



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

D8



FILE: WAC 03 209 54393 Office: CALIFORNIA SERVICE CENTER Date: JUN 13 2005

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.

Mari Johnson

g Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care provider. 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 endocrinologist.

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 record shows that the beneficiary is an alien with extraordinary ability in his field.

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 is a 33-year old native and citizen of the Philippines. The record reflects that he received his undergraduate and medical degrees at George Washington University. He completed an internship and residency in internal medicine, and an endocrinology fellowship with Baylor College of Medicine. The record reflects that the beneficiary was last admitted to the United States in H-1B nonimmigrant classification.

After reviewing the evidence submitted in support of the petition, the director found the beneficiary ineligible for O-1 nonimmigrant 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 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.

Initially, the petitioner indicated that the beneficiary satisfied criterion number two by virtue of his membership in the American Association of Clinical Endocrinologists and The Endocrine Society. The director determined, and the AAO concurs, that the petitioner failed to establish that these are associations that require outstanding achievements of their members. The petitioner does not contest this finding on appeal.

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 on March 1, 2004, the beneficiary was invited as a guest speaker for a television show, Medical Monday, to lecture on current trends in diabetes treatments. However, this appearance took place well after the petition was filed on July 10, 2003.

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 beneficiary was invited to appear on a television show eight months after the filing of the instant petition. The petitioner failed to establish that the beneficiary satisfied this criterion as of the date of the filing of the petition.

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 one article, "Changes in Metabolic Profile" in the *Journal of Acquired Immune Deficiency Syndromes*. However, this article was published on August 15, 2003, after the filing date of the petition. The record indicates that the beneficiary submitted another article for publication, but submitted no evidence that the article had been published. 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.*, *supra*. 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.

Counsel for the petitioner asserts that the beneficiary's former employer, Baylor College of Medicine, has a distinguished reputation. The AAO concurs that Baylor has a distinguished reputation. However, the petitioner failed to establish that the beneficiary has been employed in a critical or essential capacity for any organizations and establishments. The beneficiary has been employed as a resident, a fellow, and an intern at an esteemed medical institution. 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." The beneficiary does not satisfy this consultation.

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 initially indicated that it would pay the beneficiary an annual base salary of \$160,000. In response to a request for additional evidence, the petitioner indicated that it was raising the beneficiary's salary to \$200,000. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot change the terms of its job offer. The petitioner must establish that the beneficiary satisfied the criterion as of the date of the filing of the position. If significant

changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The petitioner provided CIS with the U.S. Department of Labor prevailing wages for physicians and surgeons in the geographical area where the petitioner is located (Glendale, California). The petitioner asserts that the proffered wage (\$160,000) exceeds the prevailing wage (\$145,600). The petitioner also submitted a salary survey for endocrinologists in the Glendale, California area, indicating that the median wage is \$167,724 and those in the 75% percentile earn \$189,820.

Although the survey submitted indicates that the beneficiary would receive 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 endocrinologists on a nationwide basis. The petitioner should have provided the highest wages offered nationwide to endocrinologists. The beneficiary does not satisfy this criterion.

The petitioner submitted five testimonials. The testimonials' authors all speak highly of the beneficiary. It is noted that all of the authors are former advisors, or colleagues of the beneficiary. 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 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.

ORDER: The appeal is dismissed.