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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 04 2009
LIN 07 098 52475

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in the sciences, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. Specifically, the director concluded that the petitioner meets two of the ten regulatory criteria, of which an alien must meet at least three.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we uphold the director's decision. The evidence falls far short of demonstrating *sustained* national or international acclaim in 2007 when the petition was filed. Specifically, the most significant evidence in every category dates from 2001 or earlier. We reach this conclusion through an analysis of the evidence under the regulatory criteria individually and in the aggregate.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise

are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

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'r. 1988). It would be absurd to suggest that USCIS 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).

This petition seeks to classify the petitioner as an alien with extraordinary ability as a postdoctoral research fellow. While the petitioner's position in a postdoctoral training position does not preclude eligibility, we will not narrow the petitioner's field to postdoctoral research fellows. Rather, the petitioner must compare with the most experienced and renowned members of his field. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence that, he claims, meets the following criteria under 8 C.F.R. § 204.5(h)(3).[1]

[1] The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Initially, the petitioner submitted two second grade Scientific and Technological Progress Awards of Chinese Military issued to the petitioner in 1998 and 2001. In response to the director's request for additional evidence, the petitioner submitted a 2008 certificate from the Department of Technology of Second Military Medical University indicating that the Scientific and Technological Progress Award of Chinese Military is "equal to [a] nationally recognized prize" and recognizes "important, innovative, leading and scientific levels in this research field nationally." The petitioner also submitted evidence that he was a finalist in 2008 for a Young Investigator's Award from the Third Annual Heart-Brain Summit.

The director concluded that the petitioner had not established the criteria for his Chinese awards and that the petitioner's finalist status for a Young Investigator's Award could not be considered a nationally recognized award. Regardless, the director further noted that the Young Investigator's Award postdates the filing of the petition in 2007.

On appeal, the petitioner submits a lengthy certificate from the Department of Technology of Second Military Medical University discussing the petitioner's award-winning projects and asserting that they were recognized with second grade prizes of ¥20,000 ($2,416.22 on January 1, 2001 according to www.oanda.com, accessed on July 30, 2009 and incorporated into the record of proceedings.) The petitioner also submitted a "Detailed Implementary [*sic*] Criteria of the Scientific and Technological Progress Award of Chinese Army." This information indicates that a second grade award is limited to important breakthroughs that "reach the top levels internationally and leading levels nationally." The awards are judged by experts in science, education, economics and national safety. The first and second grade awards are limited to the top one percent of the candidates while third grade awards are limited to the top five percent. The materials do not indicate how many awards in each grade are issued.

Even if we were to conclude that the above awards were qualifying without knowing how many awards are issued in each grade, the most recent prize was awarded in 2001, six years before the petition was filed. For the reasons discussed below, the evidence submitted to meet the other criteria does not demonstrate that the petitioner has maintained that level of recognition after 2001. Thus, the evidence submitted to meet this criterion cannot be considered evidence of *sustained* national or international acclaim in February 2007.

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.

On appeal, counsel does not challenge the director's conclusion that the petitioner's memberships in Sigma Xi and the American Society of Gene Therapy (ASGT) cannot serve to meet this criterion. The

record contains no information about the membership requirements for ASGT. Significantly, ASGT boasts that it is the "largest association of individuals involved in gene therapeutics," which, while not determinative, is not indicative of an exclusive society. While Sigma Xi members are nominated and elected to membership, the record lacks the society's definition of "noteworthy" accomplishments. The nomination form for the petitioner submitted into the record only inquires as to the petitioner's education, work history and publication history, none of which are outstanding achievements. In light of the above, we concur with the director that the petitioner has not established that he meets this criterion.

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.*

On appeal, counsel does not challenge the director's conclusion that the citations of the petitioner's work do not serve to meet this criterion. As the articles which cite the petitioner are about the author's own work and not about the petitioner relating to his work, we concur with the director that citations cannot serve to meet the plain language of the criterion at 8 C.F.R. § 204.5(h)(3)(iii).

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.*

On appeal, counsel does not challenge the director's conclusion that participation in the widespread peer-review process cannot serve to meet this criterion. While we concur with the director that the petitioner does not meet this criterion, further discussion is warranted.

First, counsel initially claimed that the petitioner meets this criterion through his services as a teacher. The evidence submitted to meet a given criterion must be indicative of or consistent with national or international acclaim if that statutory standard is to have any meaning. *Accord Yasar v. DHS,* 2006 WL 778623 *9 (S.D. Tex. March 24, 2006); *All Pro Cleaning Services v. DOL et al.,* 2005 WL 4045866 *11 (S.D. Tex. Aug. 26, 2005). Evaluating student work is inherent to teaching. We cannot conclude that every teacher meets this criterion. Similarly, supervising student projects or another employee at the institution where the petitioner works is not evidence indicative of or consistent with national or international acclaim beyond the institution where he is working. Thus, the petitioner's employment as a teacher and collateral supervision duties cannot serve to meet this criterion.

Finally, the evidence that the petitioner has reviewed manuscripts for peer-reviewed journals postdates the filing of the petition and cannot serve as evidence of the petitioner's eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. Regardless, we concur with the director that simply participating in the widespread peer-review process is not sufficient. Specifically, we cannot ignore that scientific journals are peer-reviewed and rely on many scientists to review submitted articles. Thus, peer-review is routine in the field and is not indicative of or consistent with national or international acclaim. Without evidence that sets the petitioner apart from others in his

field, such as evidence that he has reviewed an unusually large number of articles, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, we cannot conclude that the petitioner meets this criterion.

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

The director considered the reference letters submitted and the petitioner's publication and presentation record and concluded that the petitioner meets this criterion. While we will not withdraw that conclusion, the objective evidence relating to this criterion is more persuasive regarding the petitioner's earlier work than his recent work.

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. To be considered a contribution of major significance in the field of science, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. The reference letters submitted are primarily from the petitioner's close colleagues or other researchers at nearby institutions. Some of the language in these letters does not appear to be the original language of the authors. For example, both [redacted], a research assistant professor at Uniformed Services University of the Health Sciences, and [redacted], Head of Pathology Core Facility at the National Heart, Lung and Blood Institute, state:

> [The petitioner] is well endowed with profound and extraordinary intellectual ability, exemplified in his originality in planning and executing research, his ability to use highly sophisticated methodologies in a masterful way, and in developing scientific ideas.

The truly independent letters are from experts who claim to have learned of the petitioner through his publications but do not affirm being personally influenced by those publications. While the petitioner did submit evidence that his work has been cited, his most heavily cited article is from 1997. None of his articles after that date had been cited more than three times as of the date of filing. While the petitioner published an article in the *Proceedings of the National Academy of Sciences (PNAS)* in 2006, the record contains no letters from any of his coauthors explaining his role on this research. Similarly, the petitioner's awards recognizing his scientific contributions are from 1998 and 2001. Thus, while the petitioner continues to produce original work in the field through his publications and presentations, he has not demonstrated a consistent influence on the field through 2007 when the petition was filed.

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

The director concluded that the petitioner meets this criterion. The Department of Labor's Occupational Outlook Handbook, (OOH), available at http://www.bls.gov/oco/ocos047.htm#training (accessed July 30, 2009 and incorporated into the record of proceeding), provides that a solid record of published research is essential in obtaining a permanent position in basic research. As a researcher must demonstrate published research prior to even obtaining a permanent job in the petitioner's field, published research alone cannot serve to set the petitioner apart from others in his field. As noted above, the petitioner has only a single article from 1997 that has been moderately cited. That said, we acknowledge that his work continues to be consistently cited, that his conference presentation was a finalist for a young investigator's award and that his work recently appeared in *PNAS*. While not evidence of the petitioner's eligibility as of the date of filing, we acknowledge that the petitioner's work has been cited after that date. Thus, while the evidence from 1997 is the most persuasive, given the evidence in the aggregate, we will not withdraw the director's conclusion.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

On appeal, counsel does not challenge the director's implicit conclusion that the petitioner does not meet this criterion. As this criterion relates to visual artists and the petitioner's conference proceedings are better considered under the scholarly articles criterion, we concur with the director that the petitioner has not demonstrated that he meets this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

Initially, counsel characterized the petitioner's certificate of teaching and Ph.D. thesis paper identifying the petitioner as an advisor as evidence to meet this criterion. In response to the director's request for additional evidence, counsel asserted that the petitioner has "been involved in critical work at such prestigious research institutions as the Cleveland Clinic and the National Heart and Lung and Blood Institute." The petitioner submitted evidence of the distinguished reputation of these entities.

The director did not address this criterion. On appeal, counsel notes that the director concluded that the petitioner had made contributions of major significance to the field and requests that the AAO consider the petitioner's claim to meet this criterion in that context.

We will not presume that meeting one criterion demonstrates eligibility under a separate criterion. To do so would render meaningless the regulatory requirement that a petitioner meet at least three criteria. Whether the petitioner has been able to contribute to the field is a separate question from whether he has been hired into a leading or critical role by an entity with a distinguished reputation.

At issue for this criterion are the nature of the position the petitioner was hired to fill and the reputation of the entity that hired him. We concur with counsel that the petitioner has adequately documented the prestige of the institutions where he has worked. [redacted], a senior investigator at the National Cancer Institute, indicates that he hired the petitioner as a "postdoctoral fellow." [redacted] director of the Cerebrovascular Research Center at the Cleveland Clinic, asserts that he hired the petitioner into a research associate position in his laboratory. The OOH defines postdoctoral appointments as temporary research appointments that allow a biological scientist to develop the type of publication record that can lead to permanent employment. *See* http://www.bls.gov/oco/ocos047.htm#training. The petitioner did not submit an organizational chart or other evidence that a "postdoctoral fellow" or a "research associate" position is leading or critical to the petitioner's employers as a whole. Thus, we cannot conclude that the petitioner meets this criterion.

Finally, the conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The petitioner, a postdoctoral fellow and now a research associate, relies on his past recognition from the Chinese army, several publications, moderate citation record and the praise of his peers. While this may distinguish him from other postdoctoral researchers and research associates, we will not narrow his field to others with his level of training and experience. As stated above, [redacted] is head of the Pathology Core Facility at the National Heart, Lung and Blood Institute. [redacted] has also served on the editorial board of a scientific journal. [redacted], Chair of the Department of Anatomy at the Uniformed Services University School of Medicine and one of the petitioner's references, indicates that he has served on the editorial board of several journals. [redacted] a professor at the University of Pittsburgh and one of the petitioner's references, asserts that he is on the editorial boards of five journals and has served on study section panels for the National Institutes of Health. Thus, the top of the petitioner's field appears to be significantly higher than the level he has sustained through 2007.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and that he is one of the small percentage who have risen to the very top of the field of endeavor. Review of the record, however, does not establish that the petitioner has distinguished himself as a researcher to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence submitted is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.