director
Administrative Appeals Office

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

The petitioner in this matter is the medical school of a university. The beneficiary is a medical doctor and surgeon. The petitioner seeks a one-year extension of stay for the beneficiary, under 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 continue to employ him in the United States as a clinical fellow at a salary of $40,000.

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

On appeal, counsel for the petitioner argued that O-1 classification was previously approved for the beneficiary and the Service's reversal of position is arbitrary and capricious. Counsel resubmitted the documentation used to establish eligibility at the time of the original petition.

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 with extraordinary ability in the sciences as defined in these proceedings.

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.

The record reflects that the beneficiary is a native and citizen of Israel. The petitioner stated that the beneficiary was last admitted to the United States on or about June 20, 1998, in O-1 classification, authorized for employment by the petitioner. The record contains a copy of a Form I-797 notice of approval reflecting approval of a petition for O-1 classification valid from July 6, 1998 to June 30, 1999. The record reflects that the beneficiary passed his "board" examinations and completed his medical residency in Israel in July 1998. The record also reflects that the beneficiary developed a certain surgical technique and has published approximately three articles in peer-reviewed professional journals relating to that technique.

It must first be noted that the petition was filed on May 16, 1999, seeking extension of the beneficiary's stay until June 30, 2000. As that time period has lapsed, the matter is largely moot. The reasons for the delay in forwarding the record for adjudication of the appeal is unknown.

In reaching a determination for O-1 classification, the Service must take into account the evidence of record as a whole. In this case, the beneficiary had recently completed his residency program and has engaged in a one-year fellowship at a prestigious United States medical school. The record reflects that the beneficiary is recognized and has been published regarding his development of a "one-way valve atrial septal patch" in the field of surgery. The fact that the beneficiary was offered a post-graduate fellowship at a leading United States medical school is in itself proof of recognition of the beneficiary's superior abilities as a surgeon.

At issue is whether the beneficiary has reached the level of recognition necessary for O-1 classification. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. In order to establish eligibility for extraordinary ability, the statute requires proof of "sustained" national or international acclaim and proof that the alien's achievements have been recognized in the field of endeavor through "extensive documentation." After careful review of the record, it must be concluded that the petitioner has not established that the beneficiary's abilities have been so recognized.

In the petitioner's appointment letter dated May 12, 1999, it was stated that the 12-month fellowship program was "designed to continue your advanced training in surgical techniques pioneered by the faculty of Georgetown."

In order to establish eligibility for O-1 classification, the regulations require proof that the alien has achieved "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)(ii). The fact that the beneficiary is a post-doctoral fellow pursuing advanced training demonstrates that, while he may eventually be classifiable as an alien with extraordinary ability in science, he has not yet achieved that level of expertise. The beneficiary's supervisors and the affiants who submitted recommendation letters for the beneficiary, who were tenured faculty at leading medical schools, may be considered to have risen to the level of O-1 classification, but not a post-doctoral fellow at the same institution, regardless of his or her potential as a scientist.

Clearly, the initial petition for O-1 classification was approved in error. Accordingly, the center director's reversal of that determination was not arbitrary and capricious. The center director's decision of July 19, 1999, denying the instant petition and the extension, are affirmed.

The denial of this petition is without prejudice to the petitioner pursuing any other immigration benefit for which the beneficiary 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.