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FILE: LIN 04 131 54595 Office: NEBRASKA SERVICE CENTER

Date: **AUG 16 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.

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 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 a pediatric cardiovascular surgery fellow.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary has achieved 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, among other things, that the petitioner is seeking an extension of the validity of a previously approved petition for O-1 classification.

The beneficiary of the instant petition was previously accorded O-1 classification due to a petition filed by a former employer. The new petitioner/employer cannot step into the shoes of the prior petitioner/employer to request an extension of the validity of the previously approved petition. As a new employer, the petitioner must file its own petition. *See* 8 C.F.R. § 214.2(o)(2)(iv)(B).

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 35-year old native and citizen of Scotland. The record reflects that he received his medical degree in 1993 at the M.P. Shah Medical College & Irwin General Hospital, Jamnagar, India. He completed a residency in surgery at the New York Medical College, Bronx, New York. He performed a research and cardio-pulmonary organ procurement fellowship at Columbia Presbyterian Medical Center, New York, New York. He completed a fellowship in cardiothoracic surgery at the University of Louisville, Kentucky and most recently completed a fellowship in pediatric cardiovascular surgery at the University of Michigan, Ann Arbor, Michigan. According to Citizenship and Immigration Services (CIS) records, the beneficiary previously entered the United States as a J-1 exchange visitor and is subject to the two-year foreign residency requirement set forth at section 212(e) of the Act.

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 denied the instant petition "contrary to the directive in April 23, 2004 Interoffice Memorandum by William Yates [because the director failed to articulate] the material error, changed circumstances, or new material information."

The petitioner noted that CIS approved another petition that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he 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 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).

On appeal, the petitioner indicated that she would submit a brief and/or additional evidence within 30 days. More than one year has lapsed and nothing more has been submitted for the record. In a fax dated August 8, 2005, counsel for the petitioner indicated that she had not submitted a brief and/or additional evidence in support of the appeal.

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:

- National Heart Lung and Blood Institute grant from Columbia University, 1999.
- Chosen for a cardiothoracic surgery fellowship at the University of Louisville, 2002.
- Invited to give grand rounds while a chief resident at New York Medical College, 2001.
- Selection for a fellowship at the University of Michigan, Ann Arbor, Michigan, 2004.

This criterion requires nationally or internationally recognized prizes or awards for excellence in the field of endeavor. According to the evidence on the record, the "National Heart Lung and Blood Institute grant" was awarded to fund research. Research grants simply fund a scientist's work. The past achievements of the principal

investigator are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and is not an award to honor or recognize past achievement.

Academic study is not a field of endeavor, but training for a future field of endeavor. As such, awards for academic work, scholarships and fellowships cannot be considered awards in the field of endeavor. Moreover, only students compete for such awards. As the petitioner did not compete with nationally or internationally recognized experts in the field, the awards cannot be considered evidence of the beneficiary's national or international acclaim. The petitioner failed to demonstrate that these were awards for excellence in the field of endeavor.

Selection for a competitive slot at an esteemed institution is not a nationally or internationally recognized prize or award for excellence in the field of endeavor. The beneficiary was competing with fellow students for these slots.

While working as a chief resident, the beneficiary gave grand rounds. Giving grand rounds was an integral part of his job. The petitioner failed to demonstrate that 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 American College of Surgeons (ACS), the American Heart Association's Council on Cardiovascular Surgery, the International Society of Heart and Lung Transplantation, the Society of Thoracic Surgeons, and the American Society of Artificial Internal Organs, 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.

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 director determined that no published material about the alien had been submitted in support of the petition; however, evidence of citations was submitted in lieu of published material. The director considered evidence of citations but determined that the criterion had not been met. The AAO has consistently held that having one's work cited is not equivalent to having articles written about the alien and his work in major media or trade publications as envisioned in the statute and regulations. Citations are not about the alien or his work, rather, they are references to his work. Citations are considered with respect to another criterion. The record contains a one-paragraph article captioned "What's New in Surgery," which was compiled by the American College of Surgeons. The article briefly describes the beneficiary's work.

The petitioner also submitted several articles about AbioCor, an implantable artificial heart. The beneficiary is not mentioned in the articles. The evidence is insufficient to establish that the beneficiary satisfies 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.

The petitioner asserts that the beneficiary has met this criterion by serving as the Chief Resident at New York Medical College/Our Lady of Mercy Medical Center. The record indicates that the beneficiary has instructed and evaluated medical residents and conducted grand rounds.

In the capacity of a chief resident, the beneficiary was not judging the work of experienced professionals in the field, but was evaluating medical 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 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, 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 CIS with testimonials about the value of the beneficiary's work.

All of the testimonials were written by persons employed either at the petitioner's organization, or at organizations where the beneficiary worked in the past. 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.

Richard Ohye, Assistant Professor of Surgery, University of Michigan, wrote that the beneficiary's "observations have influenced the management of patients undergoing heart transplantation and those being treated with ventricular assist devices." Dr. Ohye failed to specify how the beneficiary has influenced his field. Dr. Niloo Edwards, Associate Professor, Chairman & Program Director, Division of Cardiothoracic Surgery, University of Wisconsin-Madison Medical School wrote that the beneficiary "successfully propelled the development of a novel external cardiac compression assist device." Dr. Edward Bove, Professor of Surgery, Director of Pediatric Cardiovascular Surgery, Head of the Cardiac Surgery section, University of Michigan, wrote that the beneficiary "was the first to describe the successful use of combining a new mitral valve repair technique with an aortic valve replacement." Dr. Mehmet Oz of Columbia wrote that the beneficiary "played a vital role in the development and experimental use of a novel cardiac assist device known as the AbioBooster, which could potentially support and resuscitate the 250,000 patients that present with and succumb to acute cardiogenic shock each year in our country."

The evidence is insufficient to establish that the beneficiary's contributions are original and significant in comparison to the work of others in the field. The testimonials are couched in generalities. Several testimonials' authors indicate that the beneficiary played a "novel" and "vital" role in the development of the AbioBooster. The record also contains a letter written by a representative of ABIOMED, Inc., the maker of the AbioBooster and Abiomed, which states that the beneficiary's "collaboration with ABIOMED has been instrumental in providing astute clinical input for the development of advanced cardiac assist systems, including a minimally

invasive heart massage device, the HeartBooster.” The ABIOMED representative further indicates that these devices are in the experimental stage; hence, the beneficiary’s contribution has not yet had an impact. This criterion requires that the petitioner establish that the beneficiary has met the criterion as of the date of the filing of the petition, rather than prospectively. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. The petitioner has not established that the beneficiary’s work on the AbioBooster has had an impact as of the date of filing the petition. 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. 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 21 articles and 12 abstracts as of the date of the filing of the instant petition. The petitioner indicated that the beneficiary also has submitted two additional articles for possible publication and has a forthcoming chapter in a cardiac surgery text. 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.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

According to the evidence in the record, six of the 20 articles listed have been cited. Five of the six were cited between one to three times. One article on right ventricular dysfunction has 12 cites. These citations histories are not indicative of sustained acclaim. 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 beneficiary has been employed as a resident, and a fellow 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." 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 \$53,664. To evaluate whether the salary is high, CIS needs to compare it to the median and highest wages offered nationwide to pediatric cardiac surgeons. The petitioner failed to submit any evidence such as salary surveys to demonstrate that the proffered wage may be considered high in relation to others in the field. 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.

LIN 04 131 54595

Page 8

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.