



D8

U.S. Department of Justice
Immigration and Naturalization Service

Identifying data deleted
to prevent clearly unwarranted
invasion of personal
privacy

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



16 SEP 2002

File: SRC 02 211 52614

Office: Texas Service Center

Date:

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)

IN BEHALF OF PETITIONER



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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was conditionally approved by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on certification for review. The decision of the director will be withdrawn. The petition will be denied.

The petitioner is a private medical practice. 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, in order to temporarily employ him in the United States as a physician for a period of three years at a salary of \$150,000 and a 35% production bonus for the first year and up to \$300,000 in the second and third years.

The director approved the petition finding that the applicant appears to be an extraordinary medical doctor and researcher. The director certified her decision to the Administrative Appeals Office for review.

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 the Act.

8 C.F.R. 214.2(o)(3)(ii) states, 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 Sri Lanka. His resume reflects that he received his Bachelor of Medicine and Surgery (M.B.B.) in 1993 from the North Colombo Medical College, Ragama, Sri Lanka, and a diploma in Acupuncture from the International University for Complementary Medicine in Sri Lanka. He taught and practiced acupuncture and complementary

medicine in Sri Lanka from 1987 to 1991. He interned in Sri Lanka from April 1994 to April 1995, and then practiced medicine in Sri Lanka until 1996. He taught and practiced medicine in Richmond, Virginia from 1997 to 1998 then in Boston, Massachusetts from 1998 to 2001. The petitioner declared that the beneficiary was last admitted to the United States on June 10, 2001 as a J-1 exchange visitor.

In order to be eligible for O-1 classification, a petitioner must meet the pertinent regulatory standard. In this case, 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). The director determined that the beneficiary satisfied at least three of the criteria at 8 C.F.R. 214.2(o)(3)(iii)(B). Counsel provided the Service with the following relevant documentation:

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

1. Award of Fellowship with Harvard University.
2. Physician Recognition Award by the American Medical Association.
3. Letter confirming Award for the Best Presentation, Ministry of Health.
4. Letter confirming "Gold Medal" for Best All-rounder, St. Thomas School.

The petitioner did not establish that these awards were all received as awards for excellence in the field of endeavor, let alone nationally or internationally recognized as such. The beneficiary was recognized as the "best all-round student" by his preparatory school in 1981. Clearly, the beneficiary's receipt of an award as "best all-round student" at preparatory school was not an award for excellence in his field of endeavor, pain management. In 1995, the beneficiary received an award for best presentation at the annual medical conference in Matara, Sri Lanka. His presentation was on the subject of admissions to a pediatric ward, again, a subject unrelated to his field of endeavor. The petitioner included a certificate issued to the beneficiary by the American Medical Association. The certificate states that the beneficiary has fulfilled the requirements for the Physician's Recognition Award in Continuing Medical Education. The petitioner failed to establish that this certificate is an award for excellence in the field of endeavor. Finally, the petitioner provided proof that the beneficiary was awarded a clinical fellowship at Harvard University. This award may be one that is nationally or internationally recognized as one for excellence in the beneficiary's field of endeavor.

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.

1. Member, American Academy of Physical Medicine and Rehabilitation.

2. Member and office bearer, American Academy of Physical Medicine and Rehabilitation.
3. Member, American Academy of Physiatrists.
4. Member and office bearer, Massachusetts Medical Society, Residents and Fellows section
5. Member and delegate, American Medical Association.
6. Life member, Sri Lanka Medical Society.

The beneficiary is a member of the American Academy of Physical Medicine and Rehabilitation (AAPMR), billed as the national medical society representing more than 6,400 physicians who are specialists in the field of physical medicine and rehabilitation. He was appointed to serve as the vice-chair of the membership marketing committee of the AAPMR. He joined the Association of Academic Physiatrists (AAP), a national organization of physiatrists who are affiliated with medical schools. He is a member of the Massachusetts Medical Society, the American Medical Association and the Sri Lanka Medical Association. The petitioner failed to establish that membership in any of these organizations is limited to those with outstanding achievements. The petitioner included a letter from the AAPMR which states that "[o]ur membership consists of world renown physiatrists who excel in research, academia and clinical care." The letter also states out of some 550 applicants, only about 350 are chosen for membership each year. The petitioner failed to show how membership in the AAPMR is limited to those with outstanding achievements, and none are indicated on the organization's website.

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.

1. Letter of invitation to edit the journal, "Rehab in Review."
2. Letter of invitation to write a review article for "Critical Reviews in Physical & Rehabilitation Medicine."
3. Article on dystonias co-authored by beneficiary.
4. Consultant to Glaxo SmithKline on the efficacy of a pharmaceutical product.
5. Certificate of Chief of Resident Physicians, Tufts University and New England Medical Center.

In review, the evidence in the record does not demonstrate that the beneficiary has judged the work of others in the same or an allied field of specialization. The petitioner submitted a letter of invitation to edit a journal. An editor is not a judge, per se. The petitioner provided an invitation to author a review article. Writing a review article is not equivalent to judging others' work. In either case, an invitation to review an article is not evidence of sustained national or international acclaim, but rather evidence of availability and familiarity with the subject matter. The petitioner provided proof that the beneficiary co-authored an article on dystonias. The petitioner failed to demonstrate how writing an article is akin to judging others' work. The petitioner submitted evidence that the beneficiary has served as a consultant to a pharmaceutical company. The consultant agreement provides that the beneficiary

shall review and analyze marketing data, survey research, market data, and strategic plans, and analyze managed care strategies. Again, the petitioner failed to show how the beneficiary's consulting work is related to *judging* the work of others in the same or an allied field. Similarly, the beneficiary's work as chief resident does not fit into the category of judging others' work. Although a chief resident supervises others, he does not judge others' work in the sense of ranking contestants.

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

Research contributions:

1. Research on laser acupuncture.
2. Research in Lidocaine.
3. Research in Botox.
4. Research in Zonisamide.
5. Research in Frovapriptan
6. Research in Eletriptan.
7. Research in Rizatriptan.
8. Research in Alpha Agonist.
9. Research proposal on the effects of Theophylline.
10. Research proposal on predictive factors of successful pain rehabilitation.

Clinical contributions:

1. List of procedures mastered by beneficiary.
2. Certificates to perform invasive procedures including implantable therapies, and percutaneous electrothermal treatment.
3. Certificate of completion in internship in surgery.
4. Certificate of completion of residency in physical medicine and rehabilitation.
5. Residency certificate from New England Medical Center-Tufts University.
6. Pain management: Harvard University and Spaulding Rehabilitation Hospital.

The record contains evidence that the beneficiary has participated in research trials for eight different drugs. The petitioner failed to demonstrate how the beneficiary's research constituted contributions of major significance. Similarly, he failed to show how the beneficiary's clinical contributions may be categorized as contributions of major significance.

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

1. Co-author, [REDACTED] published in eMedicine journal.
2. Author, [REDACTED] " Web-chapter in eMedicine.
3. [REDACTED]

4. Co-author, [REDACTED] published in the "American Journal

of *Physiatrists*," March 1999.

5. [REDACTED] "Tizanidine for the Treatment of Chronic Myofascial Pain," accepted for publication and presentation at the 10th World Congress on Pain in August 2002.
6. Acknowledged by author of beneficiary's contribution in compiling a textbook titled [REDACTED]

In review, the petitioner failed to demonstrate how the beneficiary has sustained national or international acclaim and recognition for achievements in his field by authoring one article individually, and by co-authoring several articles.

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

1. Letter from the Ministry of Health, Sri Lanka.
2. Internship certificate from Virginia Commonwealth University.
3. Residency certificate from Tufts University - New England Medical Center.
4. Harvard University Fellowship.

Both Tufts and Harvard University have a distinguished reputation. However, the petitioner failed to demonstrate how the beneficiary has been employed in a *critical or essential capacity* at Tufts or Harvard.

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.

1. Letter of offer from employer.
2. Salary comparison.
3. Two other employment offers.

The petitioner has offered to pay the beneficiary \$150,000 per year plus a monthly production bonus and benefits worth \$18,000 per year. The petitioner included a salary survey showing that the median annual income for physiatrists in the United States is \$135,068. \$150,000 is not significantly greater than the median salary of \$135,068. The petitioner included two other employment offers extended to the beneficiary, but the offers are silent as to the salary offered.

In this case, 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). There is no evidence that the beneficiary has ever received any significant national or international recognition for his achievements. Nor does the record indicate that the beneficiary has commanded a high salary relative to others in his profession. The petitioner did not establish that being awarded a Fellowship by a prestigious university is sufficient to demonstrate that the recipient of that honor is recognized as one of the few at the very top of the field of physiatry.

In order to establish extraordinary ability in science, a petitioner must do more than merely submit documentation addressing the criteria at 8 C.F.R. 214.2(o)(3)(iii); the sum and the quality of that evidence must establish that the beneficiary has sustained national or international acclaim in his or her field of endeavor.

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 or recognition in the field of science necessary to establish extraordinary ability. Nor does mere recognition as an expert in a specialized area of a field of endeavor establish that one is at the very top of the field as a whole.

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.

Administrative notice is made that the beneficiary was admitted to the United States in J-1 classification. Documentation of that admission, copies of the beneficiary's I-94's and Forms IAP-66, were submitted to the record. 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. Section 212(e) of the Act. In addition, 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. Section 248 of the Act.

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 director's decision of July 23, 2002 is withdrawn. The petition is denied.