



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 99 116 50829 Office: Vermont Service Center Date:

NOV 8 2000

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

Public Copy

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

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DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a developer of [REDACTED] methods for [REDACTED] which seeks to employ the beneficiary as a senior scientist. It seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability in the sciences. The director determined the petitioner had not established that the beneficiary has earned sustained national or international acclaim.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Service regulation at 8 C.F.R. 204.5(h)(3). These criteria will be addressed below. It should be reiterated, however, that the petitioner must show that the beneficiary has sustained national or international acclaim at the very top level.

This petition, filed on February 25, 1999, seeks to classify the petitioner as an alien with extraordinary ability in the sciences. The regulation at 8 C.F.R. 204.5(h)(3) outlines ten criteria, at least three of which must be satisfied for an alien to establish

sustained national or international acclaim. The petitioner has submitted evidence which, counsel claims, meets seven of the criteria.

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

The beneficiary was the first-named author of a paper that received the [REDACTED] in [REDACTED] from the American Pharmaceutical Association ("APhA"). APhA documentation describes the prize:

The Ebert Prize . . . was established in 1873. It recognizes the author(s) of the best report of original investigation of a medicinal substance published in the APhA/American Chemical Society *Journal of Pharmaceutical Sciences* in the past year.

According to an APhA news release, "the Ebert Prize is the oldest pharmacy award in the United States." The record does not indicate what prestige the Ebert Prize holds outside of the APhA. Furthermore, the prize appears to be somewhat limited because consideration is limited to that handful of researchers who had published articles in one journal during one year. A researcher who is responsible for an undeniably major breakthrough in pharmaceuticals, but who chooses to publish her research in a different journal, is ineligible for this prize.

Harvard Medical School's Harvard Health Letter listed one of the beneficiary's projects as one of the "Top Ten Medical Advances of [REDACTED]" There is no evidence that any actual award accompanied the publication of the list. This ranking is not an award in its own right, but rather published material about the alien's work, which falls under a separate criterion further below.

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.

Counsel asserts that the beneficiary's membership in Sigma Xi, "the Scientific Research Society of North America," fulfills this criterion, because "[m]embership in Sigma Xi is by invitation only, and full membership is conferred upon those individuals who have demonstrated noteworthy achievements in scientific and engineering research."

The record, however, shows that the beneficiary was elected not by a national or international panel, but by his college's chapter of the society. Full membership in Sigma Xi requires "noteworthy achievement," which society documents define as "publication,

patents, written reports or a thesis or dissertation." Sigma Xi documents in the record state the society's size as "nearly 90,000" members. An organization of this size plainly does not restrict its membership to the very top of the field.

Counsel cites "an extensive list of Sigma Xi members who have won the Nobel Prize." It does not follow, however, that Sigma Xi's members, in general, are of Nobel Prize caliber, or that membership increases one's chance of winning the prize.

While membership in Sigma Xi is certainly an honor accorded to only a minority of scientists, we cannot find that its requirements are sufficiently restrictive to meet the plain wording of this criterion.

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

As noted above, the Harvard Health Letter listed the "Top Ten Medical Advances of [redacted]" with the beneficiary's [redacted] project ranked at [redacted]. While the article refers to "[redacted] researchers at the [redacted]", the beneficiary's name does not appear in the article. Similarly, articles in the Wall Street Journal, USA Today and BusinessWeek mention the project but not the beneficiary. Thus, his recognition would not have appreciably increased as a result of these articles. The regulation requires published material "about the alien."

The beneficiary's name [redacted] in conjunction with his work with [redacted] appears in varying degrees of prominence in articles in New Scientist, the New York Times, Science News, Chemical & Engineering News, the International Herald Tribune, and lesser publications. The bulk of these articles, however, devote far more attention to Dr. [redacted] than to the beneficiary. A German-language article in Der Spiegel features the beneficiary's photograph but not his name; the photograph is captioned simply "ultraschallspritze." A Wall Street Journal article does not mention the petitioner, but states that [redacted] . . . led the [redacted] team." Thus, taken together, these articles indicate that the petitioner was a lesser participant in [redacted] project, rather than the chief instigator or innovator in that project.

The petitioner has not demonstrated that the beneficiary has been the subject of sustained media attention, which would contribute to sustained acclaim; rather, the beneficiary was involved largely in a burst of media attention which accompanied the [redacted] announcement

of the [REDACTED] project. Even then, [REDACTED] and not the beneficiary was clearly the focus of this media attention.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The beneficiary has reviewed two manuscripts of journal articles. Most persuasive in this criterion is a letter from Dr. [REDACTED] of [REDACTED] editor-in-chief of the [REDACTED] inviting the beneficiary to review a chapter of that book because the beneficiary is "the most qualified authority on this aspect of [REDACTED]" This last request carries somewhat greater weight because Dr. [REDACTED] specifies how she came to select the beneficiary to perform the review; it did not result from random selection or some other process less indicative of acclaim or recognition.

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

Counsel submits evidence that the beneficiary has secured patents for his innovations. Patents demonstrate originality but not necessarily significance; an alien does not satisfy this criterion simply by holding one or more patents.

To establish the significance of the beneficiary's work, the petitioner has submitted 19 letters, examples of which are considered here. Professor [REDACTED] of [REDACTED] states:

[The beneficiary] published a paper along with myself and others describing the mechanism of [REDACTED] a discovery that has led to dramatic improvements in the efficiency of [REDACTED]

[The beneficiary] has continued to make outstanding contributions to the field of [REDACTED] and diagnostics.

Professor [REDACTED] also of [REDACTED] states that the beneficiary's "discovery that cavitation is the primary mechanism for [REDACTED] . . . opened the way for the fascinating possibility of delivering proteins like insulin [REDACTED] to humans, rather than by using [REDACTED]"

The witnesses are, at present, affiliated with institutions across the United States, and some in other nations. A significant number of these witnesses, however, were students or researchers at [REDACTED]

while the beneficiary was also at that institution, or studied under the beneficiary's mentor, Prof. [REDACTED]. One witness, [REDACTED] submits a letter on [REDACTED] letterhead, not mentioning that he is also a co-founder, chairman, and CEO of the petitioning entity. While [REDACTED] is a highly prestigious institution, the beneficiary is not nationally acclaimed if his reputation is largely limited to those who crossed his path at [REDACTED].

The chief contribution with which the beneficiary has been associated is the [REDACTED] technique. The available evidence does not credit the beneficiary with inventing the technique, or devising the underlying concept. Rather, the beneficiary's chief contribution to the project appears to have been his explanation of how the process works [REDACTED].

[REDACTED]. The clinical significance of the [REDACTED] project is not yet clear, because after several years of research the technique is still in an experimental stage. Because the beneficiary has contributed to research on a medical device, the obvious place to look for evidence of significance is in the practice of medicine. There is no evidence that the device is widely used in medical facilities, or even that it has been approved for such use. The record shows only that the petitioning company is gathering venture capital for the eventual future introduction of related products into the marketplace.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The beneficiary satisfies this criterion. He is the author or co-author (often the first-named author) of two book chapters and several journal articles. Counsel also includes the beneficiary's doctoral thesis in the list of publications, but there is no evidence that the thesis has been published. Among the other pieces, however, is an article in Science, which is one of the top scientific journals in the world. The beneficiary is the first-credited author of this [REDACTED] piece. Other articles also appeared in major, recognized journals. The petitioner has shown that the work reported in several of these articles has attracted significant attention.

Counsel notes that, in addition to his senior scientist position at the petitioning company, the beneficiary has been offered faculty positions at the University [REDACTED] the University [REDACTED]; and [REDACTED] College [REDACTED].

¹Service records indicate that the beneficiary now resides in the vicinity of [REDACTED] suggesting that he ultimately accepted the University [REDACTED] offer. The beneficiary's

The director instructed the petitioner to submit further evidence to demonstrate that the beneficiary has attained sustained national or international acclaim. The director noted that simply listing the beneficiary's achievements does not demonstrate such acclaim. The director also noted the absence of evidence that the beneficiary has commanded a high salary in his field.

In response, counsel dissects the regulatory language at length, phrase by phrase, and contends that the petitioner has satisfied seven of the regulatory criteria. Counsel asserts (correctly) that evidence of remuneration is not required to establish sustained acclaim. High remuneration is one optional criterion, but an alien can demonstrate eligibility without showing high remuneration.

The petitioner submits evidence showing 92 citations of articles co-written by the beneficiary. This evidence strengthens the claim regarding the beneficiary's published work, showing that such work has had influence or impact in the field.

The petitioner submits a copy of an electronic mail message, dated [REDACTED] showing that the beneficiary has "been selected as one of the [REDACTED] the hundred young innovators to be profiled in a special [REDACTED] issue" of [REDACTED]. This selection appears to have taken place well after the petition's February 1999 filing. See Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Furthermore, [REDACTED] is published by [REDACTED] and therefore the beneficiary's selection by this publication is consistent with the beneficiary's acclaim being largely limited to individuals and institutions affiliated with [REDACTED]. The panel of judges selecting the [REDACTED] was certainly diverse and impressive, including a number of Nobel laureates. Also on the panel was Dr. [REDACTED] the beneficiary's direct supervisor during the ultrasound drug delivery project.

The petitioner has also submitted evidence of further articles submitted for publication by the beneficiary and his collaborators. As above, this evidence did not exist as of the petition's filing date, and circumstances which arise after the filing date cannot retroactively establish eligibility.

relocation to a site thousands of miles from the petitioning company certainly suggests the termination of any previous employment relationship, and raises the question of whether the beneficiary will, in fact, continue performing research in the area of [REDACTED]

The director denied the petition, stating that the petitioner has not established that the beneficiary has reached the top level of recognition in his field. The director found assertions of widespread benefit arising from the beneficiary's work to be "speculative."

The petitioner submits no evidence on appeal, relying instead on a brief from counsel. Counsel argues that the director has imposed new requirements beyond those included in the regulations, and that the director's decision relies primarily on "sixteen (16) conclusory 'boilerplate' paragraphs devoid of substantive comment or analysis."

Counsel cites the director's finding that the benefits arising from the beneficiary's work are "speculative." Counsel deems this finding "incredibly obtuse and self-serving," and states that the beneficiary's work would affect millions of [REDACTED] in the United States who must regularly [REDACTED]

Counsel has not overcome the finding that such benefit is "speculative." Most of the press coverage of the [REDACTED] is from [REDACTED]. The petitioner filed the appeal [REDACTED] years later, but there is no evidence that the method has been widely implemented, or that it has even been approved for such implementation. The press coverage of the invention speaks only of its potential. Until that potential is realized, then the benefits are necessarily speculative in that they rely not on existing evidence, but on projections of what may occur in the future. Even documentation from as late as November [REDACTED] indicates only what could arise, rather than what has arisen, from the beneficiary's work. The petitioning company (which the beneficiary co-founded) has not produced or marketed any finished project; it is still raising capital for some future commercial venture. The petition is based on the beneficiary's involvement in developing a medical device which, to date, has not yet been made available for medical use. The assertion that it will one day become available is, itself, speculative.

Counsel cites "the Beneficiary's selection as one of the [REDACTED] individuals in the world most likely to influence technology in the 21st Century. The recipients were chosen by a panel of 24 judges, among them 4 Nobel Laureates" and other prestigious figures (emphasis in original). As noted above, the [REDACTED] is disproportionately represented on this panel, which includes the beneficiary's mentor, Prof. [REDACTED]. Comparison of the beneficiary's accomplishments and credentials with those of the panel members makes it eminently clear that the panelists themselves are far closer to the top of the field than the beneficiary. Certainly, the panelists do not declare that the

beneficiary has reached their own level of accomplishment and recognition.

Furthermore, this extremely restrictive visa classification is not for individuals who are "likely to influence technology in the 21st century," but rather who have already influenced their field in some way and thereby attained widespread recognition. The very use of the term "likely" here raises, once again, the issue of speculation, in terms not of the beneficiary's benefit to the United States, but rather of his very impact or influence on the field itself. The petitioner has not demonstrated that the beneficiary is primarily responsible for any existing advance in practical medical technology, but only that his work is likely to lead to such advances in the future.

Counsel contends that the petitioner has satisfied more than enough regulatory criteria and that the director has no discretion to deny the petition. The above review of the evidence, however, calls into question the basic issue of how many criteria the petitioner has in fact satisfied. The Service is certainly not bound to abide by counsel's opinion of whether the available evidence satisfies a particular criterion. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaiqbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel accuses the director of abuse of discretion, specifically by not sufficiently explaining the grounds for denial of the petition. While the notice of decision is not as flawless and precise as it could have been, at the same time the director is subject to numerous constraints and cannot devote unlimited time to each decision without generating a substantial backlog. Given these unalterable realities, the director is not always able to analyze a record document-by-document, particularly in cases where the sheer volume of evidence presented would require hours to catalog in detail. The director must, to an extent, deal in generalities provided those generalities are applicable to the case at hand.

The director, in this case, has inserted some inapplicable language, such as references to the national interest which are more appropriate in dealing with another visa classification altogether. The director was correct, however, in finding that the totality of the evidence presented does not demonstrate that the beneficiary is among the best known or most highly acclaimed figures in his field. The record shows that the beneficiary is an accomplished researcher who has won the respect of his mentors at [redacted] (no mean feat, given [redacted] prestigious reputation) and whose services are in demand at various research institutions. We cannot find, however, that the beneficiary stands at the top of his field, unless we define his "field" so narrowly as to exclude all but a

handful of researchers; for instance, by defining his field as "research into [REDACTED] methods for [REDACTED]

The backgrounds of the 24 judges on the [REDACTED] panel, cited by counsel, demonstrate the heights of achievement to which one can rise in the sciences, heights which this beneficiary has not attained. The confident prediction that he will one day reach such a level may well be borne out by future events, in which case a future petition may be approvable, but "potential" and actual achievement are two different things and it is disingenuous to claim that "speculation" has played no part in this petition.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim, is one of the small percentage who has risen to the very top of the field of endeavor, and that the alien's entry into the United States will substantially benefit prospectively the United States.

Review of the record, however, does not establish that the beneficiary has distinguished himself as a scientist to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the beneficiary shows talent in his specialty, and has won some degree of recognition, but is not persuasive that the beneficiary's achievements set him significantly above others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.