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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

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File: SRC-02-152-53827 Office: Texas Service Center Date: SEP - 5 2002

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]

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

for 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 major research hospital. 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 science. The petitioner seeks to employ the beneficiary temporarily in the United States for a period of three years as a Clinical Fellow in the Department of Infectious Diseases at a salary of \$40,000 per year.

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

On appeal, counsel for the petitioner submitted a brief arguing that the record shows that the beneficiary is an alien with extraordinary ability in science and that the center director failed to consider all the evidence submitted.

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 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 described as a native and citizen of India. His curriculum vitae reflects that he received his medical degree in 1994 in Gujarat, India. He completed a residency program in pediatrics at the Milton S. Hershey Children's Hospital, Hershey, Pennsylvania from 1996 to 1999, and has been employed at St. Jude's Children's Hospital since 1999. He authored two professional journal publications, three professional research abstracts, and contributed to chapters in three text books on pediatrics. The record reflects that he was last admitted to the United States on January 3, 2002, in J-1 classification as an exchange visitor. His visa is annotated that he is subject to the foreign residency requirement of section 212(e).

After reviewing the evidence submitted in support of the petition, the center director found the beneficiary ineligible for O-1 classification based on finding the sum of the evidence insufficient to demonstrate that he is "at the very top" of his field of science pursuant to 8 C.F.R. 214.2(o)(3)(ii). The director acknowledged that the beneficiary was a published researcher, a member of professional societies, and had completed a residency program in pediatrics, 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.

In the appellate brief, counsel argued, in pertinent part, that the director failed to consider all the evidence submitted and asserted that the evidence is sufficient to satisfy at least three of the criteria at 8 C.F.R. 214.2(o)(3)(iii). Counsel argued, in part, that the director failed to consider the beneficiary's involvement in NIH funded research, his involvement in developing a protocol for the treatment of pediatric HIV infection, that he has reviewed articles for professional peer-reviewed journals, that he has contributed chapters to text books of pediatric disorders, and that he is a member of professional societies.

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 an award equivalent to that listed at 8 C.F.R. 214.2(o)(3)(iii)(A). Nor has it been established that the beneficiary satisfied at least three of the criteria at 8 C.F.R. 214.2(o)(3)(iii)(B).

Evidence submitted to address the criteria at 8 C.F.R. 214.2(o)(3)(iii)(B) must demonstrate the national or international acclaim of the beneficiary. The list of evidentiary criteria shows the different kinds of documentation that can demonstrate that an alien has the national or international acclaim required for O-1 classification.

For criterion number 1, there is no evidence that the beneficiary has been the recipient of an internationally recognized prize or award for excellence. While the beneficiary was selected as Outstanding Third Year Resident at his hospital, this is not the type of "internationally recognized award for excellence" contemplated by the regulation.

For criterion number 2, while the beneficiary is a member of three professional societies, 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. Most medical associations, even the specialized associations, are open to all licensed physicians in good standing practicing in that area of medicine. The regulatory standard contemplates associations that have selective membership based on outstanding achievements, not merely an area of specialization.

For criterion number 3, while the beneficiary's publications may have been cited by other researchers, this is not the type of "published material in professional or major trade publications or major media about the alien" contemplated by the regulation.

For criterion number 4, while the beneficiary has reviewed articles for professional journal publications, he has done so on an *ad hoc* basis. He is not a regular reviewer or board member of a professional publication, and has not been shown to have been chosen as a reviewer based on his acclaim within the scientific community.

For criterion number 5, 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.

For criterion number 6, the beneficiary has authored scholarly articles. Therefore, this criterion may be considered satisfied.

For criterion number 7, the beneficiary has been a resident and a fellow at two distinguished hospitals and is being offered a position as a staff physician. While employment with such distinguished institutions reflects favorable recognition of a physician's abilities, such staff or assistant positions are not considered employment in a "critical or essential capacity" as would a position as a department head or lead researcher on major projects.

For criterion number 8, while there is no evidence of the beneficiary's salary history, the current offer of \$40,000 is not a "high salary" in the medical field.

As noted by the director, publishing scholarly articles, joining professional associations, and engaging in research is the norm in the professions and is not sufficient to establish the requisite acclaim in the field of science necessary to sustain a claim of extraordinary ability as contemplated under this provision.

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 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." 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 his or her field of endeavor. 8 C.F.R. 214.2(o)(3)(ii). In order to meet this criterion 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 serve on editorial boards of major publications in the field. The beneficiary's achievements have not yet risen to this level.

The denial of this petition is without prejudice to the petitioner pursuing classification of the beneficiary under alternate provisions of the Act.

Administrative notice is made that the beneficiary was admitted to the United States in J-1 classification and is subject to the provisions of section 212(e). Pursuant to section 212(e) of the Act, an alien admitted under section 101(a)(15)(J) of the Act who is subject to the two-year foreign residence requirement is

ineligible to apply for an immigrant visa or for an employment-based nonimmigrant visa. In addition, pursuant to section 248 of the Act, an alien admitted in J-1 classification for the purpose of graduate medical education or training or who is subject to the two-year foreign residence requirement of section 212(e) is ineligible for a change of nonimmigrant classification, except to the A and G diplomatic classifications.

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.