



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D-F-P-

DATE: OCT. 19, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a fertility clinic, seeks to temporarily employ the Beneficiary as an embryologist. To do so, the Petitioner seeks O-1 nonimmigrant visa classification, available to foreign nationals who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i).

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not satisfy, as required, the alternative evidentiary criteria applicable to individuals of extraordinary ability in the sciences, either a major, internationally recognized award or at least three of eight possible forms of documentation. 8 C.F.R. § 214.2(o)(3)(iii)(A)-(B).

On appeal, the Petitioner avers that the Director did not properly consider the record, and based the decision on “requirements that are not supported by the law” in finding the Beneficiary did not meet the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(4). It maintains that the evidence satisfies the regulatory requirements and thus the Beneficiary is eligible for O-1 classification.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

As relevant here, section 101(a)(15)(O)(i) of the Act establishes O-1 classification for an individual who has extraordinary ability in the sciences, arts, education, business, or athletics that 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. Department of Homeland Security (DHS) regulations define “extraordinary ability in the field of science, education, business, or athletics” as “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.” 8 C.F.R. § 214.2(o)(3)(ii).

Next, DHS regulations set forth alternative evidentiary criteria for establishing a beneficiary’s sustained acclaim and the recognition of achievements. First, a petitioner can demonstrate a beneficiary’s sustained acclaim and the recognition of the individual’s achievements in the field

through evidence of a major, internationally recognized award, such as the Nobel Prize. 8 C.F.R. § 214.2(o)(3)(iii)(A). If the petitioner does not submit this evidence, then it must submit sufficient qualifying evidence that meets at least three of the eight categories of evidence listed at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1)-(8). And if the petitioner demonstrates that the listed criteria do not readily apply to the beneficiary's occupation, it may submit comparable evidence to establish eligibility. 8 C.F.R. § 214.2(o)(iii)(C).

The submission of documents satisfying the initial evidentiary criteria does not, in and of itself, establish eligibility for O-1 classification. See 59 Fed. Reg. 41818, 41820 (Aug. 15, 1994) (“The evidence submitted by the petitioner is not the standard for the classification, but merely the mechanism to establish whether the standard has been met.”). Accordingly, where a petitioner provides qualifying evidence satisfying the initial evidentiary criteria, we will determine whether the totality of the record and the quality of the evidence shows sustained national or international acclaim such that the individual is among the small percentage at the very top of the field of endeavor.¹

II. ANALYSIS

The Beneficiary in this matter holds a Ph.D. in Science (Cell and Tissue Biology) from the [REDACTED] (2009), and served there as a Postdoctoral Fellow in cell and developmental biology between 2009 and 2011. He subsequently worked as an embryologist at fertility clinics in Brazil, obtained a specialization in Assisted Human Reproduction, and since 2016 has been employed by [REDACTED] as a research associate and senior embryologist in the [REDACTED] of its veterinary college. The petitioning fertility clinic seeks classification of the Beneficiary as an alien with extraordinary ability in the sciences, specifically, reproductive biology.

Absent evidence of a Nobel-like, major international award, the Petitioner seeks to demonstrate the Beneficiary's sustained acclaim and recognition of achievements through evidence corresponding to the eight regulatory criteria. The Director determined that the Petitioner satisfied only one of the evidentiary criteria: 8 C.F.R. § 214.2(o)(3)(iii)(B)(6) (authorship of scholarly articles). Upon review, we agree that the Petitioner has met that criterion. On appeal, the Petitioner maintains that it has also met the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B)(2) (membership in associations), 8 C.F.R. § 214.2(o)(3)(iii)(B)(4) (judging the work of others), 8 C.F.R. § 214.2(o)(3)(iii)(B)(5) (significant recognition for achievements from experts in the field), and 8 C.F.R. § 214.2(o)(3)(iii)(B)(7) (employment in a critical or essential capacity).² As discussed below, we conclude that the record satisfies only two of the claimed criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

¹ While not at issue here, there are other evidentiary requirements for O foreign nationals, including documentation relating to the terms of the proposed employment and the nature of the activities and events in which the beneficiary will participate. 8 C.F.R. § 214.2(o)(2)(ii).

² The Petitioner does not contest the decision of the Director that it has not claimed that it satisfies the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1), (3), or (8). Accordingly, we will not address these criteria in the decision.

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.
8 C.F.R. § 214.2(o)(3)(iii)(B)(2).

The Petitioner contends that the Beneficiary satisfies this criterion based upon his membership in the [REDACTED]. In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based only on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue is membership requirements rather than the association's overall reputation. Upon review, the Petitioner has not provided sufficient evidence establishing that the [REDACTED] requires outstanding achievement as an essential condition for admission to membership.

The record contains a copy of the Beneficiary's membership certificate, indicating that he is a member of the [REDACTED] at the Regular Member level. The Petitioner also provided documentation from the organization's website, stating the qualifications for becoming a Regular Member and providing the term's definition. The qualifications for membership are stated on the website as follows:

- Regular membership in the Society shall be conferred by the Membership Committee on the basis of scientific productivity and continuing interest in the field of reproduction or related areas.
- A nominee must have a doctorate or demonstrate its equivalent in scientific accomplishments.
- The nominee must submit the nomination form.

A Regular Member is defined in the organization's bylaws as "[a]ny individual who has demonstrated professional competence in and made scientific contributions to the field of reproductive biology." The Petitioner further submitted a letter from [REDACTED] president of the [REDACTED] explaining that the Beneficiary met the requirements for Regular Membership by "having attained a doctorate, working for 13 years as a research associate and senior technician engaged in research activities in the area of reproduction and [having] more than 3 articles published as first author."

Within its response to the Director's request for further evidence, the Petitioner provided a letter from [REDACTED] chair of the [REDACTED] membership committee. Her letter indicates that the definition of Regular Member requires "significant scientific contributions to the field." (Emphasis added). She does not identify, however, the source of this change, such as any amendments to the [REDACTED] bylaws or rules of admission. Regardless, her letter also confirms that the above-cited qualifications for Regular Membership are unchanged.

Upon review, the qualifications for Regular Membership, contained on the [redacted] website, do not satisfy this criterion. Membership requirements based on attaining a doctoral degree and demonstrating “scientific productivity and continuing interest in the field” do not constitute outstanding achievements. Similarly, the definition of Regular Member contained in the [redacted] bylaws, namely one who “demonstrated professional competence” and “made scientific contributions,” does not demonstrate that the association requires outstanding achievement as an essential condition for admission to membership. As stated previously, membership criteria based solely on training, certification, and experience in the field do not satisfy this criterion. Based on the foregoing, the Petitioner has not established eligibility under 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. 8 C.F.R. § 214.2(o)(3)(iii)(B)(4).

The Director determined that the evidence did not sufficiently establish that the Beneficiary has judged the work of others in the field. Upon review of the record we withdraw the Director’s determination.

In support of this criterion, the evidence submitted includes the following:

- An e-mail dated 2014 from [redacted] senior editor, [redacted] thanking the Beneficiary for reviewing a manuscript for the journal in 2014
- A letter from [redacted] editor of [redacted] confirming that the Beneficiary served as a referee and reviewed a manuscript for the journal in 2010³

Upon review, the evidence satisfies this criterion.

Evidence of the alien’s original scientific, scholarly, or business-related contributions of major significance in the field. 8 C.F.R. § 214.2(o)(3)(iii)(B)(5).

As evidence relating to this criterion, the Petitioner submitted letters of support from mentors and colleagues attesting to the Beneficiary’s scientific contributions. These materials include two letters from the Beneficiary’s supervisor, [redacted] Professor in the [redacted] and Director of its [redacted]. In her initial letter, she explains that her lab hired the Beneficiary in 2016, based upon his clinical and research experience in human intracytoplasmic sperm injection (ICSI), a method of *in vitro* fertilization used in assisted reproductive technology (ART). She indicates that the Beneficiary’s work as a research associate has exceeded expectations, due to his excellent clinical and research

³ The Petitioner also provided a Reviewer Certificate from [redacted] an executive with [redacted] publishing company, stating that the Beneficiary served as a peer reviewer in 2011-2012 for [redacted] but since this letter is not signed it holds limited probative value and we will not consider it in this proceeding.

skills. As examples, she indicates that he was the first embryologist successfully trained by the lab's senior embryologist to perform equine ICSI using a Piezo drill, and she describes as "original and significant" his work developing an equine model to compare ICSI techniques previously examined in human models. She also states that the Beneficiary's research "resulted in novel data with outcomes directly relevant to human reproductive medicine," that have recently been presented at scientific conferences. She further credits his work with pioneering, in her lab, the use of the Piezo drill with a non-toxic fluid in place of mercury, improving the lab's blastocyst production via ICSI, and improving quality assurance techniques. In her second letter, [REDACTED] notes that the manuscript draft of his research findings in comparing ICSI techniques was recently submitted to the *Journal of Assisted Reproduction and Genetics*, and mentions the Beneficiary's "recently-accepted" paper examining the effect of oocyte shipping temperature on blastocyst production.

[REDACTED] Professor in the Department of Cell and Developmental Biology in the Institute of Biomedical Sciences at [REDACTED] was the Beneficiary's doctoral advisor and supervisor of his postdoctoral research between 2004 and 2011. She describes as "novel" and "first-of-its-kind" the Beneficiary's equine study of ICSI techniques, indicating that Piezo-driven ICSI could increase embryo quality and viability.

[REDACTED] Professor of Reproductive Biomedicine at the [REDACTED] supervised the Beneficiary for a six-month internship during his doctoral studies, and describes him as "a professional with exceptional abilities in investigative and clinical embryology" who "developed original scientific and scholarly contributions" in his equine study comparing ICSI techniques.

[REDACTED] Professor of Cell and Developmental Biology at [REDACTED] supervised a portion of the Beneficiary's doctoral research, and states that he made "original scientific and scholarly contributions" to the field through his research at [REDACTED] and his "novel" equine study of ICSI techniques.

[REDACTED] Research Director for the [REDACTED] medicine, a fertility clinic, states that she is a colleague of [REDACTED] and was requested to render an expert opinion. She states that her expert opinion is based upon review of the Beneficiary's CV and publications, and discussions with [REDACTED]. She describes the Beneficiary as having made "original scientific and scholarly contributions" to his field, based upon the findings of his equine study, indicating that Piezo-driven ICSI could increase embryo quality. She describes his research as "novel" and "first-of-its-kind." Additionally, the letters of [REDACTED] and [REDACTED] emphasize that the Beneficiary is one of only a few embryologists trained in the use of both ICSI techniques

The authors' assertions, however, do not explain who is using the Beneficiary's research findings or otherwise describe how those findings have been implemented throughout the field. The findings of the Beneficiary's equine study of ICSI techniques have not been published and cited, and the record does not contain additional evidence indicating that other reproductive biologists have widely relied on his work. Without additional detail explaining his accomplishments relating to new or innovative

techniques, the record does not adequately demonstrate that this work has made a significant impact on the field.

The Petitioner maintains that the fact that the Beneficiary's work was recently introduced at an international conference and published in the conference proceedings contributes to his eligibility under this criterion. Many professional fields regularly hold conferences and symposia to present new work, to discuss new findings, and to network with other professionals. Participation in these events, however, does not necessarily reflect an original contribution of major significance in the field. Additionally, demonstrating ability as a skilled embryologist is not itself a contribution of major significance; rather, the Petitioner must demonstrate that the Beneficiary has impacted the field of reproductive biology as a whole. *Cf. Visinscaia v. Beers*, 4 F. Supp. 3d 126, 134-135 (D.D.C. 2013) (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole). Here, the record does not include documentary evidence showing the widespread implementation of the Beneficiary's work, that it has been seminal, or that it otherwise equates to an original contribution of major significance in the field.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought. *Id.* Upon review, the preceding letters of recommendation demonstrate that the Beneficiary's work has earned the respect and admiration of those with whom he has worked and collaborated, but these letters do not establish that he has made original scientific contributions of major significance in his field.

On appeal, the Petitioner acknowledges that "the widespread scope of [the Beneficiary's] research is yet to be determined," and urges that we evaluate his work comparing ICSI techniques "in terms of the research findings, not in the application of the research." According to the plain language of this criterion, however, a beneficiary's contributions must be not only original but of major significance. The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003). We find, therefore, that a demonstrable influence on the field is in fact necessary in order to meet this criterion.

Regardless of the field of endeavor, the plain language of the phrase "contributions of major significance in the field" requires evidence of an impact beyond one's employer and clients or customers. *Cf. Visinscaia*, 4 F. Supp. 3d at 134-35. Without documentation showing that the Beneficiary's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion. Here, the Petitioner has not established that the Beneficiary's work in the field has had a demonstrable impact on the field as a whole commensurate with a contribution of major significance. Based on the foregoing, the Petitioner has not established eligibility under this criterion.

Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation. 8 C.F.R. § 214.2(o)(3)(iii)(B)(7).

The scope of this evidentiary criterion focuses on the relative importance of the Beneficiary's position within the organizations that have employed him. The Petitioner asserts that the Beneficiary satisfies this criterion based upon his current position as Research Associate/Senior Embryologist with [REDACTED] and his previous position as a postdoctoral researcher in [REDACTED] lab at [REDACTED]. In support of this criterion, the Petitioner submitted the above-discussed letters from [REDACTED] and an additional letter from [REDACTED].

In her first letter, [REDACTED] explains that in 2016, upon the resignation of the lab's senior embryologist, the Beneficiary's expertise was essential to continuing the lab's clinical equine ICSI services and ongoing research, until he trained two research assistants in the ICSI procedure. In her second letter, [REDACTED] states that the Beneficiary, as the lab's senior embryologist, currently oversees and/or coordinates the work and research of other laboratory personnel. She describes her lab's clinical ICSI program as one of the premiere programs in the world, that "greatly enhances the reputation and prestige" of [REDACTED] veterinary college.

On appeal, the Petitioner contends that from 2009 to 2011 the Beneficiary performed in a critical or essential capacity as a postdoctoral fellow with [REDACTED]. Her second letter states that, while she was occupied with the administrative duties associated with her position as Dean for Undergraduate Studies, the Beneficiary was her lab's sole postdoctoral researcher "evidencing his essential capacity in my laboratory and, thus, in [REDACTED]. She credits him with being "essential" in carrying on the research in her laboratory and "keeping the high standards of our scientific production." She explains that he designed the lab's Molecular Biology sector with a research grant from the [REDACTED] and describes his research findings regarding uterine tissue in mice as and having "significantly enriched the quality of our research."

While the Beneficiary has performed admirably on research projects, the evidence does not establish, however, that his role as a research associate, embryologist or postdoctoral fellow has been in a critical or essential capacity for the preceding employers. While university staff may consider the Beneficiary's achievements to be of great benefit to the university, the focus of this criterion, based on the plain language of the regulation, is the Beneficiary's role itself. While he has been able to provide his clinical and research expertise as an embryologist to his fellow researchers in a manner that is not expected of the average researcher, the record does not establish that his role as a research associate, embryologist, or postdoctoral fellow has been critical or essential for either university. For example, while [REDACTED] mentions that her lab employed eight persons in 2016, the record does not contain an organizational chart or other evidence documenting how the Beneficiary's position fits within the general hierarchy of the university, and differentiates him from its other research associates and embryologists. Although the Beneficiary's current position title includes "senior" embryologist, it has not been established that he has a leading or a senior role within the university or veterinary college as a whole.

Similarly, we note that the Beneficiary's Postdoctoral Fellow position at [REDACTED] was intended to provide specialized research experience and training in his field of endeavor. The Petitioner's evidence does not demonstrate how the Beneficiary's research position at that university differentiated him from the other researchers, let alone its tenured faculty or senior managerial staff. The fact that he may have designed the lab's Molecular Biology sector, resulting in improved quality and productivity, does not elevate his position within the institution above that of a postdoctoral research fellow for the purposes of this criterion. Based on the above, the documentation submitted by the Petitioner does not establish that the Beneficiary was responsible for the success or standing of the preceding organizations to a degree consistent with the meaning of "critical or essential," as required by this criterion.

III. CONCLUSION

The Petitioner has not submitted evidence that the Beneficiary has received a major, internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), and the exhibits do not satisfy at least three of the evidentiary criteria specified in the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B). Even if these initial evidentiary requirements had been met, the cumulative record does not demonstrate the sustained national or international acclaim and recognition for achievements required for this classification. 8 C.F.R. § 214.2(o)(3)(iii). Nor does the evidence show a level of expertise indicating that he is one of the small percentage at the very top of the field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). Consequently, the Petitioner has not established that the Beneficiary is eligible for the O-1 visa classification as a foreign national with extraordinary ability in the sciences.

ORDER: The appeal is dismissed.

Cite as *Matter of D-F-P-*, ID# 1589654 (AAO Oct. 19, 2018)