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MAR 11 2004

FILE: SRC 03 250 53799 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 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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. A subsequent motion to reopen and reconsider was dismissed by the Texas Service Center director. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, on September 16, 2003, 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 engineering, in order to employ him in the United States for a period of one year¹ as an assistant professor at an annual salary of \$52,000.

The director denied the petition because the petitioner failed to establish that the beneficiary is at the very top of his field of endeavor.

On appeal, counsel submits a brief asserting that the beneficiary qualifies for O-1 classification.

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 engineering 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;

(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

¹ The petitioner indicated on the Form I-129 that it sought O-1 classification of the beneficiary for a three-year period. The petitioner also indicated that it had contracted to employ the beneficiary for one academic year (nine months).

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.

The petitioner does not assert that the criteria in 8 C.F.R. § 214.2(o)(3)(iii) are inapplicable to the beneficiary's occupation, but the petitioner did suggest that the evidence on the record could be considered comparable evidence in order to establish the beneficiary's eligibility. The petitioner must establish that the criteria in 8 C.F.R. § 214.2(o)(3)(iii) are inapplicable to the beneficiary's occupation before CIS will consider comparable evidence.

The regulation at 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 43-year old native and citizen of Pakistan. The record reflects that he received a bachelor of science in mechanical engineering in 1984 from the University of Engineering and Technology in Lahore, Pakistan. He earned a master's degree in management engineering at the New Jersey Institute of Technology in 1989. He earned a master's degree then a doctorate in industrial engineering at the State University of New York at Buffalo. He has been working for the petitioner since August 2000. The record reflects that he was last admitted to the United States on January 14, 1993, in J-1 classification as an exchange visitor and that 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 has sustained national or international acclaim or proof that his achievements have placed him at the very top of his field pursuant to 8 C.F.R. § 214.2(o)(3)(ii). The director acknowledged that the beneficiary is highly regarded by his associates and colleagues, but his reputation has not expanded to the larger scientific community. The director

also determined that the beneficiary is ineligible to apply for an immigrant visa or an employment-based nonimmigrant visa because he is subject to the two-year foreign residency requirement.

On appeal, counsel for the petitioner asserts that the director erred in finding the evidence insufficient to find that the beneficiary is an alien of extraordinary ability. Counsel for the petitioner further asserts that the two-year foreign residence requirement does not preclude the beneficiary from obtaining an O-1 visa at a consulate abroad.

In review, even though the beneficiary is subject to the two-year foreign residency requirement, the beneficiary is not barred from obtaining an O-1 visa at a consulate abroad.²

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 petitioner asserts that the beneficiary satisfies this criterion because he was awarded a four-year scholarship by Pakistan's Ministry of Science and Technology, a Mark Diamond Research Grant at the State University of New York and a Faculty Research Grant at the University of Memphis.

Academic study is not a field of endeavor, but training for a future field of endeavor. As such, awards for academic work, scholarships and fellowships cannot be considered awards in a field of endeavor. Moreover, only students compete for such scholarship awards. As the beneficiary did not compete with national or internationally recognized experts in the field, the awards cannot be considered evidence of the beneficiary's national or international acclaim.

Regarding the beneficiary's research grants, 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 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 Operations Research Honor Society, the Industrial Engineering Honor Society, the Institute for Operations Research and Management Science and the Institute of Industrial Engineers, there is insufficient evidence to establish that these are associations which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines. Indeed, two of the associations are limited to students. 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 translation.

² See letter of Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch, Adjudications, to Bernard Wolfdorf (August 30, 1994) reprinted in 71 *Interpreter Releases* 1376 (October 7, 1994).

For criterion number three, the petitioner asserts that the beneficiary satisfies this criterion because he has authored several articles that have been published. This criterion requires evidence of the beneficiary's acclaim in the form of published material about the alien. The beneficiary does not satisfy 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 satisfies this criterion by virtue of his work evaluating the performance of his students and reviewing articles for two publications. As an instructor, the beneficiary 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 petitioner also asserts that the beneficiary has conducted peer review for two publications, but the petitioner failed to provide corroborating evidence. We also note that occasional peer review may not meet the statutory requirement for extensive documentation of sustained acclaim in this category. The evidence is insufficient to establish that the beneficiary satisfies this criterion.

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 petitioner provided CIS with several testimonials about the value of the beneficiary's work. Dr. Rakesh Nagi, Associate Professor at the State University of New York at Buffalo, wrote that the beneficiary "made significant scholarly research contributions to the field of Production Systems Scheduling and Optimization." On appeal, counsel for the petitioner submitted additional testimonials. The testimonials are conclusory and fail to demonstrate with factual specificity how the beneficiary has made significant original contributions to his field. The record does not show that the beneficiary's research is of major significance in relation to other similar work being performed.

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 two articles that were published in refereed publications. He has co-authored four articles that were distributed in conference publications. He wrote a master's thesis and a doctoral dissertation. It is expected that 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. No citation history of his works has been submitted. Published articles by the beneficiary that have been cited by others would more meaningfully establish that the beneficiary enjoys a measure of influence through his publications. The material submitted by the petitioner does not distinguish the beneficiary from others in his field. 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.

No evidence was submitted in relation to criterion number seven.

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

On appeal, counsel for the petitioner asserts that the director's decision was erroneous because she stated in her decision dated December 4, 2003 that "[p]erhaps [the beneficiary's] accomplishments meet most or even all of the criteria listed in the regulations." This portion of the director's decision shall be withdrawn. In her initial decision denying the petition, which was incorporated by reference in the December 4, 2003 decision, the director determined that the beneficiary satisfied none of the criteria listed in the regulations. The AAO concurs with the director's decision that the petition should be denied.

Counsel for the petitioner further asserts that because the director limited her request for evidence pertaining to three criteria in a Request for Additional Evidence (RFE), the director conceded that the other five criteria were satisfied. Counsel's argument is not persuasive. The petitioner had ample opportunity to establish that the beneficiary satisfies three of the eligibility criteria, and failed to do so.

Counsel for the petitioner cites published American Immigration Lawyers Association/Texas Service Center Liaison Minutes for the proposition that "publication of research in scientific journals usually indicates that the research is significant." The cited minutes have no precedential value and are not binding on CIS or AAO.

Counsel argues that the director added requirements to the law by requiring that the petitioner show that the beneficiary's achievements exceed the norm. Counsel argues that by adding requirements, the director abused her discretion and cites a federal district court decision, *Buletini v. INS*, 860 F. Supp. 1222, (E.D. Michigan, S. Div. 1994). 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." According to the regulations, the petitioner also 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 extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). 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 appeal is dismissed.