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U.S. Citizenship and Immigration Services

PUBLIC COPY

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MAR 29 2004

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Mari Johnson

For Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant 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 classification 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 the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

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 regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a research scientist. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability.

The petitioner is a researcher in andrology, described as the "branch of medicine concerned with diseases that result in male infertility and sexual dysfunction." We note that in the subject line of his letter accompanying the petition, counsel indicates that the petitioner was seeking a visa preference classification "in the national interest." However, the petitioner did not request a national interest waiver. The director's decision does not

address a national interest claim by the petitioner, and counsel did not address the issue further. Therefore, the issue will not be addressed on appeal.

The petitioner, through counsel, has submitted evidence that he claims meets the following criteria. It is noted that counsel indicated on the Form I-290B, Notice of Appeal to the Administrative Appeals Unit, that he would be submitting a brief and/or evidence to the AAO within 30 days. As of the date of this decision, more than four months later, the AAO has not received a brief or other evidence from counsel in support of this appeal.

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

The petitioner claims to meet this criterion based upon his receipt of the equivalent of over $300,000 in research grants. As evidence, the petitioner submitted an English summary of the supporting documents with a confirmation by the translator that the documents "attest[ed] to the fact that [the petitioner] has been awarded the aforementioned grants." We note that the translation is not in compliance with the provisions of 8 C.F.R. § 103.2(b)(3), which require that the documents be accompanied by a full translation with the translator's certification that the documents are complete and accurate.

The summaries provided by counsel show that the petitioner received a grant from the P.R. Kempkes Foundation in September 1998 and in September 2002. The petitioner also received grants from the German Research Foundation in April 1999 and September 2002, and a research fellowship from the German Research Foundation in April 1998.

Grants and fellowships are not awards within the meaning of this criterion. Research grants simply fund a scientist's work. The past achievements of the principal investigator are factors in grant proposals, as 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. Additionally, a research fellowship is financial support for ongoing research. Fellowship grants are generally given to support future research rather than to recognize prior achievements. The receipt of a research fellowship does not place the petitioner at the pinnacle of his field.

Counsel also submits evidence that the petitioner won third prize in a poster competition during a 2002 joint conference on reproduction physiology and pathology and veterinary-human medicine. He also won a monetary prize for a poster presentation at a 1997 conference of the German Dermatologic Society. Although counsel states that the competition was open to anyone, he submits no evidence regarding the selection criteria for the prizes. Counsel also submits no evidence that these awards are nationally or internationally recognized awards for excellence. The record does not establish that the petitioner meets 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.

To demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or work 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. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

The petitioner submits evidence that he is a member of the Society for the Study of Reproduction. Membership in the organization is "limited to individuals or organizations who demonstrate active interest in the field of reproduction and related areas." Regular membership in the organization is based on "scientific productivity and continuing interest in the field," possession of a doctoral degree or demonstration of its equivalent through scientific accomplishments, and a specific history of publication within the previous six year period. The guidelines allow the membership committee to waive the publication requirement if the individual serves in an administrative capacity that is of "great relevance to the area of reproductive research." The above guidelines make it clear that outstanding achievement is not a prerequisite for membership in the Society for the Study of Reproduction.

The petitioner also claims to meet this criterion based on his membership in the Anatomical Society. Counsel submitted a letter from Dr. Wolfgang Kühnel who states that membership in the society requires documentation of outstanding achievements in anatomical science as a prerequisite for joining. In his request for evidence (RFE) dated June 9, 2003, the director noted that the petitioner became a member of this society while he was still in school, and there is no evidence of his outstanding achievements that resulted in his selection for membership to the society. Counsel did not further address this organization in his response to the RFE, and we find that the evidence does not establish that membership in the organization is based on outstanding achievements.

The record does not establish that the petitioner meets this criterion.

> *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.*

As evidence that he meets this criterion, the petitioner submitted a letter from Dr. Martin Bergmann, one of the co-editors-in-chief of *Andrologia*, a journal of andrology. Dr. Bergmann states that the petitioner evaluated manuscripts for the journal from 1996 through 2002. In a separate letter, Dr. Bergmann states that the petitioner's selection to review manuscripts for *Andrologia* was based on his numerous published articles and the multiple research grants he had received. These two criteria, according to Dr. Bergmann, established the petitioner's reputation for scientific knowledge. Dr. Bergmann provides no details as to how often the petitioner participated in the peer-review process. The statute requires that a petitioner must prove eligibility for visa preference classification as an alien of extraordinary ability with extensive documentation. A simple statement that the petitioner reviewed manuscripts prior to publication does not provide the qualitative or quantitative evidence necessary to establish that the petitioner meets this criterion.

The petitioner also submitted two lists with the petitioner listed as one of the ad hoc reviewers for the journal *Biology of Reproduction* for a period of several months in 2000 and 2001. A letter from the editor-in-chief of the journal states that the petitioner was chosen to review articles for the journal because of his expertise in the field. The evidence presented, however, suffers from the same lack of detail as the evidence presented from Dr. Bergmann. Citing *Buletini v INS*, 860 F. Supp. 1222 (E. D. Mich. 1994), counsel asserts that the director applied an inappropriate and higher standard to this criterion than that required by regulation and caselaw. In *Buletini*, the court stated that the director abused his discretion in requiring the alien to demonstrate that his participation as a judge of the work of others required or involved extraordinary ability.

the frequency and the regularity of invitations to perform peer review. Occasional participation in the peer review process does not substantiate that the petitioner has earned such sustained national or international acclaim that his opinions and insight are regularly sought as a valued element of that process.

Counsel asserts that the petitioner's role as an assistant professor and senior research fellow, and other teaching responsibilities at the Philipps-University of Marburg, are evidence that he meets this criterion. The director determined that "judging" his students work is an inherent part of the petitioner's teaching responsibilities, and simply doing one's job does not evidence national or international acclaim. In response to the RFE, counsel stated that in his role as senior research fellow, the petitioner was also responsible for reviewing the work of other research fellows. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel provides no corroborative evidence of the petitioner's job responsibilities as a senior research fellow.

The director determined that the petitioner had met this criterion; however, the evidence does not support the director's conclusions and we withdraw his determination.

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

The petitioner claims to meet this criterion based on his "groundbreaking research" in the field of andrology, primarily through his development of a research methodology that allows him to study a single living sperm cell. Dr. Gerhard Aumüller, a professor in the Department of Anatomy and Cell Biology at the Philipps-University of Marburg, Germany, with whom the petitioner works as a senior research fellow, also served as the petitioner's thesis advisor. He states that the petitioner's research in physiology and cell biology of single spermatozoa rank him among the "most innovative young scientists in the field of reproductive biology." Dr. Aumüller writes:

> [The petitioner] invented a methodology known as "single sperm cell photometry" that allows the isolation of single cell spermatozoa in order to measure reactions to pharmacological protocols . . . This methodology for studying spermatozoa is a radical departure from the traditional methods in that it allows the researcher to isolate single living spermatozoa . . . [and] maintains the viability of individual sperm cells . . . [The petitioner] fixed a single sperm cell to a glass slide using a special preparation. To be able to fix and hold a single living sperm cell in one place while maintaining viability was truly ground breaking. This is important because in the scientific world, any theories or conclusions must be repeatable in order to have scientific credence. In the study of single cell spermatozoa, this requires that protocols can be applied, measured, and reversed before the cell dies.
>
> Prior to [the petitioner's] methodology, traditional research methods were limited to analysis of a reaction by a batch of spermatozoa as a whole, not individually. This methodology is known as a "cuvette experiment." Cuvette experiments are limited analytical tools. Cuvette experiments do no yield a "pure" sample because of contamination with other cells. Simply put, a scientist cannot eliminate all other types of cells, thus harming an experiment's control factors. By using [the petitioner's] single sperm cell

> Prior to [the petitioner's] methodology, traditional research methods were limited to analysis of a reaction by a batch of spermatozoa as a whole, not individually. This methodology is known as a "cuvette experiment." Cuvette experiments are limited analytical tools. Cuvette experiments do no yield a "pure" sample because of contamination with other cells. Simply put, a scientist cannot eliminate all other types of cells, thus harming an experiment's control factors. By using [the petitioner's] single sperm cell photometry, research scientists can select only pure, normal, motile, and viable sperm for experimentation. This innovation allows for reproducible results with scientifically significant data in fewer experiments. Contamination and misleading results due to abnormal spermatozoa are eliminated completely. Before single cell photometry, all findings had a percentage of uncertainty due to contaminations with other cells or abnormal sperm cells.
>
> Research using cuvette experiments has been the norm for years and it has not lead [sic] to the discovery of a cure for male infertility and or the development of a male birth control pill. Using [the petitioner's] single cell photometry methodology, scientists can make greater discoveries in less time and with fewer experiments which in the end will impact how quickly a cure for male infertility can be discovered.

Dr. Bertil Hille, professor of physiology and biophysics at the University of Washington, in whose laboratory the petitioner worked on and off for a period of four years and with whom he published several scientific papers, writes in a similar vein: the petitioner's research "has been fine enough to follow the signaling events in single spermatozoa on a second-by-second basis, revealing a rich opening for medically important research . . . he has greatly advanced the leads available for research in male disorders of fertility and in regulation of fertility."

In the second of two letters submitted on behalf of the petitioner, Dr. Gregory S. Kopf, an Assistant Vice President, Women's Health Research Institute, Contraception at Wyeth Research and an Adjunct Professor of Obstetrics and Gynecology at the University of Pennsylvania, states:

> [The petitioner] innovated "single sperm cell photometry," a significant new tool used by scientists to analyze and experimentally manipulate individual sperm. The buffer system that [the petitioner] utilizes in this technique essentially slows spermatozoa activity to the point where individual cells can be studied while maintaining viability; this had been a limitation in the field. Prior to this revolutionary development, researchers were forced to extrapolate results from tests performed either on groups of sperm or on spermatogenic cells, thus lowering the reliability and reproducibility of the data. Single Sperm Cell Photometry is now employed by other researchers all over the world.

Dr. Tracy Rankin, Program Director of the Male Reproductive Sciences Branch of the National Institute of Child Health and Human Development, writes that the petitioner's article that appears in the July 2000 *Journal of Biological Chemistry* describes two important developments that have a "significant impact on the field."

> The first development relates to the methodology developed by [the petitioner] known as "Single Sperm Cell Photometry." This new methodology allowed [the petitioner] to

Although the authors speak of the significance of the petitioner's methodology in the field, no corroborative evidence appears in the record. The petitioner's manuscript in which he publishes his methodology has, by the evidence presented by counsel, been cited only 12 times as of the date of filing the petition.[1] In response to the director's concerns, counsel submits letters of support from two of the independent researchers who cited the petitioner's work.

Dr. Susan Stevens Suarez, a professor of physiology at Cornell University, writes that she became aware of the petitioner and his work while doing research on animal reproduction. She states she cited to the petitioner's work in her own publication because of the discoveries made and the unique methodology developed by the petitioner. Dr. Suarez does not state that she has relied upon the methodology in her own research, but references its use by another researcher, Dr. Yu Sakata. Dr Suarez indicates that Dr. Sakata stated in his published work that he used the petitioner's methodology.

Dr. Alberto Darszon, a professor in the Department of Genetics of Development and Molecular Physiology Institute of Biotechnology at the Universidad Nacional Autonoma de Mexico, Cuernavaca, Mexico, states that his current research focuses on the role of ion fluxes in sperm physiology. He is aware of the petitioner through his published works. He states that he relied on the petitioner's work because "it has provided evidence for the presence and localization of specific ion channels that are relevant to important functions of sperm that we are studying such as capacitation and the acrosome reaction." He does not state that he used or uses the petitioner's methodology, but also cites its use by Dr. Sakata.

The evidence indicates that the petitioner's research has achieved some recognition as noteworthy. The evidence falls short of establishing, however, that the petitioner's methodology has been widely adapted or applied, or that it has been ground breaking as claimed.

The authors of the petitioner's letters of support and recommendation also state that his finding a fundamental difference in the structure of sperm and spermatogenic cells constituted a finding of major significance to the field. According to Dr. Aumüller:

> Even more remarkably, [the petitioner's] findings demonstrated a difference in the fundamental structure of sperm and spermatogenic cells. Many scientific findings were flawed based upon the assumption that both types of cell were physiologically and structurally the same. However, spermatogenic cells are the non-motile cells that give rise to and are uniquely different from sperm cells. This revelation was only made possible because of [the petitioner's] work with both spermatogenic and motile sperm cells. [His] discovery created an entirely new area of research.

Dr. Rankin also writes:

> Using this novel methodology, [the petitioner] discovered that spermatozoa and spermatogenic cells are fundamentally different. This discovery disproved the longstanding belief that such cells were fundamentally similar. This has brought into question some

[1] In response to the director's request for evidence (RFE) dated June 9, 2003, the petitioner submitted evidence that the article had been cited an additional six times. However, 18 citations to an article that is claimed to report a groundbreaking research is not evidence that the research was of major significance to the field.

Dr. Rankin also writes:

> Using this novel methodology, [the petitioner] discovered that spermatozoa and spermatogenic cells are fundamentally different. This discovery disproved the longstanding belief that such cells were fundamentally similar. This has brought into question some previously held assumptions about the nature and class of spermatogenic calcium channels. Now that these channels have been described in mature sperm, it is possible to consider novel agents for either contraceptive development or infertility.

Dr. Kopf writes of the petitioner's calcium studies:

> In another astonishing breakthrough, [the petitioner] shed light on the cellular clearance mechanisms by which sperm regulate calcium concentrations . . . [He] discovered that ATPase activity and mitochondria play critical roles in this clearance mechanism. This latest discovery alters the standing tenets of sperm function with regard to clearance mechanisms. This finding is the gateway to a new body [of] research in how calcium regulates sperm function.

Again, although the authors speak of the impact of the petitioner's research on long held beliefs in the andrology community and the subsequent new field of research his findings generate, no other evidence in the record substantiates these opinions. While not without weight, the opinions of experts in the field cannot form the cornerstone of a successful claim. As with all opinion evidence, expert opinions must be supported by objective verifiable evidence.

In his response to the RFE, counsel asserts that the "Service's 'preference' for verifiable, documentary evidence is met where qualified disinterested third parties offer their candid opinion" of the petitioner. He states that to "discount" such evidence because it is a "'subjective opinion' harms the reputations of those who have offered their opinions." Counsel asserts that even the Nobel Prize is awarded based on the opinions of experts who make their recommendations. Nonetheless, although expert opinions are necessary to aid the adjudicator or any fact finder in understanding and evaluating the evidence that is presented, they are not as reliable as other objective evidence such as citation history, contemporaneous media coverage of major scientific contributions, published material about the author or his work, or other indicia measuring the impact of one's work on the field. The statute requires extensive documentation. A researcher of extraordinary ability should be able to produce unsolicited material in support of his claim. The petitioner has failed to establish that his work is a contribution of major significance to the field.

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

The petitioner submits a list of 15 published articles and 24 abstracts that he has co-authored, his contribution of chapters in two books and a book of which he is the author, and a list of 29 other publications. He submits corroborating evidence of ten of the published articles and one accepted for publication, his co-authorship of

three chapters in two books[2], and a copy of the book he authored. The articles appear in publications of international circulation.[3] Although counsel asserts that the petitioner's book is a medical school textbook used by students in Germany, Austria, and Switzerland, no evidence of this use is in the record. As noted above, the assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. A letter from the petitioner's publisher, however, does indicate the book is in distribution throughout German speaking countries in Europe, is in its second printing and has sold over 9000 copies. Contrary to the director's inference, we do not find that because the book is about anatomy, it does not fit within this criterion.

As noted by the director, publication is an expected part of scientific research, even in postdoctoral appointments. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, sets forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition are the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This is not meant to devalue publications done in academic settings. It simply reinforces CIS's position that publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles. The frequency of citation to the articles by independent researchers would tend to demonstrate their interest in and reliance on the published research.

The petitioner submitted evidence that independent researchers have frequently cited his published articles. We withdraw the director's determination and find that the evidence establishes that the petitioner meets this criterion.

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.*

In his cover letter accompanying the petition, counsel asserts that the petitioner's grants were reflective of his high remuneration. Grants are monies to perform specific research and are not compensation for services rendered. Counsel also states that the petitioner was offered a paid research position while pursuing his doctoral degree. Counsel maintains that, as this was unique in Germany, the fact that the petitioner received any compensation placed him at a salary higher in relation to other (students) in the field. This criterion is met by evidence showing that the petitioner's remuneration is significantly high in relation to all others in the field, and not in relation to a discrete subsection such as other doctoral candidates. Counsel submitted no additional evidence regarding this criterion in his response to the RFE, and we concur with the director that the petitioner does not meet this criterion.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of his field of endeavor.

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[2] The petitioner's name does not appear as author or co-author of the chapter "Skrotum, Hodenhüllen und Samenstrang" in *Andrologie*.

[3] The petitioner fails to provide translations of several of the documents as required by 8 C.F.R. § 103.2(b)(3).

Review of the record, however, does not establish that the petitioner has distinguished himself as a scientific researcher 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 petitioner shows talent as a research scientist, but is not persuasive that the petitioner's achievements set him significantly above almost all 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.