

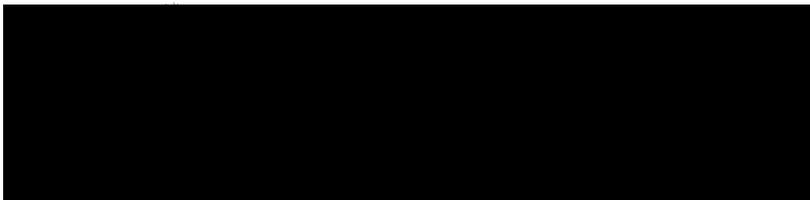
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [redacted]
LIN 04 143 53690

Office: NEBRASKA SERVICE CENTER

Date:

AUG 17 2005

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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.

Mari Johnson

R 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 private medical group. 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 intensivist.¹

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 asserting that the beneficiary meets the requirements of an alien of extraordinary ability in the medical sciences and that the director disregarded the Yates Memorandum on the significance of prior approvals.

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 first issue to be addressed 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;

¹ The petitioner states that an intensivist is a physician specializing in intensive care medicine.

- (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 33-year old native and citizen of El Salvador. The beneficiary received his medical degree in 1995 at the Autonomous University of Central America, San Jose, Costa Rica. He completed an internal medicine internship and residency at Texas Tech University Health Sciences Center, Lubbock, Texas in June 1999. He next performed a critical care medicine fellowship at Mayo Clinic, Rochester, Minnesota. He served as Medical Director, Intensive Care Unit (ICU) at Abbott Northwestern Hospital, Minneapolis, Minnesota from March 2002 until August 2003. The record reflects that the beneficiary was last admitted to the United States in O-1 classification in November 2003. According to Citizenship and Immigration Services (CIS) records, the beneficiary has previously held status as a J-1 exchange visitor and may therefore be subject to the two-year foreign residency requirement set forth at section 212(e) of the Act. An alien who is subject to the two-year foreign residency requirement is ineligible for adjustment of status and is also ineligible to receive a change of status to that of an H-1B nonimmigrant, without a waiver. Section 212(e) of the Act; *Matter of Kim*, 13 I&N Dec. 316 (Reg. Comm. 1968).²

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.

² CIS records show that the alien is the beneficiary of an approved Form I-129 petition seeking authorization to employ the alien as an H-1B nonimmigrant. (LIN 05 095 51787).

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:

- Critical Care Fellow Outstanding Teacher of the Year Award, June 2001, Mayo Clinic.
- Admission to the Autonomous University of Central America, Costa Rica.
- Selection for research fellowship at University of California Los Angeles (UCLA).
- Selection for internship by Texas Tech University, Lubbock, Texas.
- Selection for critical care medicine fellowship at Mayo Clinic, Rochester, Minnesota.
- Board certification in critical care medicine.
- Invited speaker at the 10th International Christian Medical Central American Congress.
- Inclusion in *Who's Who*.

This criterion requires nationally or internationally recognized prizes or awards for excellence in the field of endeavor. The beneficiary received a Critical Care Teacher of the Year Award in 2001 at the Mayo Clinic. The director determined, and the AAO concurs, this is an institutional award, limited to staff at a single institution. As the beneficiary did not compete with nationally or internationally recognized experts in the field, the award cannot be considered evidence of the beneficiary's national or international acclaim.

Similarly, selection for competitive internships and fellowships is limited to students. The beneficiary was not competing with the entire field. Board certification is contingent upon test scores rather than sustained acclaim. The petitioner failed to demonstrate that any of 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 Society of Critical Care Medicine (SCCM), the American Medical Association (AMA), the American Thoracic Society (ATS), the Mayo Medical Alumni Association, and is a Diplomate of the American Board of Internal Medicine, 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. According to the evidence in the record, applicants for membership in the American Thoracic Society need only submit the signature of a sponsor who is an ATS member in good standing, and evidence of their demonstrated interest in the goals of the ATS. According to a printout from the SCCM's website, applicants simply need to have an interest in Critical Care (see http://www.sccm.org/mem/join_body [accessed on 7/7/2001]). AMA membership is open to medical students at accredited medical schools, resident physicians, and physicians who agree to abide by *The Principles of Medical Ethics*.

The petitioner has failed to establish that the above listed organizations require outstanding achievements of their members, as judged by recognized national or international experts in the field of endeavor. 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.

No evidence was submitted in relation to criterion number three.

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.

Counsel for the petitioner wrote, “[f]or his extraordinary prowess, [the beneficiary] has been selected to serve in leading and critical roles in which judging the work of others is an implied and essential part of the job.” The petitioner asserts that the beneficiary satisfies this criterion because he has supervised and judged the work of staff as medical director of the medical intensive care unit at Abbott Northwestern Hospital and was requested by the American Board of Internal Medicine to evaluate critical care examination certification questions. The evidence in the record does not establish that evaluating test questions is tantamount to judging the work of experienced professionals in the field. The regulation at 8 C.F.R. § 214.2(o)(3)(iii) provides that “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.” Evidence of the petitioner’s participation as a judge must be evaluated in terms of these requirements. For example, evaluating the work of accomplished professors as a member on a national panel of experts is of far greater probative value than evaluating students in one’s research laboratory.

We do not find that supervising and judging the work of staff is tantamount to judging the work of others in one’s field for purposes of this criterion. While an intensive care unit medical director may evaluate the work of staff, this evaluation process is inherent to a supervisory relationship. It does not, however, elevate the petitioner above almost all others in his field at the national or international level. We find no evidence to demonstrate that the petitioner has formally judged the work of established researchers (such as tenured professors) who have long since completed their graduate studies or postdoctoral training. The beneficiary’s involvement in supervising staff and students is not indicative of national or international acclaim. 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.

The petitioner asserts that the beneficiary satisfies this criterion by virtue of the publication of the beneficiary's research in the following areas:

- The use of the APACHE III database to determine the impact of ventilator associated pneumonia on the outcome of critically ill patients.
- The diagnosis of acute abdomen in the medical intensive care unit.
- Accuracy of the history, physical examination and routine tests in predicting post operative pulmonary complications.
- Clinical and functional imaging characteristics of Parkinsonian dementia.

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 nine testimonials about the value of the beneficiary's work. All of the testimonials' authors wrote of the beneficiary's skill and experience. The majority indicated that the beneficiary made a substantial contribution to the literature in the field of intensive care. In the absence of a citation history, it is difficult to evaluate the impact of the beneficiary's research.

Seven of the nine testimonials were written by former or current associates. The record does not indicate that the beneficiary has achieved acclaim beyond his immediate circle of associates. While these testimonials speak highly of the beneficiary, letters written by those with professional ties to the beneficiary do not establish that the beneficiary is well known beyond his immediate circle of colleagues, as one might expect of a person who had made an original contribution of major significance in the field. 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 five articles and abstracts as of the date of the filing of the instant petition. The beneficiary indicated on his CV that he also had two additional articles "in progress" as of the date of the filing of the petition. The AAO will only consider those articles and abstracts 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 failed to provide citation histories for the beneficiary's publications. In the absence of citation histories, the AAO cannot evaluate the impact of the beneficiary's work on the field of endeavor. 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.

The director determined that the beneficiary satisfies this criterion. This portion of the director's decision will be withdrawn. The beneficiary has been employed as an intensive care physician and medical director of the 30 bed intensive care unit of the Abbott Northwestern Hospital in Minneapolis, Minnesota. To satisfy this criterion, the petitioner must establish that the beneficiary has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation. While the petitioner established that the Abbott Northwestern Hospital has a distinguished reputation, it failed to establish that the beneficiary played a critical or essential role for the hospital. Similarly it failed to establish that the Abbott Northwestern Hospital's medical intensive care unit holds a distinguished reputation. 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 \$220,000. The petitioner provided CIS with a *Jackson & Harris* physician salary survey that indicates that the median salary for intensivists in the western region of the United States was \$206,720 in 2004. The petitioner also submitted a wage salary indicating that pulmonologists earned an annual salary of \$185,562 plus a 10% bonus on average in 2003.

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 intensivists. 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 second issue to be addressed in this proceeding is the petitioner's assertion that the director "disregarded its own interoffice memorandum on the significance of a prior CIS approval for a nonimmigrant petition in the context of a subsequent determination regarding eligibility for extension of petition validity."

The petitioner noted that CIS approved another petition that had been previously filed on behalf of the beneficiary by a former employer. 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 record, the approval would constitute 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 prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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.