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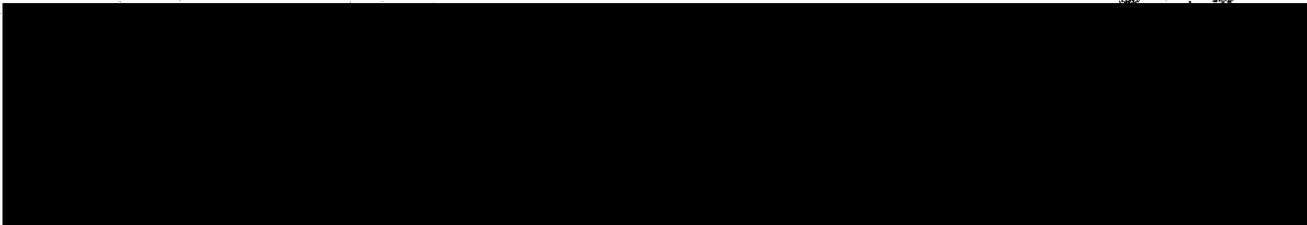
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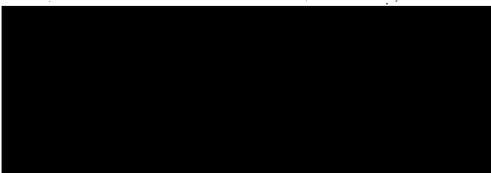


FILE: SRC03 059 50346 Office: TEXAS SERVICE CENTER Date: APR 13 2005

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition in a decision dated December 1, 2003 and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed a Form I-129, Petition for Nonimmigrant Visa, seeking an extension of the validity of the petition for 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 one year as a nephrologist.

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 the beneficiary's field of endeavor.

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 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;

(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 40-year old native and citizen of Pakistan. The record reflects that he received his medical degree in 1990 at the Sindh Medical College in Karachi, Pakistan. He completed a three-year residency at the Illinois Masonic Medical Center, Chicago, Illinois, in 1997. He performed a nephrology fellowship at the University of Texas Medical Branch at Galveston, from June 1997 until June 1999. The petitioner has worked as a nephrologist in Mesquite, Texas and in Shelby, North Carolina. The record reflects that he was previously admitted to the United States as a J-1 exchange visitor, subject to the two-year foreign residency requirement.

After reviewing the evidence on the record, the director determined that the evidence was insufficient to establish the beneficiary's eligibility for O-1 classification.

On appeal, counsel for the petitioner submits a brief.

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, counsel for the petitioner asserts that the beneficiary satisfies this criterion by virtue of his election "as Chief Nephrology Fellow because of his remarkable skills and talent." The counsel for the petitioner further asserts that the beneficiary satisfies this criterion because the beneficiary is a Diplomate of the American Board of Internal Medicine. Counsel asserts that becoming a diplomate is an "honor because a candidate must pass a rigorous certifying examination." Passing boards or certifying examinations are not equivalent to competing with one's peers for nationally or internationally recognized awards for excellence in the field of endeavor.

The record contains two certificates from the American Board of Internal Medicine (ABIM), which indicate that the beneficiary was board certified in nephrology and internal medicine. There is no evidence on the record to show that these certificates are internationally or nationally recognized awards for excellence.

Counsel for the petitioner asserts that the beneficiary was chosen as Chief Nephrology Fellow at the University of Texas Galveston Medical Branch. Counsel failed to submit corroborating evidence of the beneficiary's selection as chief nephrology fellow. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In any event, this recognition is not tantamount to an internationally or nationally recognized award for excellence.

The petitioner also submitted a certificate that was awarded to the beneficiary in appreciation for the two years he volunteered time to the patients at the HIV Treatment Center at the Illinois Masonic Medical Center.

Finally, the petitioner submitted a letter from the University of Texas Medical Branch at Galveston that was addressed to the beneficiary, notifying him that he was being placed on their honor roll for his recognition in a patient survey.

The petitioner failed to establish that the certificate of appreciation and honor roll placement are internationally or nationally recognized prizes for excellence in the beneficiary's 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 Diplomate of the American Board of Internal Medicine, a member of the American Society of Nephrology, the American College of Physicians and the Pakistan Medical and Dental Council, the evidence is insufficient to establish that these are associations which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines. The evidence on the record indicates that the beneficiary became a Diplomate of the American Board of Internal Medicine based upon his successful completion of their certifying examination.

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.

For criterion number four, the petitioner asserts that the beneficiary satisfies this criterion by virtue of his selection to be Chief Nephrology Fellow at the University of Texas. Counsel states that "as Chief Nephrology Fellow, [the beneficiary] was responsible for all of the nephrology residents and medical students at the Galveston Branch of the University of Texas." The petitioner asserts that the beneficiary served as a judge of

others' work while evaluating medical students, and residents. 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.

The petitioner also submitted a letter from Lynn Langdon, Senior Vice President, ABIM, which is addressed to the beneficiary, inviting him to review the clinical relevance of the ABIM's examination questions. The evidence fails to establish that the beneficiary was selected to review examination questions on the basis of his reputation in the field of endeavor. The letter indicates that the ABIM asks all its diplomates who spend a majority of their time as clinicians to review their questions. 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, the petitioner indicates that the beneficiary has made a significant contribution to his field by virtue of his clinical expertise, and transplantation experience. The petitioner provided Citizenship and Immigration Services (CIS) with five testimonials in support of the instant petition. The testimonials' authors indicate that the beneficiary is one of a very few experts who can perform peritoneal dialysis without resorting to vascular access. All of the testimonials' authors spoke highly of the beneficiary's expertise and experience. [REDACTED] Chief Executive Officer of the petitioning organization asserted that the beneficiary is a "pioneer in his field," and that the beneficiary's "identification of defects in catheters used in dialysis is an extraordinary achievement because he outlined simple methods for the prevention of catheter defects. Thus, the measures will result in the reduction of complications for hundreds of patients and will save the lives of many." The petitioner further asserts that the beneficiary has made a significant contribution by developing strategies for the prevention and treatment of excessive potassium accumulation. The other four testimonials are insufficiently specific as to the nature of the beneficiary's contributions. While the beneficiary has published results of his research, the record does not show that his research is considered of major significance in relation to other similar work being performed.

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 director determined that the beneficiary satisfies this criterion. This portion of the director's decision shall be withdrawn. The record contains no evidence that independent researchers have cited the petitioner's work. As such, we cannot conclude that the petitioner's publication history is indicative of national or international acclaim.

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, counsel for the petitioner asserted that the beneficiary has been appointed to "numerous leading and critical roles." Counsel failed to elaborate on such employment. According to the beneficiary's curriculum vitae, the beneficiary has been employed as a resident, fellow, medical officer, senior house officer, and as a nephrologist.

In review, the petitioner failed to establish that the beneficiary has played an essential or critical role at a distinguished institution. It is not enough to assert that the petitioner has played a critical role. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The regulation requires evidence that the beneficiary has played a critical or essential role at a distinguished institution.

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.

No evidence was submitted in relation to criterion number eight.

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.

On appeal, counsel for the petitioner asserts that the doctrines of *res judicata*, estoppel, and administrative finality bar CIS from denying the petition. The Administrative Appeals Office, like the Board of Immigration Appeals, is without authority to apply the estoppel doctrine so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the Administrative Appeals Office is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's estoppel claim.

Counsel bases his arguments on the principles of estoppel and *res judicata*. Counsel correctly notes that the regulations relating to the nonimmigrant classification for which the petitioner was approved and the immigrant classification he now seeks list the same evidentiary requirements. In response to the director's request for additional documentation, counsel relied on *Matter of McMullen*, 17 I&N Dec. 542 (BIA 1980), *Matter of Perez-Valle*, 17 I&N Dec. 581 (BIA 1980), *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984), and *In re Mario Salvador Ruiz-Massieu*, 22 I&N Dec. 833 (BIA 1999). While the cases rely on the following test for *res judicata* determinations – identical parties, a valid final judgment upon the merits, and identical issues – the cases all deal with administrative adjudication of immigration matters already determined in federal court or on issues specifically delegated to other government agencies. Specifically, *McMullen* held that decisions made in judicial extradition proceedings were not *res judicata* in deportation proceedings because the parties were different. *Matter of Perez-Valle* involved an acquittal in criminal court. *Matter of Fedorenko* rejected an administrative re-adjudication of an issue already decided by the Supreme Court of the United

States. Finally, *In re Mario Salvador Ruiz-Massieu* held that an immigration judge could not require the CIS to show the reasonableness of the Department of State's determination that an alien's presence in the United States was detrimental to U.S. foreign policy because that determination had been specifically delegated by Congress to the Department of State.

The fact that nonimmigrant visas can be revoked pursuant to 8 C.F.R. § 214.2(o)(8) suggests that the approval of a nonimmigrant visa is not an unalterable, unreviewable decision subject to *res judicata*. Decisions subject to *res judicata* may not be revisited or reopened at all. Moreover, the petitioner in this case has been afforded all the process that is required in revocation proceedings. Specifically, the director issued a request for additional documentation advising the petitioner of the deficiencies in the record. In addition, the petitioner had the opportunity to appeal the director's adverse decision to this office.

Second, counsel cites the minutes of legacy INS and AILA Liaison meetings¹ as evidence of CIS policy to deny petitions for extensions of classification only in instances of "gross error." Counsel noted that CIS approved four other petitions that had been previously filed on behalf of the beneficiary. The oral statements of legacy INS or CIS officials that are made during liaison meetings are not official policy. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory 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.

¹ Legacy INS/AILA HQ Adjudications Liaison Meeting Minutes dated November 1999, February 2001, and October 2002.