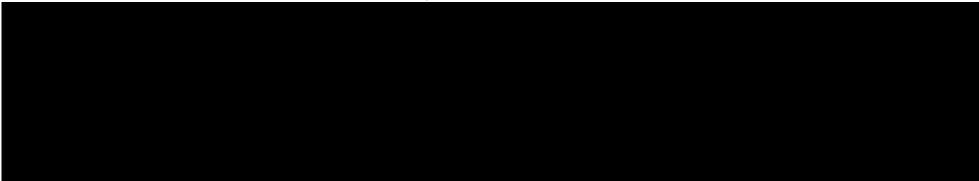


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



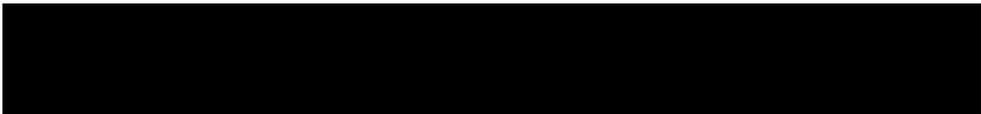
U.S. Citizenship
and Immigration
Services



FEB 24 2004

FILE: LIN 03 228 53526 Office: NEBRASKA 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:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical practice, seeking O-1 classification of the beneficiary, under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), 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 an ears, nose and throat (ENT) pediatric otolaryngologist.

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 his field of endeavor.

On appeal, counsel for the petitioner submits a brief arguing that the director failed to acknowledge all of the evidence provided, and improperly interpreted and applied the regulations. Counsel for the petitioner further asserts that the regulations are so vague as to permit arbitrary decisions, and that the beneficiary satisfies all eight of the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). Counsel for the petitioner asserts that the facts in the instant case are similar to the facts in two federal district court decisions.¹

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 to be addressed 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.

The regulation at 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.

The regulation at 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;

¹ *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994) and *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995).

- (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.

The beneficiary in this matter is a 37-year old native and citizen of Israel. He received his medical degree from the Sackler School of Medicine, Tel-Aviv, Israel in 1990. He pursued post-doctoral studies in otolaryngology at the Sackler School of Medicine, earning a Master's of Science Degree in year. Subsequently he pursued an internship at the Wolfson Medical Center in Tel Aviv and completed his residency in general surgery and intensive care at the Department of General Surgery at the Rabin Medical Center in Petah-Tikva, Israel in 1997. He completed a second residency in otolaryngology and head and neck surgery at the Sourasky Medical Center in Tel-Aviv, Israel. The beneficiary became an instructor at the School for Postgraduate Studies in Otolaryngology at the Sackler School of Medicine, Tel-Aviv, Israel in 1999. Most recently, the beneficiary completed a two-year postgraduate clinical fellowship in pediatric otolaryngology at the Children's Hospital of Michigan, Detroit, Michigan. The record reflects that he was last admitted to the United States as a J-1 exchange visitor on August 29, 2001. He is subject to the two-year foreign residency requirement.

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 medical science pursuant to 8 C.F.R. § 214.2(o)(3)(ii).

On appeal, counsel for the petitioner asserts that the evidence is sufficient to show that the beneficiary meets all of the criteria listed in the regulations at 8 C.F.R. § 214.2(o)(3)(iii)(B). Counsel also asserts that the director's decision is inconsistent with two federal district court decisions.

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 indicates that the beneficiary received a \$75,000 research grant in 1998. In 2000, he received the Itzhak Rabin Award for Excellence in Clinical Research from the Sourasky Tel-Aviv Medical Center Research and Science Committee.

Regarding the [REDACTED] Award, the director stated in his decision:

The record contains conflicting information. The letter from Lederman Bianca indicates that two awards are given each year and the award money may be used at the recipient's discretion, whereby, the letter from Russell Faust states that five awards are given each year and the grant money is to be used for further research.

In review [REDACTED] Chief, Department of Otolaryngology, Children's Hospital of Michigan, wrote that: "The Itzhak Rabin award (\$25,000.00), which is a nationally recognized award for excellence, is given only to two outstanding medical researchers every year." The reference to the research grants that are awarded to five recipients each year is not a reference to the Itzhak Rabin award. This portion of the director's decision will be withdrawn.

The director further indicated that the Itzhak Rabin award is an institutional award, limited to employees and students of the Tel Aviv Medical Center.

According to a letter submitted in response to the director's request for additional evidence, Lederman Bianca, Assistant to the Director General, Sourasky Tel Aviv Medical Center, wrote regarding the Itzhak Rabin Award for Excellence in Clinical Research that the beneficiary won in 2000:

I am the Chairperson of the Research and Science Committee of the Sourasky Tel Aviv Medical Center and am responsible, with other members of the committee, for selecting the proper applicants and electing the recipients of the award.

The "Award for Excellence in Clinical Research" was established some 20 years ago, with the purpose of encouraging physicians to engage in high quality clinical research that will contribute to the advancement of medicine. It has gained national and international reputation over the years, and the criteria for receiving the award have evolved and became very restrictive, reflecting the extraordinary quality of the research required. . . .

The criteria for becoming the recipient of the award are:

1. Applicants must be practicing physicians in the field of endeavor with active clinical practice. Medical students, post-doctorate students and other clinical or basic science researchers are not eligible for receiving the award. *National and international applicants are considered without discrimination.*

* * *

There are between 300-500 applicants for the [REDACTED] award worldwide each year. Only two are selected to receive the award annually.

The high quality of the research studies that are submitted, and the rigid and demanding criteria for receiving the award, have made the [REDACTED] Award for Excellence in Clinical Research a highly competitive and sought after scientific award. It has gained national and international acclaim, drawing the best national and international physicians to compete for it. Winning the [REDACTED] award carries with it a scientific prestige that is recognized worldwide.

(Emphasis added.) In review, the petitioner has established that the Itzhak Rabin award is not an institutional award, but a nationally or internationally recognized prize or award for excellence in the field of endeavor. Nonetheless, it is just one award.

Regarding the \$75,000 research grant that was awarded to the beneficiary in 1998, research grants simply fund a scientist's work. The past achievements of the principal investigator are a factor in grant proposals. 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 evidence is insufficient to establish that the beneficiary satisfies 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 Israeli Medical Council, the Israeli Academy of Otolaryngology Head and Neck Surgery, and the American Society of Pediatric Otolaryngology (ASPO), the petitioner failed to establish that these are associations which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines. The petitioner submitted a letter written by a Walter Belenky, Chief Emeritus, Department of Pediatric Otolaryngology, Director, Fellowship program, Michigan Pediatric ENT Associates, PLLC, that states that "ASPO is a highly prestigious organization, that accepts as members only those who have completed a full two-year pediatric otolaryngology fellowship and are actually practicing solely pediatric otolaryngology. In addition, you must have letters of recommendation from an established ASPO member in order to become a member yourself." Although more stringent than many medical associations, the ASPO requirements are not tantamount to requiring outstanding achievements of their members as judged by recognized national or international experts in the field of endeavor. The beneficiary does not satisfy this criterion.

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.

No evidence was submitted in relation to 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 asserts that the beneficiary has served as a judge of others' work while evaluating medical students, residents and fellows as an instructor. He was not judging the work of his peers, but rather, of his subordinates. The beneficiary's work evaluating others in this capacity is not indicative of the beneficiary's sustained acclaim. He evaluated the work of others as an integral part of his job. The evidence is insufficient to establish that the beneficiary satisfies this criterion.

On appeal, counsel for the petitioner asserts that the facts in the instant are similar to those in a U.S. District Court case, *Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich. 1994) because that court determined that the director abused his discretion in requiring that the alien demonstrate that he was selected to serve as the judge of others as the result of the alien's extraordinary ability. The facts in this case are distinguishable from *Buletini*. In *Buletini*, the alien was evaluating the work of his peers. In the instant case, the beneficiary was evaluating the work of

subordinates. In any event, *Buletini* is not binding on the AAO. The AAO is not bound to follow the published decision of a United States district court. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

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

The director determined that the beneficiary satisfies this criterion.

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 four articles that have been published in peer reviewed publications. Two more of the beneficiary's articles have been accepted for publication. It is expected that medical scientists will publish articles discussing their research. It does not follow that all scientists who publish articles in peer-reviewed journals enjoy sustained acclaim in their field. According to the citation history submitted, the beneficiary's work was cited on six occasions. A more extensive citation history might have indicated that the beneficiary's work has had a major impact on his field of endeavor. Counsel for the petitioner asserts on appeal that the beneficiary has eight published articles, but the evidence shows that only four of the eight have been published. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The evidence is insufficient to establish that the beneficiary satisfies this criterion.

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

For criterion number seven, the petitioner asserted that the beneficiary has been and will continue to play a critical or essential role for the petitioner and its patients. The regulation requires evidence that the beneficiary has or currently holds an essential or critical position for organizations and establishments that have a distinguished reputation. It is not enough to assert that the beneficiary will hold such a position in the future. While employment with such institutions is evidence of a degree of recognition, such staff positions as have been held by the beneficiary are not considered employment in a "critical or essential capacity."

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 has offered the beneficiary an annual wage of \$250,000 plus \$150,000 in benefits. The petitioner submitted wage surveys for the petitioner's locality. The petitioner also submitted national wage surveys for first year ENT otolaryngologists and for those with three years experience. The national average salary for first-year starting ENT otolaryngologists is \$175,000 with \$120,000 being the lowest and \$195,000 the highest salary. The national average salary for ENT otolaryngologists with three or more years of experience is \$264,878, with \$180,084 being the lowest and \$392,890 the highest salary. The prevailing wage for pediatric otolaryngologists in Detroit, Michigan is \$69.97/hour or \$145,537.60 annually. The prevailing wage for general pediatricians is \$99,237 for starting practitioners and \$136,198 for more experienced practitioners in the petitioner's locality. This criterion must be indicative of national acclaim in the field. The petitioner has offered to pay the beneficiary an annual salary of \$250,000. While the proffered wage is high in relation to the nationwide starting salaries, it is not high in relation to the salaries of more experienced pediatric otolaryngologists. The petitioner should have submitted wage survey information for all pediatric otolaryngologists on a nationwide basis, rather than submitting just the average wage for practitioners who are starting out or have three years of experience. To evaluate whether the salary is high, AAO needs to compare it to the median and highest wages offered nationwide to all pediatric otolaryngologists. The beneficiary does not 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 O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of his field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). 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.

Counsel for the petitioner requested oral argument. Oral argument is limited to cases where cause is shown. It must be shown that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, no cause for argument is shown. Therefore, the request is denied.

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.