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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 169 50869 Office: TEXAS SERVICE CENTER Date: MAY 06 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.

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 is an institution of higher education. The beneficiary is an anesthesiologist with expertise in pediatric anesthesiology. The petitioner filed a Form I-129, Petition for Nonimmigrant Visa, seeking an extension of 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 continue to employ the beneficiary temporarily in the United States for one year as an assistant professor and anesthesiologist.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary is one of the small percentage who has risen to the very top of his field of endeavor as envisioned by the statute.

On appeal, counsel for the petitioner submits a brief asserting that the record shows that the beneficiary is an alien with extraordinary ability in his field 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 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 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 India. The record reflects that he received his medical degree in 1990 at the Bangalore University, India. He completed a one-year internship in medicine and surgery at St. John's Medical College Hospital, Bangalore, India, and a three-year residency training in anesthesia at the Sir J.J. Group of Hospitals, Mumbai, India. He served a one-year term as registrar in anesthesiology at the Apollo Mallya Hospital, Bangalore, India. In 1995, the beneficiary commenced an internship in transitional medicine and surgery at the Overlook Hospital, Summit, New Jersey. He next performed a three-year residency in anesthesiology at the Cleveland Clinic Foundation in Ohio. The beneficiary completed a one-year fellowship in pediatric anesthesiology at the Children's Hospital of Boston in Massachusetts. For approximately the last three years, the beneficiary has worked for the petitioner as an assistant professor in pediatric anesthesiology and as an anesthesiologist at the Children's Hospital of Oklahoma, Oklahoma City, Oklahoma.

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 by virtue of his receipt of the following awards:

- Zeneca Travel Award for the Abstract presentation at the 1999 SAMBA Conference, Seattle, Washington.
- SAMBA Research Foundation Award for an Abstract presented at the 1999 SAMBA Conference, Seattle, Washington.
- Ranked fourth in the final medical school examination at Bangalore University.

- The Dr. C.V. Shankarambal Gold Medal for excellence in pathology, Bangalore University, 1989.

- The Victoria Hospital Commemoration Gold Medal for excellence in pathology and bacteriology, Bangalore University, 1989.

It is noted that the awards appear to be restricted to medical students or physicians in training. 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 the field of endeavor. Moreover, only students compete for such awards. As the petitioner did not compete with nationally or internationally recognized experts in the field, the awards cannot be considered evidence of the beneficiary's national or international acclaim. The petitioner failed to demonstrate that these were awards for excellence in the 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.

For criterion number two, while the beneficiary is a member of the American Society of Anesthesiologists, the International Anesthesia Research Society, the Society of Pediatric Anesthesia, the American Medical Association, the Oklahoma Society of Anesthesiologists and a Specialty Fellow of the American Academy of Pediatrics, the evidence is insufficient to establish that these associations require outstanding achievements of their members, as judged by recognized national or international experts in the field of endeavor.

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 states that the beneficiary has been an active member of the petitioner's Departmental Education Committee and coordinates the critical review of literature for his department. The petitioner states that the beneficiary recently received national recognition for his educational abilities by being selected to become a question-writer for the American Society of Anesthesiologists' Self-Education and Evaluation Program. Writing exam questions is not judging the work of others within the meaning of this criterion. The petitioner further states that the beneficiary has been selected to direct the petitioner's pediatric anesthesiology fellowship program. The beneficiary's work for the petitioner as a committee member and reviewing literature for his department, while laudable work for the university, do not indicate that the beneficiary has achieved acclaim outside of the petitioning university. The petitioner failed to establish that the beneficiary's selection to direct a fellowship program was based upon his stature in the field. It appears that the beneficiary occupies a very active role within the medical university. This visa category, however, is reserved for those who establish that they are at the top of their field nationwide. Not all physicians who perform evaluative work for their employers are extraordinary in their field. The beneficiary does not satisfy 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 petitioner has published and presented the results of his research, the record does not show that his research is considered of "major significance" in the field. The record does not show that the beneficiary's research is of major significance in relation to other similar work being performed. Counsel for the petitioner asserts that the beneficiary's research on the effects of a new muscle relaxant for anesthesia and ways to reduce the incidence of laryngospasm[1] during general anesthesia was essential in helping to secure the Food and Drug Administration's approval of the drug. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 authored three abstracts, a dissertation and a case report that he presented at an anesthesiologist conference. Publication of three abstracts does not constitute extensive documentation of sustained acclaim through publication of scholarly articles. Such evidence would be more persuasive if the beneficiary's abstracts had been extensively cited by others in the field. The petitioner has not submitted any citation history for these abstracts, which would tend to indicate acclaim. The beneficiary does not satisfy 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 plays a critical role for the petitioning organization because it will have to close the surgical services of the Children's Hospital of Oklahoma if the beneficiary is not allowed to remain. The record shows that the beneficiary is one of only two pediatric anesthesiologists at the Children's Hospital of Oklahoma. The record credibly establishes that the beneficiary plays a critical role for the Children's Hospital of Oklahoma. The beneficiary meets 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 submitted a salary chart indicating that the beneficiary earned $461,382 last year. The petitioner also provided a letter from the Chair of the petitioner's anesthesiology department that states that the beneficiary's salary is the third highest in his department. In response to the director's request for additional evidence, the petitioner submitted a survey indicating that the 75th percentile salary for assistant professors in anesthesiology is $237,000. The petitioner indicated on the Form I-129 that it had offered to pay the beneficiary an annual salary of $282,200. A physician who has risen to the very top of his field of endeavor would be paid a wage higher than the 75th percentile. The proffered wage is not high enough

[1] Laryngospasm is a sudden contraction of the vocal cords and epiglottis that results in the contraction of the airway. This condition can lead to death.

in relation to others in the field to indicate sustained acclaim as required by the statute and regulation. The AAO must compare the proffered wage to the highest wages offered in the field to determine that it places the alien at the top of the field. The evidence is insufficient to establish that a salary of $461,382 is high in relation to anesthesiologists' wages nationwide. The petitioner failed to establish that the beneficiary meets this criterion.

On appeal, counsel for the petitioner asserts that he has the impression from Citizenship and Immigration Services (CIS) Headquarters that re-adjudication is not necessary in instances of extensions of the validity of petitions such as the instant case. Counsel for the petitioner attached a letter written by William Yates, CIS, dated March 22, 2004, addressed to Michele Stelljes at the Baylor College of Medicine. It is noted that the letter specifically excludes cases that were appealed or are currently on appeal to the AAO.

The petitioner noted that CIS approved a petition that had been previously filed on behalf of the beneficiary. If the previous nonimmigrant petition were approved based on the current record, the approval would constitute clear error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.