

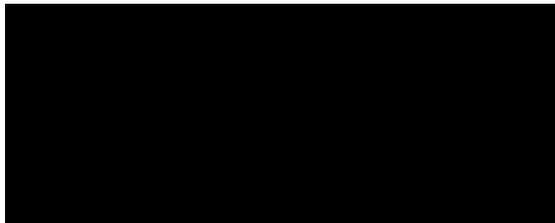
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services



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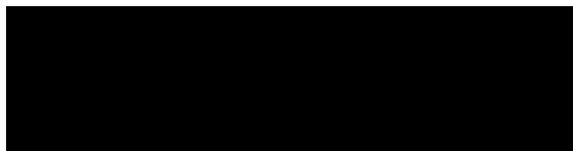
Date: OCT 21 2004

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical institution, teaching hospital, outpatient clinic and research organization. The beneficiary is a physician. The petitioner seeks 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 assistant professor and associate staff physician.

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 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, a 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, 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 35-year old native and citizen of Columbia. The record reflects that he received his medical degree in 1994 in Bogotá, Columbia. He completed a research fellowship in hematology and oncology with the Harvard Medical School at the Beth Israel Deaconess Medical Center. He completed an internal medicine residency at the Albert Einstein College of Medicine in 2001. He next performed a fellowship in hematology and oncology at the University of California San Francisco (UCSF) Medical Center. He most recently completed a fellowship in urologic oncology at the UCSF Comprehensive Cancer Center. The record reflects that the beneficiary was last admitted to the United States on August 27, 2000, in J-1 classification as an exchange visitor, 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 that the petitioner failed to establish that the beneficiary meets the requirements of Title 8, Code of Federal Regulations, Part 214.2(o)(3), *supra*.

On appeal, counsel for the petitioner asserts that the director erred in the adjudication of the petition.

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.

The petitioner asserts that the beneficiary satisfies criterion number one because he has received the following awards:

- American Society of Clinical Oncology (ASCO) 2004 Foundation Young Investigator Award.
- 2003 American Association for Cancer Research (AACR)/ASCO Methods in Clinical Cancer Research Award.
- 2002 Amgen Educational Grant Award in hematology and oncology.
- Outstanding Junior Resident Award in recognition for excellence in patient care from the Albert Einstein College of Medicine for 1999-2000.
- [REDACTED] Society Teaching Award at the [REDACTED] College of Medicine in 1998.

This criterion requires nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

According to the evidence on the record, the "ASCO Foundation Grants Program offers funding to cancer research investigators allowing them to focus on their research and develop their careers." The ASCO Young Investigator Awards is a research grant. 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 petitioner submitted a letter written by the chief executive officer of AACR that states that the purpose of the award is to allow investigators to participate in a competitive and intensive weeklong workshop. The award is a scholarship. The letter indicates that in 2003, more than 270 applications were received and only the top third (top 100) were invited to participate. The evidence indicates that this workshop is open to all oncology fellows and junior faculty worldwide. In review, the AACR/ASCO award is limited to applicants. As the beneficiary did not compete with a large field of experts, the award cannot be considered evidence of the beneficiary's national or international acclaim.

The Amgen¹ award was given to the University of California at San Francisco (UCSF) to support their hematology/oncology fellowship program. The petitioner submitted a letter from a medical education manager at Amgen that states "Amgen is pleased to offer [its] support [to UCSF's] hematology/oncology fellowship program for the year beginning July 2002." The letter further provides that the educational grant is provided to UCSF based on the merits of the activity described in its request for funding and that the selection of the fellowship recipient is independent from Amgen and is at UCSF's full discretion. However, several testimonials' authors indicated that the beneficiary won the 2002 Amgen Best Fellow of the Year Award. There is no independent corroborative evidence to establish the beneficiary won such an award. The evidence indicates that the award

¹ Amgen is billed as the world's largest biotechnology company. See Amgen's website at www.amgen.com [accessed on October 12, 2004.]

was given to UCSF. 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 beneficiary received a certificate of merit in recognition for excellence in patient care and a teaching award from the Albert Einstein College of Medicine. These are institutional awards, limited to staff at a single institution. Similarly, being chosen as chief resident at the East Campus of the Albert Einstein College of Medicine is an institutional award. As the beneficiary 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. 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 American Medical Association, the American Board of Internal Medicine, the American Society of Clinical Oncology, the American Association for Cancer Research, and the Association of Northern California Oncologists, there is insufficient evidence that these are associations which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines. A review of the organizations' websites confirms that membership does not 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.

For criterion number three, the director determined that no published material about the alien had been submitted in support of the petition; however, evidence of citations was submitted in lieu of published material. The director considered evidence of citations but determined that the criterion had not been met. The AAO has consistently held 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 and regulations. Citations are not about the alien or his work, rather, they are references to his work. 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.

As a member of the Genitourinary Protocol Review Committee and the Urological Oncology Tissue Core Protocol Review Committee at the UCSF Comprehensive Cancer Center, the beneficiary participated in the review and approval of research proposals. In the capacity of a committee member, the beneficiary was not judging the work of experienced professionals in the field, but was evaluating research proposals.

The beneficiary was selected to write a literature review for *New Urology: Prostate Cancer* in October 2003. The director determined that the beneficiary satisfies criterion number four. This portion of the director's decision

shall be withdrawn. The evidence on the record indicates that the beneficiary was chosen to write an article discussing the findings of key papers published in late 2003. Writing a review article is not equivalent to judging the work of others. 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 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 provided Citizenship and Immigration Services (CIS) with 13 testimonials about the value of the beneficiary's work. One wrote that the beneficiary's "seminal contributions in the field come from a series of [research] trials he designed. Results from these trials will have a tremendous impact in the field of prostate cancer immunotherapy." This criterion requires that the petitioner establish that the beneficiary has met the criterion as of the date of the filing of the petition, rather than prospectively. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Several wrote that the beneficiary "uniquely contributed to the field of immunology by demonstrating the anti-tumor activity of CD1d-restricted T-cells." The evidence is insufficient to establish that this contribution is original and significant in comparison to the work of others in the field. Several stated that the beneficiary is the "first to demonstrate that estrogenic therapy does not impact subsequent estramustine-based chemotherapy in patients with advanced prostate cancer." Again, the petitioner failed to establish that the beneficiary's research is significant. Several of the testimonials' authors stated that the beneficiary was co-investigator of more than 30 clinical trials for patients with genitourinary malignancies. Participation in research trials is the norm in the beneficiary's field. Participation in the trials does not distinguish the beneficiary from others in the field. 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. 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.

For criterion number six, the beneficiary has published articles and abstracts as of the date of the filing of the instant petition. The beneficiary indicated on his CV that he also had several additional articles and textbook chapters "in press" as of the date of the filing of the petition. The AAO will only consider those articles that had been published as of the date of the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner submitted evidence of the "impact factor" of each publication that published an article co-authored by the beneficiary. The petitioner asserts that these publications have high impact factors; hence, the beneficiary's articles have had a significant impact on their readership. A more significant measure is the citation history of each of the author's articles. In the instant case, the petitioner provided evidence that the beneficiary's articles have extensive citation histories. 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.

Counsel for the petitioner asserts that the beneficiary "will most definitely be serving in an essential capacity for an [sic] nationally/internationally distinguished employer" in the proffered position. This criterion requires that the petitioner establish that the beneficiary has served in an essential or critical role for a distinguished establishment as of the date of the filing of the petition.

The beneficiary has been employed as a resident, a fellow, and an intern at esteemed medical institutions. While employment with such 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 or lead researcher on major projects.

The petitioner submitted a letter written by the Director of UCSF's Urologic Oncology program that states that the beneficiary played an essential role in its program because the beneficiary became "a leader within our group designing and conducting immunotherapy clinical trials in prostate cancer." It is not enough to establish that the beneficiary played a lead role for one or more clinical trials, unless the petitioner can establish that these trials have a distinguished reputation. It is further noted that the beneficiary was designated as a co-investigator rather than as a principal investigator, which is indicative of a lesser role. 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 states that the beneficiary will earn an annual salary of \$170,000 plus a grant award in the amount of \$35,000. The petitioner provided CIS with the U.S. Department of Labor prevailing wages for medical scientists and physicians in the geographical area where the petitioner is located (Cuyahoga County, Ohio). The petitioner asserts that the proffered wage exceeds the prevailing wage.

Although the survey submitted indicates that the beneficiary would receive significantly more than the prevailing wage for medical scientists and physicians 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 assistant medical school professors and staff physicians 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 assistant medical school professors/staff physicians. 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 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. 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.

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ORDER: The appeal is dismissed.