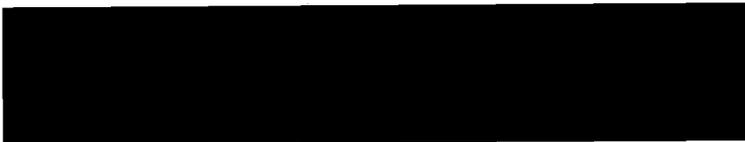


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D8
U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



JUN 02 2003

File: SRC 02 224 52106

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)

ON BEHALF OF PETITIONER:



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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. Counsel for the petitioner filed a motion to reopen and reconsider. The director granted the motion to reopen and reconsider and reaffirmed her original decision denying the petition. The director certified her decision to the Administrative Appeals Office (AAO). The director's decision will be affirmed.

The petitioner is a medical school. The beneficiary is a research physician. The petitioner seeks a continuation of 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 one year as an assistant professor of pathology.

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

On motion, counsel for the petitioner submits a brief arguing that the record shows that the beneficiary is an alien with extraordinary ability in his field.

The record consists of a petition with supporting documentation, a request for additional documentation and the petitioner's reply, the director's decision, the motion to reopen and reconsider, a brief and additional documentation, the director's decision on the motion and certification to the AAO.

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 by the statute and

the regulations.

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 of Argentina and a citizen of Peru. The record reflects that he received his medical degree in 1990 at the University of Peru. He completed a five-year residency in pathology at the Henry

Ford Hospital in Detroit, Michigan in 1997. He performed a one-year fellowship in surgical pathology at the University of Texas Medical Branch Galveston (UTMB) in 1998 and another one-year fellowship in infectious diseases at UTMB in 1999. Following completion of his fellowships he has worked as a member of the faculty at UTMB and with the World Health Organization (WHO) Collaborating Center for Tropical Diseases. The record reflects that he was last admitted to the United States on December 31, 2001 in O-1 classification as an alien of extraordinary ability.

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 he is "at the very top" of his field of science pursuant to 8 C.F.R. § 214.2(o)(3)(ii).

On motion, counsel for the petitioner asserts that the director erred in weighing the evidence, and submits additional evidence. Counsel also asserts that the director's decision is contrary to an unpublished decision of the AAO. Counsel's assertion that the director's decision in this case is contrary to an unpublished AAO decision is not persuasive. First, the petitioner failed to establish that the facts here are analogous to those in the cited unpublished decision. Second, unpublished decisions have no precedential value. See 8 C.F.R. § 103.3(c).

There is no evidence that the beneficiary has received a major, internationally recognized award equivalent to that listed at 8 C.F.R. § 214.2(o)(3)(iii)(A). Neither is the record persuasive in demonstrating that the beneficiary has met at least three of the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

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

For criterion number one, the evidence states a research proposal made by Prof. [REDACTED] and his research group, which includes the beneficiary, was selected for funding in a highly competitive process. While the past achievements of the principal investigator are a factor in grant proposals, research grants simply fund a scientist's work. The funding institution has to be assured that the

investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and is not an award to honor or recognize past achievement. The beneficiary does not satisfy this criterion.

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.

For criterion number two, while the beneficiary is a member of the United States and Canadian Academy of Pathologists, the American Society of Clinical Pathologists and the American Board of Pathology, 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.

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 translations.

For criterion number three, the petitioner asserts that the beneficiary satisfies this criterion by virtue of having authored a chapter in a textbook and by having his work cited in over twenty-two articles by others in his field. The director determined that having one's work cited is not equivalent to having articles written about the alien and his work in major media or trade publications as envisioned in the statute. The AAO concurs.

The petitioner submitted a book review of the text that contains a chapter authored by the beneficiary. The book review does not mention the beneficiary by name or his chapter. The evidence is insufficient to demonstrate that the beneficiary satisfies this criterion.

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.

For criterion number four, the petitioner asserted that the beneficiary satisfies this criterion by virtue of having played a leading role in the education and evaluation of junior residents, medical students and supervision of lab technicians. The director determined that the beneficiary satisfies this criterion. This portion of the director's decision shall be withdrawn. The beneficiary's work overseeing interns, students, and residents does not fit into the category of judging others' work in the field. As an educator and evaluator, the beneficiary was not judging the work of experienced professionals in the field, but was performing his job. Further, in order to fulfill the regulatory criterion, the petitioner must establish that the beneficiary's selection to judge the work of others resulted from his national or international acclaim. The petitioner failed to establish that the beneficiary was chosen to judge of the work of other medical researchers on the basis of his acclaim in his field.

In response to a request for additional evidence, counsel for the petitioner asserts that the Service (now known as the Bureau) recognized teaching graduate students as satisfying this criterion. Counsel cited the minutes of the June 2002 meeting between AILA and the Texas Service Center. The minutes state that the TSC "has reinforced that providing official direction for a thesis or a dissertation satisfies the judge of the works of others criteria." It is noted that the record is silent as to whether the beneficiary has provided official direction for a thesis or dissertation. In any event, AILA meeting minutes are not binding on the Bureau.

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

For criterion number five, 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. The petitioner asserts that there are very few physicians in the United States who are engaged in research in the area of the pathology and immunohistochemistry of rodent-borne

infectious diseases including Hantavirus pulmonary syndrome (HPS). Arguments about the importance of a given field of endeavor, or the urgency of an issue facing the United States, cannot by themselves establish that an alien possesses extraordinary ability. The petitioner asserts that the beneficiary's research is significant because it will lead to the development of a vaccine and treatment for HPS. The petitioner provided the Bureau with numerous testimonials about the value of the beneficiary's work. Dr. [REDACTED] Director of Anatomic Pathology at New York Medical Center, wrote that the beneficiary made "unique and highly significant" contributions to the field of HPS research by developing a successful animal model of the Hantavirus infection using immunohistochemical techniques. Dr. [REDACTED] Director of the Mosquito Research Program at the University of California, [REDACTED] wrote that the beneficiary's work on the development of an animal model for HPS is "pioneering and a highly significant achievement to the study of the pathogenesis of HPS." Dr. [REDACTED] Staff Pathologist and Medical Officer in the Infectious Disease Pathology at the Centers for Disease Control and Prevention in Atlanta, Georgia, wrote that the beneficiary's work is original and significant because he was the first scientist to develop different animal models using rodents and Hantaviruses that are nonpathogenic to humans. Finally, Dr. [REDACTED] describes the beneficiary's research on Maporal viral infection in the Syrian golden hamster as a "breakthrough discovery" with "great implications." Dr. [REDACTED] fails to adequately explain how or why the beneficiary's research on Maporal viral infection is a "breakthrough discovery." The record contains no corroborating evidence in the form of articles about the impact of the beneficiary's discoveries in major media or professional trade publications.

The nature of scientific research is to expand the body of knowledge of science. The beneficiary's contributions are original and noteworthy, but they are best described as adding to our body of knowledge incrementally rather than as a scientific breakthrough. 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.

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

For criterion number six, the beneficiary has co-authored nine articles that have been published in peer-reviewed publications. He co-authored a dozen abstracts on his research that were disseminated at professional conferences. He co-authored a chapter for a medical textbook.

The director determined that the beneficiary satisfies this criterion. The AAO concurs, in part, because the citation history provided by the petitioner is evidence that the beneficiary's work has been recognized in his field.

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

The petitioner asserts that it considers the beneficiary critical to the continued progress of research to conduct further studies in the use of an animal model to develop a vaccine for the Hantavirus. The issue is not whether the beneficiary will play a critical or essential role in the future, rather, whether he has been so employed in the past.

Dr. [REDACTED] Chairman of the Department of Pathology at UTMB, wrote that "during the last three years [the beneficiary] has played a critical (i.e. lead) role in the development of several laboratory animal models of Hantavirus Pulmonary Syndrome (HPS) which is an oftentimes lethal human disease that is endemic in [the Americas]." Here, the issue is not whether the beneficiary has played a critical role in a single research project, but rather whether he has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation.

For the last three years, the beneficiary has been employed as an assistant professor in the department of pathology at UTMB. Counsel asserts that the Bureau "does not contest that UTMB is an organization with a distinguished reputation." In review, the director's decision was silent on the issue of whether the petitioner is an organization with a distinguished reputation. In a large institution with many functions such as UTMB, the Bureau may consider whether the department that employed the beneficiary has a distinguished reputation. The petitioner asserts that the beneficiary played a lead critical role as a co-

investigator on research projects at UTMB. Even if the record established that the beneficiary played a critical role on one or more research projects, it would not satisfy this criterion, as it requires that the beneficiary has been employed in a critical or essential capacity for organizations or establishments that have a distinguished reputation. The record is silent as to whether the beneficiary played a critical or essential role within UTMB's department of pathology.

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.

For criterion number eight, the petitioner provided the Bureau with wage survey information for all physicians and surgeons in the Galveston, Texas area and another for all physicians and surgeons in the Houston, Texas area. These surveys are both overly broad and geographically narrow. The petitioner has offered to pay the beneficiary a base salary of \$127,000 per year. As the regulations require that the beneficiary have sustained national or international acclaim, to evaluate whether the salary is high, the Bureau would need a wage survey for medical professors and researchers that is national in scope. The wage survey should specify the median and highest wages offered nationwide to medical researchers and professors. Here, the director requested additional evidence. The petitioner replied but the evidence is insufficient to satisfy this criterion.

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.

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 decision of the director is affirmed.