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

U.S. Citizenship and Immigration Services

D8

[redacted]

FILE: LIN 04 230 50871 Office: NEBRASKA SERVICE CENTER Date: DEC 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]

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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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 school, seeking a continuation 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 employ the beneficiary temporarily in the United States for a period of three years as an assistant professor and pediatric nephrologist in new employment.

The Acting 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.

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 native and citizen of India. The record reflects that he received his medical degree in 1985 at the Maulana Azad Medical College, University of Delhi, India. He performed a three-year residency in pediatrics at the Safdarjung Hospital, University of Delhi, India, and another three-year residency in pediatrics at the State University of New York (SUNY) at Brooklyn, New York. He most recently completed a three-year fellowship in pediatric nephrology at SUNY, Brooklyn, New York, in July 2003. The record reflects that he was last admitted to the United States on September 12, 2003 in O-1 classification as an alien of extraordinary ability to work for another employer. He was previously admitted as a J-1 exchange visitor, subject to the 2-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 science pursuant to 8 C.F.R. § 214.2(o)(3)(ii).

On appeal, counsel for the petitioner asserts that the director erred in denying the instant petition because he did not address the beneficiary's receipt of a prior O-1 petition approval.

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 the following awards satisfies this criterion:

- A Young Investigator Travel Award from the Society on Neuro-Immune Pharmacology in July 2002.

- Selection for "a highly coveted fellowship in nephrology" at SUNY Downstate.
- Selection as Director of Pediatric Dialysis Unit at SUNY Downstate.
- A Gold Medal (2nd prize) for research at the 28th National Conference of the Indian Academy of Pediatrics in 1991.

The AAO notes the emphasis placed by the petitioner on the beneficiary's specialized training, including his academic awards and selection for highly competitive training programs at leading institutions. The AAO acknowledges that the petitioner's rationale for seeking to employ the beneficiary is readily apparent. However, unlike recruiting and hiring decisions, eligibility for this visa classification is not based on a beneficiary's performance during preparatory specialized training, or in having specific professional competencies, however superb they may be, but rather hinges on the beneficiary's level of acclaim and recognition in the actual field. The context is thus much broader than an evaluation for suitability for a particular position. In any case, academic awards and honors (i.e., Young Investigator Award, selection for competitive fellowships) received while preparing for the vocation fall substantially short of constituting a national or international prize or award for recognition in the field. 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 Heart Association, the National Kidney Foundation, the American Society of Pediatric Nephrology, the American Society of Transplantation, and the American Academy of Pediatrics, there is no evidence 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 information on the mission statements of these associations rather than their membership criteria. 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.

For criterion number three, the petitioner submitted evidence that the beneficiary's receipt of an award was published in the Fall 2002 issue of the *Pediatric Alumni News*. The fact that the petitioner's receipt of an award was noted in an institutional publication once is not indicative of national or international acclaim. 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 because he has interviewed and evaluated candidates for fellowship and residency programs, and taught medical students and physicians through clinical rounds, rotations and formal lectures. In this position he was not judging the work of

experienced professionals in the field, but was selecting candidates with the greatest potential for their training in medicine. 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.

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 numerous testimonials about the value of the beneficiary's work. One testimonial's author states that the beneficiary "profoundly influenced his field" but failed to state how the beneficiary influenced his field. All of the testimonials fail to demonstrate how the beneficiary's research has impacted his 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.

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 a half-dozen articles and less than ten abstracts. It is expected that researchers publish the results of their research in peer-reviewed journals, and publication of six such articles does not constitute extensive documentation of sustained acclaim through publication of scholarly articles. Such evidence would be more persuasive if others had extensively cited the beneficiary's articles in the field. The petitioner has not submitted any citation history for these articles, which would tend to indicate acclaim. The petitioner failed to establish that the beneficiary has satisfied 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 beneficiary has been employed as a resident, a fellow, and an assistant professor 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." However, the petitioner asserts that the beneficiary was employed by SUNY Downstate as Director of Pediatric Dialysis in its Pediatric Nephrology Division in Brooklyn, New York. The petitioner failed to establish that SUNY's Pediatric Dialysis Unit has a distinguished reputation, therefore, the petitioner failed to establish that the beneficiary satisfies 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.

The petitioner failed to submit evidence such as contracts or other reliable evidence to establish that the beneficiary has or will command a high salary. 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.

Counsel for the petitioner asserts that the director erred in denying the instant petition because he failed to consider the petition in the context of the William Yates Memorandum to Service Center and Regional Directors dated April 23, 2004 on the significance of a prior CIS approval of a nonimmigrant petition. It is noted that the Yates Memorandum is addressed to service center and regional directors and not to the AAO director.

The petitioner noted that CIS approved a prior petition that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross 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.