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U.S. Citizenship and Immigration Services

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D8

[redacted]

FILE: SRC 04 028 50326 Office: TEXAS SERVICE CENTER Date: MAR 16 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

Mari Johnson
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 Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [redacted] is seeking 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 attending transplant surgeon.

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 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, an appeal, brief, and additional documentation.

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.

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:

> *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;

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[1] The petitioner is affiliated with the [redacted]

(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 41-year old citizen of Israel and Romania. The record reflects that he received his medical degree in 1987 from the Carol Davilla University, Bucharest, Romania. He completed an internship in internal medicine at the Bucharest University Hospital. He then completed a three-year residency program in surgery at the Sheba Medical Center, Tel Hashomer, Israel. He completed a fellowship program in the department of liver transplantation at the Mayo Clinic, Rochester, Minnesota. He most recently completed a fellowship in transplant surgery/islet cell transplantation at the Baylor University Medical Center, Dallas, Texas. The record reflects that he was last admitted to the United States on June 26, 2000, in J-1 classification as an exchange visitor subject to the two-year foreign residency requirement.

The sole issue to be addressed in this proceeding is whether the petitioner established that the beneficiary satisfies at least three of the eight criteria at 8 C.F.R. § 214.2(o)(3)(iii).

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's receipt of two awards satisfies this criterion. The beneficiary received the Israeli Ministry of Health Award for Excellence in Service in 1998. According to counsel for the petitioner, the beneficiary received this award "based on the high praise of his patients, his professionalism, his kindness, for his assistance in improving hospital cost control and management and for his remarkable dedication to his team of colleagues." According to the documentation submitted the beneficiary was awarded this prize for being an excellent employee of the General and Vascular Surgery Department of the Chaim Sheba Integrated Medical Center. Although the award's name suggests that it is indicative of national acclaim, the record does not establish that it is a nationally or internationally recognized prize or award for excellence.

The beneficiary received a Seeger Grant in the amount of $75,000 for his work in pancreatic islet cell transplantation from the Baylor University. Regarding the beneficiary's research grant, it is noted that 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, the beneficiary is a currently a member of the American Society of Transplantation (AST), the Texas Medical Association (TMA), and the Mayo Medical Alumni Association.

Membership in the TMA does not satisfy this criterion because the evidence indicates that licensure is the only prerequisite to membership.

According to the evidence submitted, the beneficiary is a trainee member of the AST. Trainee membership is limited to individuals enrolled in transplantation training programs or individuals who have completed training but have not yet qualified for general membership.[2] The petitioner failed to establish that the AST requires outstanding achievements of its members, as required by the regulation.

The petitioner asserts that the Mayo Medical Alumni Association (MMA) requires outstanding achievements of its members, e.g., selection for a Mayo fellowship. The petitioner asserted that "fellowship positions at the Mayo Clinic are probably the most competitive positions in medical and surgical training in the world." The petitioner failed to establish that the MMA requires outstanding achievements of its members, as judged by recognized national or international experts in their disciplines or fields. According to the MMA website, to be eligible for membership one must be a graduate of the Mayo Medical or Graduate School, or have completed 12 months of training at the Mayo Graduate School, or have held a research appointment for at least one year, or be a Mayo Clinic consultant for at least one year.[3] The MMA has 13,000 members. The evidence is insufficient to establish that the beneficiary satisfies 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.

For criterion number three, the record contains two items. The beneficiary's receipt of the Israeli Health Ministry's Award for Excellence was announced in an unnamed publication. The beneficiary was mentioned in an item published in the *Hepatitis Weekly* on March 24, 2003. The petitioner does not assert and the evidence does not establish 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.

No evidence was submitted in relation to criterion number four.

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

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[2] *See* letter dated September 17, 2003, from the AST Membership Services Coordinator.

[3] *See* Mayo Medical Alumni Association webpage at www.mayo.edu/alumni/whoweare.

field.

For criterion number five, the petitioner submitted eleven testimonials written by experts in the beneficiary's field of endeavor. According to Asher Hirshberg, Associate Professor, Department of Surgery, Baylor College of Medicine, the beneficiary "made a major contribution to the field of liver transplantation by being among the first researchers to validate the new Model of End-State Liver Disease (MELD) scoring systems after liver transplantation."[4] Dr. Charles Rosen, Mayo Clinic, wrote that the beneficiary's "publications and presentations at scientific meetings played a key role in the acceptance of this new MELD system as the national standard." All of the testimonials' authors reiterate the assertions of Prof. Hirshberg and Dr. Rosen. While the beneficiary has published his findings relative to the MELD score, the record does not show that his research is considered of "major significance" in the field. According to the evidence submitted, the MELD score was implemented nationwide in 2002. In the absence of corroborating evidence in the form of mass media, the evidence is insufficient to establish that the beneficiary can be credited for playing a key role in the nationwide acceptance of the MELD system.

According to the evidence on the record, the beneficiary has been involved in the maintenance of the International Liver Transplant Tumor Registry, the only registry of its kind. The petitioner failed to establish that the beneficiary made a contribution of major significance in relation to other similar work being performed. The petitioner failed to establish that the beneficiary played a critical role in the creation or maintenance of the International Liver Transplant Tumor Registry.

Several testimonials' authors indicate that they believe that the beneficiary *will* make substantial contributions to the field of pancreatic islet cell transplantation. The regulation requires evidence that the beneficiary *has made* significant contributions as of the date of filing the petition.

In review, the beneficiary does not satisfy this criterion.

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

The director determined that the beneficiary satisfies criterion number six. The AAO concurs. The beneficiary has published numerous peer-reviewed articles and abstracts that have been cited extensively. 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 asserts that the beneficiary played a critical role as a fellow at the Baylor Medical Center and as a surgical fellow at the Mayo Clinic. While employment with esteemed institutions is evidence of a degree of recognition, such staff or assistant positions are not considered employment in a "critical or essential capacity" as would a department head. The petitioner states that the beneficiary served in a critical and essential position within Baylor University's pancreatic islet cell transplantation program because he is the only surgeon in the country to have completed a formal transplant surgery fellowship in pancreatic islet cell transplantation. M. Tim Parris, President, Baylor University Medical Center wrote:

> In January 2003, [the beneficiary] started a fellowship in Islet Cell Transplantation Program at Baylor. He has been the driving force in all facets of development including the immense documentation required by the FDA [Food and Drug Administration], the design and development of the islet cell laboratory, as well as patient care protocol design and

[4] The MELD score is a mathematical composite score currently used by the United Network for Organ Sharing to prioritize allocation of donated organs for transplantation.

> implementation. Because the Islet Cell field is so new, it was virtually impossible to find a physician already trained, and our expansion into this area would not have been possible without [the beneficiary's] unique background and expertise.

Although the petitioner's assertion that the beneficiary played a critical role in the development of Baylor's islet cell laboratory is persuasive, the petitioner failed to establish that this new islet cell laboratory has a distinguished reputation apart from Baylor University Medical Center (BUMC). While BUMC has a distinguished reputation, in this case the laboratory is claimed to be the organization or establishment with the distinguished reputation. Thus, the petitioner must submit evidence that the laboratory enjoys a distinguished national reputation of its own.

Dr. Klintmalm, Chairman and Chief, Baylor Regional Transplant Institute, wrote that the beneficiary was the principal investigator for twelve projects in the field of liver transplantation, immunosuppression and transplant oncology. The petitioner failed to submit corroborating evidence to establish that the beneficiary has served as the principal investigator on these projects. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner further asserts that the beneficiary "would be employed in a critical capacity" by the petitioner. The regulation requires that the beneficiary have been employed in a critical or essential capacity. It is not enough to assert that the beneficiary would be employed as such in the future. The beneficiary does not satisfy this criterion.

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 initially indicated that it proffered to pay the beneficiary an annual base salary of $140,000 plus benefits worth $12,000. The petitioner submitted:

- A Department of Labor prevailing wage determination for surgeons in the Dallas, Texas area:
  - Level 1: $52,582.
  - Level 2: $119,475.[5]
- A Health Care Consultant's opinion that the offered salary of $140,000 exceeds the average salary for physicians.

Although the survey submitted indicates that the beneficiary would receive significantly more than the prevailing wage for surgeons in the geographical area of the petitioner, the survey submitted is geographically too restrictive. This criterion must be indicative of national acclaim in the field. The petitioner should have submitted wage survey information for all transplant surgeons on a nationwide basis. The petitioner should have provided more than just the average (mean) wage. To evaluate whether the salary is high, CIS needs to compare it to the median and highest wages offered nationwide to transplant surgeons. The petitioner failed to establish that the beneficiary satisfies 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

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[5] *See* www.doleta.gov [accessed October 1, 2003].

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 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 beneficiary's achievements have not yet risen to this level.

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.