

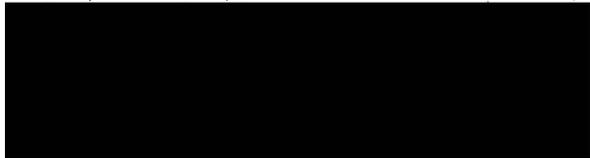
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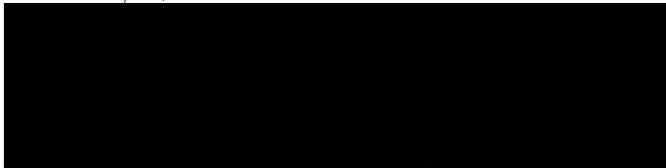


FILE: EAC 04 236 53319 Office: VERMONT SERVICE CENTER Date: MAR 01 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

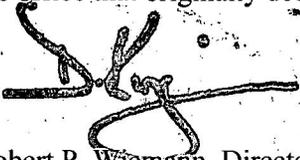
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a hospital. 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), 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 ten months as a pediatric/neonatology physician.

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 submits a brief and additional documentation.

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 regulation at 8 C.F.R. § 214.2(o)(5)(i)(A) requires, in pertinent part:

Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for O-1 or O-2 classification can be approved.

The beneficiary in this matter is a native and citizen of the Republic of Korea. The record reflects that he received his medical degree in 1983, a Master of Science degree in 1989, and a Doctor of Philosophy degree in 1993, all from the Seoul National University. The beneficiary served as chief of the neonatal intensive care unit in the pediatric department of the Seoul Red Cross Hospital, and worked as a postdoctoral fellow in pediatric oncology at the National Cancer Institute of the National Institutes of Health in Bethesda, Maryland beginning in April 2002. The beneficiary is currently a fellow in pediatric/neonatology with the petitioning organization. On the Form I-129 petition, the petitioner indicated that the beneficiary last entered the United States in J-1 nonimmigrant classification as an exchange visitor. It is noted that the beneficiary is subject to the two-year foreign residency requirement.

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 sum of the evidence was insufficient to demonstrate that he is "at the very top" of his field of medical science pursuant to 8 C.F.R. § 214.2(o)(3)(ii). The director concluded that the record failed to show that the beneficiary was recognized as a physician of extraordinary ability whose achievements have been recognized in the field through extensive documentation.

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). The petitioner has submitted evidence pertaining to the following criteria.¹

Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The petitioner stated that the beneficiary meets this criterion based on his receipt of a travel award by the International Immunocompromised Host Society (ICHS) to attend and present his research findings at the 13th International Symposium on Infection. The petitioner submitted a July 29, 2004 letter from Warren C. Snow, the secretary/treasurer of the ICHS, confirming that the beneficiary received the ICHS travel award “for excellence in research so that [he] would be able to present a poster” at the symposium held on June 27-30, 2004. The evidence indicates that the award was to aid the beneficiary’s attendance at a symposium in which one of his papers had been selected for a poster presentation. A travel award is not an award or prize for excellence in the field of endeavor. As indicated by the evidence, the award was to help the beneficiary defray the expense of attending the symposium.

On appeal, counsel asserts the travel award is restricted to only those few whose abstracts have been judged by a committee to be of “high scientific merit,” and thus is evidence that the beneficiary meets this criterion. The petitioner submitted a copy of a September 9, 2004 letter from the executive director of the ICHS confirming the beneficiary’s receipt of the travel award. In her letter, the executive director stated, “To win a Travel Award a physician must submit an abstract for poster presentation at the symposium. All abstracts submitted to ICHS are reviewed by the scientific committee and only those that have high scientific merit may be able to win on[e] of the limited number of Travel Awards.”

Nonetheless, the petitioner submitted no documentary evidence that this travel award is recognized nationally or internationally as an award for excellence in the field of medicine. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner also asserts that the beneficiary meets this criterion based on the award of a visiting fellowship, with a subsequent renewal, at the National Cancer Institute of the National Institutes of Health. A fellowship is granted generally to fund future research rather than to award an achievement in the field. While the fellowship committee will take the recipient’s accomplishments into account, such consideration ensures that the fellowship funds will advance the project and is not an award for excellence in the field.

On appeal, counsel asserts that, as the fellowship is awarded by a prestigious organization like the National Institutes of Health, and that the beneficiary was recruited for the position from a top-level role in Korea, this constituted evidence that the fellowship is nationally recognized as an award for excellence. This argument presupposes that any recognition by a renowned organization is, or should be, a nationally or internationally recognized award for excellence. However, the petitioner must establish first that the fellowship is an award, and second that the award is one of national or international significance based on its recognition of such by those in the field of endeavor.

The petitioner also alleges that the beneficiary meets this criterion based on his receipt of a grant by the Ministry of Science and Technology. The petitioner, however, submitted no documentary evidence to

¹ The petitioner does not claim to meet, or submit evidence relating to, the criteria not discussed in this decision.

corroborate the beneficiary's receipt of this grant and submitted no evidence to establish that this award is a national or international award for excellence in medicine. *Id.* Further, it is noted that research grants simply fund a scientist's work. The past achievements of the principal investigator are factors 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.

The petitioner has not established that the beneficiary meets this criterion.

Documentation of the alien's membership in associations in the field for which the 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 two, the petitioner submitted evidence that the beneficiary is a member of the Infectious Diseases Society of America (IDSA) and the American Society for Microbiology. A review of the membership requirements of these organizations that was submitted by the petitioner indicates that membership is open to anyone who meets certain educational achievements, and is not limited to those who have made outstanding achievements in the field. The petitioner also stated that the beneficiary is a member of the Korean Medical Association, the Korean Pediatric Society and the Korean Society of Neonatology. However, the petitioner submitted no corroborative evidence that the beneficiary is a member of these organizations or that membership in the organizations is limited to those of outstanding achievements in the field of medical science.

On appeal, counsel concurs that membership in these organizations does not satisfy this criterion, but argues that the beneficiary's membership should be reviewed "in context of [his] overall standing in his field." Counsel further states:

It is evident that by holding *five, high level, international memberships* [the beneficiary] is heavily involved in a range of activities in this field of research, and when this is reviewed in conjunction with the additional documentation helps show his stature in this field. Fulfillment of the various categories pertaining to extraordinary ability should be reviewed with respect to the overall picture." [Emphasis in original.]

The eight regulatory criteria at 8 C.F.R. § 214.2(0)(3)(iii) reflect the statutory demand for "extensive documentation" in section 101(a)(15)(O)(i) of the Act and list the minimum documentary requirements necessarily to establish that the beneficiary has sustained national or international acclaim in his field of endeavor. The documentation submitted in support of each criterion must stand alone as an indication of the beneficiary's acclaim in the field.

The evidence does not establish that the beneficiary meets this criterion.

Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field.

For criterion five, the petitioner asserts that the beneficiary "has made significant and groundbreaking findings in his area of research." As evidence, the petitioner submitted letters from several individuals attesting to the beneficiary's skills and abilities. Although the authors of the letters indicate that the beneficiary satisfies this criterion, none provide any specifics of how the beneficiary's contributions are of a major significance to medical

science. Doctor [REDACTED] chief of the pediatric oncology branch at the National Cancer Institute, speaking of the beneficiary's research on *Candida albicans*, stated in a letter dated August 4, 2004:

[The beneficiary] joined Dr. [REDACTED] laboratory to study the changes in the expression of gene coding for the innate host defense proteins when human monocytes are infected with a specific fungus named *Candida albicans*. [He] utilized DNA microarray and bioinformatics to assess the global changes in gene expression. This approach is unique and novel because it allows one to examine a large set of genes that are altered when human monocytes are infected with *Candida albicans*. To date, only limited information has been available as to which genes are affected after the infection because of the limitation in the assay systems. I have attended [the beneficiary's] presentation a number of times, and have no doubt that his results have significantly impacted the field.

Dr. [REDACTED] writes that the beneficiary's work in this area "for the first time, identified comprehensively the genes that are altered in the host in response to infection by *Candida albican*. This work is extremely important in elucidating the changes in gene expressions that would appropriately exert the immune reaction to a pathogen." While Dr. [REDACTED] stated that the beneficiary's work is "extremely important," he does not state how this work represents a contribution of major significance to medicine. Dr. [REDACTED] indicated that the beneficiary's work has potential for contributing significantly to medicine, stating that he has "no doubt that the results that [the beneficiary] has generated will significantly advance our understanding in immune responses during infection." 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).

Dr. [REDACTED] the chief of experimental immunology branch at the National Cancer Institute, also wrote of this research by the beneficiary, but did not indicate in his letter of July 14, 2004, that the research results were of major significance. On appeal, the petitioner submits letters from others in the field of cancer research.

Dr. [REDACTED], an associate professor of pediatrics with the petitioning organization, states in a letter of September 24, 2004:

In Korea, sepsis was the most common cause of death among the prematurely born infants. [The beneficiary's] focus was on how to reduce infection in neonates and improve the survival rate of neonates . . . [He] investigated possible causes of infection by comparing neonatal sepsis between preterm and full term infants and his work greatly increased the survival rate at the NICU. These methodologies have direct applicability to helping us deal with our own issues with infection.

Dr. [REDACTED] dean of the Gachon Medical College and Director of Pediatrics, states in a letter dated September 12, 2004, stated that the beneficiary is "one of the top neonatologists" in Korea. Dr. [REDACTED] further states:

[The beneficiary's] constant interests in improving treatments for the neonatal infection which is the leading cause of death among the prematurely born infants have lead [sic] to numerous critical publications. [He] hypothesized that surfactants which was [sic] mainly used to treat the respiratory distress syndrome in neonates could also counteract the non-specific inflammation caused by various lung diseases. Based on his hypothesis he applied surfactant treatments to other respiratory diseases in neonates and showed that surfactant treatments could be effective therapy for lung diseases beyond just the respiratory distress syndrome in

neonates. [H]is hypothesis was later confirmed by other reports . . . [H]is theory . . . has helped to improve the health of neonates. [The beneficiary] is also a pioneer in hepatitis disease in neonates . . . [The beneficiary] and colleagues developed a novel monoclonal antibody termed ASSA-1 that could react [sic] with hepatitis virus in mothers and infants to screen for those requiring preventive treatments . . . [The beneficiary's] expertise and contribution in this area was invaluable in preventing neonates from acquiring hepatitis virus.

Again, while the authors speak of the importance of the beneficiary's research, these testimonials fail to demonstrate specifically how the beneficiary's research has significantly impacted his field.

The petitioner also submitted evidence of the beneficiary's published work. However, the petitioner has not submitted evidence that the beneficiary's publications are considered to be 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. 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.

The petitioner stated that the beneficiary has published 24 articles with an additional one accepted for publication. The petitioner submitted evidence that the beneficiary's work has been published in the *Journal of Viral Hepatitis*, *Transplantation Proceedings*, the *Medical Journal of the Red Cross Hospital*, *Journal of the Korean Pediatric Society*, the *Korean Journal of Anatomy* and the *INJE Medical Journal*. The petitioner also submitted evidence that the beneficiary has presented abstracts of his work at international conferences.

In the scientific research community, publication of one's work is expected, even among researchers who are still in an academic training environment. Publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles.

No citation history of the beneficiary's articles has been submitted. Published articles by the beneficiary that have been cited by others would more meaningfully establish that the beneficiary enjoys a measure of influence through his publications. The petitioner has not demonstrated that the beneficiary's work has had a major impact on his field of endeavor. The evidence is insufficient to establish that the beneficiary satisfies 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 meets this criterion; however, the AAO does not concur with this determination. This portion of the director's decision shall be withdrawn.

Counsel asserts that the beneficiary meets this criterion based on his position as Chief of Neonatal Intensive Care Unit, Department of Pediatrics Gachon Medical College and Chief of Neonatal Intensive Care Unit of the Department of Pediatrics at Seoul Red Cross Hospital. As evidence, the petitioner relied upon the beneficiary's curriculum vitae. The petitioner submitted no corroborating evidence from these institutions that the beneficiary was employed in the stated capacity or that the positions were of a critical or essential nature to these medical

institutions. Additionally, the petitioner submitted no evidence that the Gachon Medical College or the Seoul Red Cross Hospital have distinguished reputations. *See Matter of Soffici*, 22 I&N Dec. at 165.

Counsel also states that the beneficiary meets this criterion based on his fellowships at the National Cancer Institute of the National Institutes of Health and with the petitioning organization. As evidence, counsel cites to the August 4, 2004 letter by Dr. [REDACTED] the senior investigator and chief of the Immunocompromised Host Section, Pediatric Oncology Branch of the National Cancer Institute, who stated that the beneficiary's work has been "highly acclaimed as providing critical information in the understanding of host defense against invasive candidiasis." However, Dr. [REDACTED] does not state that the beneficiary served in a critical capacity for the National Cancer Institute. The petitioner submitted no evidence that the fellowship with the petitioning organization is in a critical or essential capacity for the petitioner. While employment with such institutions is evidence of a degree of recognition, fellowship positions, without more, are not considered employment in a critical or essential capacity as would, for example, a department head or lead researcher on major projects.

The petitioner has not established that the beneficiary meets 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.

While the petitioner did not initially claim that the beneficiary met this criterion, the acting director determined that the evidence did not establish that the criterion had been met. As counsel addressed this finding on appeal, we will also address it in our decision.

The petitioner stated that it would pay the beneficiary an annual salary of \$42,156. In her decision, the acting director stated that the proffered salary "is well below the average pediatrician's salary and does not compare to other salaries earned by the top pediatricians in the field." The director did not reference the evidence upon which she relied to make her determination.

On appeal, counsel states that the beneficiary will be performing clinical research and that his salary should not be compared with those of a pediatrician. The petitioner submitted a copy of an excerpt from the U.S. Department of Labor's *Occupational Outlook Handbook*, which indicates that, in 2002, the median annual earnings of medical scientists, excluding epidemiologists, were \$56,980, with the middle percent earning between \$40,180 and \$82,720. Counsel states that the "proffered salary fits squarely in the general terms of this field."

Nonetheless, to establish that the beneficiary meets this criterion, the petitioner must establish that the beneficiary's salary is high in relation to others in the field. The evidence indicates that the beneficiary's earnings will be less than that of over half of those in the medical science field, and does not approach the \$114,640 paid to the top 10% in his field.

The beneficiary does not meet this criterion.

Beyond the decision of the director, we note that the petitioner has not submitted the mandatory consultation required by the regulation at 8 C.F.R. § 214.2(o)(5)(i)(A), which states, in pertinent part:

Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for O-1 or O-2 classification can be approved.

The record contains no documentation indicating that the petitioner obtained a consultation in accordance with the above regulation. The petitioner, instead, submitted an advisory opinion from one of its own professors. This letter from the petitioner does not meet the intent and purpose of the regulation and without the required consultation, the nonimmigrant visa petition cannot be approved. This deficiency constitutes an additional ground for denial of the petition.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.