

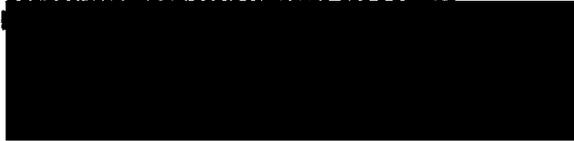


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U.S. Department of Justice

Immigration and Naturalization Service

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

NOV 20 2002

File: SRC 01 256 55694 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
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]

PUBLIC COPY

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 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 that 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, Director
Administrative Appeals Office

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

The petitioner is a medical practice group of physicians specializing in neonatal and perinatal services. 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), as an alien with extraordinary ability in medical science. The petitioner seeks to employ the beneficiary temporarily in the United States for a period of three years as a neonatologist associate at the Baylor University Medical Center, at a salary of \$135,000 per year.

The director denied the petition finding that the petitioner failed to establish that the beneficiary has sustained recognition as being among a small percentage at the very top of the field.

On appeal, counsel for the petitioner submitted a brief arguing that the record shows that the beneficiary is an alien with extraordinary ability in her field.

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 and brief.

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 medical science 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.

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 in this matter is a native and citizen of the Philippines. The record reflects that she received her medical degree in 1994 in Manila, Philippines. In 1998, she completed a residency program in pediatrics at the Christ Hospital and Medical Center, Oak Lawn, Illinois. From 1998 to 2001, she was a fellow in the neonatal-perinatal program at Baylor College of Medicine in Dallas, Texas. She authored three articles for peer-reviewed publications. The record reflects that she was last admitted to the United States on March 19, 2001, in J-1 classification as an exchange visitor.

After reviewing the evidence submitted in support of the petition, the director found the beneficiary ineligible for O-1 classification based on finding the sum of the evidence insufficient to demonstrate that she is "at the very top" of her field of science pursuant to 8 C.F.R. 214.2(o)(3)(ii). The director acknowledged the facts presented that the beneficiary is an accomplished neonatologist and fellow, but concluded that such accomplishments were insufficient to satisfy the criteria of 8 C.F.R. 214.2(o)(3)(iii). The director concluded that the record failed to show that the beneficiary was recognized as a physician of extraordinary ability whose achievements have been recognized in the field through extensive documentation.

On appeal, counsel for the petitioner asserts that the director abused his discretion in denying the petition.

After careful review of the record, it must be concluded that the petitioner has failed to overcome the director's objections. There is no evidence that the beneficiary has received a major award equivalent to that listed at 8 C.F.R. 214.2(o)(3)(iii)(A).

For criterion number 1, no evidence was submitted.

For criterion number 2, while the beneficiary is a member of the American Medical Association and the American Academy of Pediatrics, there is no evidence that these are associations which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines.

For criterion number 3, no evidence was submitted.

For criterion number 4, the beneficiary served as class representative for one year in 1999-2000 on the academic committee of the Baylor Department of Neonatology to screen applications of fellowship candidates. In this position she was not judging the work of experienced professionals in the field, but was selecting candidates with the greatest potential for their training in medicine. Further, she was selected by her peers in medical school and not due to her sustained national acclaim at the top of her profession. Her service as judge of the work of others in this capacity does not demonstrate sustained acclaim in the field of neonatology.

For criterion number 5, while the beneficiary has published results of her research, the record does not show that her 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. Counsel for the petitioner asserts that the beneficiary is a leading researcher on "cutting edge" issues in pediatric lung biology and that her work has been widely disseminated in neonatology publications worldwide. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner provided the Service with numerous testimonials about the value of the beneficiary's work. One wrote that the beneficiary's work "will have positive effects." Another wrote that her work "will have significant impact on the clinical management of PDA." Another said, "her findings have provided a significant impact on our policies regarding management of PDA." These testimonials are all conclusory and fail to demonstrate how the beneficiary's research has impacted her field. One testimonial states, "although one cannot cite national recognition for this work, her efforts have had far-reaching and significant impact on hundreds of infants and their families." In review, the evidence fails to show that beneficiary has sustained national or international acclaim and recognition for major achievements in the field of medicine.

For criterion number 6, the beneficiary has published three articles on her research. She published her first article in 2000, and the remainder in 2001. While counsel submits evidence that Pediatric Research, the journal that published two of the beneficiary's articles, is a highly cited publication, there is no citation history of the beneficiary's articles. The petitioner has not demonstrated that the beneficiary's publication of two

articles in a prestigious journal has had any impact on the field of neonatology. Publication of three articles does not distinguish the beneficiary from others in her field.

For criterion number 7, the beneficiary has been employed as a resident, a fellow, a pediatrician and neonatologist at esteemed medical institutions. 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" as would a department head or lead researcher on major projects. Counsel for the petitioner asserts that the beneficiary was selected for a pediatric residency in a highly competitive process. Counsel's assertions are not persuasive. Evidence that the beneficiary was selected as a resident in a competitive process is not evidence that she served in a critical or essential capacity. Counsel for the petitioner also argued that the beneficiary was employed in a critical capacity, similar to the alien described in a published decision. In the case¹ cited by counsel for the petitioner, the alien was deemed to be employed in a critical or essential capacity. In that case, the alien had served as both president and vice president of his hospital. In the instant case, the beneficiary has served as a resident, fellow, and an employee. Counsel for the petitioner failed to demonstrate how the cited case is applicable to the beneficiary's situation.

For criterion number 8, no evidence of the beneficiary's salary history was provided, nor were salary surveys supplied to the Service so that the current salary offer could be evaluated.

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 also must establish that the beneficiary is "at the very top" of her field of endeavor. 8 C.F.R. 214.2(o)(3)(ii). In order to meet these criteria in the field of science, the alien must normally be shown to have a significant history of scholarly publications, have held senior positions at prestigious institutions, and hold regular seats on editorial boards of major publications in the field. The beneficiary's achievements have not yet risen to this level.

¹ Buletini v. INS, 860 F. Supp. 1222 (E.D.Mich. 1994).

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.