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U.S. Citizenship and Immigration Services

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FILE: EAC 02 146 51798 Office: VERMONT SERVICE CENTER Date: MAY 03 2004

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.

Elizabeth O'Brien

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 pertinent regulations 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.

At the time he filed the petition, the petitioner was a postdoctoral fellow at Mount Sinai School of Medicine. He has since been promoted to assistant scientist. The petitioner's current research involves attempts to use a genetically altered adenovirus to target and destroy cancer cells.

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 has submitted evidence which, he claims, meets the following criteria.

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

The petitioner received an Ivy Wu Fellowship, involving six months of study at the University of Hong Kong before the petitioner began studies for his Ph.D. The petitioner has not shown that the Ivy Wu Fellowship is so

prestigious that it confers national or international acclaim on recipients. A letter from a University of Hong Kong official describes the fellowship:

> I am pleased to offer you the Mrs Ivy Wu Fellowship for PRC Academics tenable at the Department of Obstetrics and Gynaecology of the University of Hong Kong for six months special studies. . . . There is also a possibility for you to extend your stay for pursuing an M.Phil./Ph.D. study in the University after the satisfactory completion of your Special Studies programme and subject to your fulfillment of the entry requirements for registration for such higher degree studies.
>
> The Fellowship is granted for the six months Special Studies programme. Any extension of the study is allowed provided that other sources of funding has [sic] been sought.

The above indicates that the fellowship is a student program, rather than an award or prize for the top researchers in the field (who have already completed their studies and established independent careers). The wording of the letter suggests that the fellowship is a "source of funding" to pay the recipients' salary and expenses. Also, the fellowship does not recognize past work; rather, it is contingent on continued efforts; the documentation indicates "[t]he Fellowship may be terminated at any time if your progress in study or training is considered to be unsatisfactory."

The petitioner asserts that he is "the sole co-investigator" in a project that has received $495,990 in grant funding from the Department of Defense. Grants are a routine source of research funding, rather than prizes or awards. Furthermore, grants provide funding for future work, based on the merits of grant proposals. They are not a form of recognition for past work.

The director requested further evidence, stating that the above are not national or international prizes or awards. In response, counsel cites evidence showing that the Ivy Wu Fellowship is for "the most brilliant young scientists from Mainland China." "Young scientists" do not represent a separate field, distinct from "scientists" as a whole. The record clearly demonstrates that the Ivy Wu Fellowship is available only to researchers who have yet to complete their professional training. The fellowship itself is, in fact, a training opportunity.

Counsel acknowledges that "[t]echnically speaking, the [petitioner's] Department of Defense (DOD) grant does not qualify as a major prize, because it is not a prize," but it should nevertheless be considered an "award." The petitioner submits nothing from the DOD to show that that agency considers a research grant to be an award for excellence in the field of endeavor. The record is rife with evidence that research grants from external (often governmental) sources are a routine source of funds, rather than rare occasions of such importance that they result in acclaim at a national or international level.

> *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.*

The petitioner states that he was "accepted as a member of both the American Society of Gene Therapy (ASGT) and the American Association for Cancer Research (AACR)" because of his "strong scientific background and substantial experience."

Robin E. Felder, manager of Membership Services at AACR, states:

> [The petitioner] is an Associate Member of the American Association for Cancer Research (AACR). AACR is an international professional organization consisting of over 17,000 scientists. . . .
>
> Associate membership is open to graduate students, medical students and residents, and clinical and postdoctoral fellows who are following a course of study or who are working in a research program relevant to cancer. Applicants must be nominated by one current Active, Emeritus or Honorary member in good standing in the AACR, who can attest to the candidate's achievements, and affirm that his or her research adheres to accepted ethical standards.

The above description does not indicate that associate membership requires outstanding achievements as judged by national or internationally recognized experts in the field. The organization's size does not readily suggest restrictive membership requirements.

Barbie Brennan, membership coordinator of ASGT, states "[a]ny person with a doctoral degree or its equivalent who has manifested an interest in gene therapy . . . is eligible for Membership. Associate Membership is offered to those individuals who are Graduate Students or Postdoctoral Fellows in gene therapy research programs." The petitioner is an associate member of ASGT. A doctoral degree is not an outstanding achievement, but rather the expected outcome of a course of study and research.

The director informed the petitioner that neither of the above memberships meets the regulatory requirements. In response, counsel maintains that the petitioner's AACR membership demonstrates extraordinary ability. Counsel cites a letter from AACR, which indicates "active membership is open to individuals who have conducted two years of research resulting in peer-reviewed publications relevant to cancer, or who have made **substantial** contributions to cancer research in an administrative or educational capacity" (counsel's emphasis).

Counsel's argument collapses upon even a cursory review of this quotation. First, at the time he filed the petition, the petitioner was an associate member, not an active member, of AACR, and therefore the above requirements are entirely irrelevant. The letter that refers to the petitioner as an active member is dated nearly a year after the petition's March 2002 filing date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date based on a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Second, even if the petitioner had been an active member at the time of filing, AACR does not *require* "substantial contributions" as a condition of membership; AACR requires "two years of research . . . *or* . . . substantial contributions" (emphasis added). Two years of experience is hardly a restrictive requirement that greatly limits the pool of eligible applicants for membership. Third, a contribution can fall short of "outstanding" without being "insubstantial." Finally, the letter refers to "substantial contributions to cancer research *in an administrative or educational capacity*." The petitioner is neither an administrator nor an educator. This clause appears to apply to individuals who are not, themselves, cancer researchers (and thus cannot accumulate two years of research experience), but who facilitate the training and careers of those who *are* researchers.

Counsel offers no further comment regarding the petitioner's ASGT membership, except to maintain that "membership . . . requires outstanding scientific contributions on the candidates' part." This claim is not only entirely without support, it is also flatly contradicted by the evidence of record. As noted above, anyone with a graduate degree in a field related to gene therapy can become a member. Whether deliberately or otherwise, counsel has obviously misinterpreted the membership requirements of AACR and ASGT, which necessarily affects the light in which we must view counsel's overall credibility and reliability.

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 petitioner states that he meets this criterion because he reviews manuscripts for *Cancer Research*. The record shows that the petitioner's postdoctoral supervisor, Prof. Savio L.C. Woo, is an associate editor of *Cancer Research*. This relationship appears to be sufficient to explain the petitioner's work for the journal; review forms reproduced in the record indicate that Prof. Woo himself provided the manuscripts and review forms to the petitioner. Furthermore, peer review appears to be a more or less routine duty of researchers, rather than a rare privilege reserved for top scientists. Absent evidence of extraordinarily heavy and widespread demand for the petitioner's services as a reviewer, such peer review is not strong evidence of acclaim at the required levels. The record only documents two instances of peer review, both at the invitation of the petitioner's own supervisor.

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

The petitioner submits letters from several witnesses, discussing his work. Professor Woo, identified above, is director of the Carl C. Icahn Institute for Gene Therapy and Molecular Medicine at Mount Sinai School of Medicine. Prof. Woo, who has supervised the petitioner's postdoctoral work since 1999, states that the petitioner "played a central role in the conception and execution of [the] grant" application that funds the petitioner's work. Prof. Woo describes the project:

> [A]denovirus is a widely studied vector for gene transfer in vivo. However, the adenoviral vectors currently used are not tissue specific, are toxic at high doses, and elicit a strong immune response. We propose to remove natural tropism of adenovirus, and incorporate a new binding site into the adenovirus genome, making [the] virus specific for the tumor vasculature. . . . Once tumor vasculature is destroyed, the tumor cells will die because of lack of nutrients. This successful ongoing study will provide important data for developing new targeted agents for this treatment of cancers.
>
> In addition, [the petitioner] made important contributions to our gene therapy study aimed at using adenovirus expressing human IL-12, which is one of the most effective reagents for tumor gene therapy. Thanks to [the petitioner's] work, this virus has passed most of the quality control testing by the FDA and has been approved for the use in clinical trial in the near future.

The above projects appear not to have yielded final results. One project has only recently received funding, and the other has not yet been tested in clinical trials. It seems, therefore, premature to assert that either of the above developments have earned the petitioner national or international acclaim.

Professor Hextan Yuen-Sheung Ngan was the petitioner's doctoral supervisor at the University of Hong Kong. Prof. Ngan states:

> [The petitioner had] success in constructing the first recombinant retinoblastoma-adenovirus in Hong Kong. . . . Using this recombinant virus and that of a p53-adenovirus, [the petitioner] was able to perform a number of experiments showing important findings of changes in cell survival after restoring tumor suppressor genes in cervical cancer cell lines. These findings have potential application[s for] gene therapy in cervical cancer.

The director, in a request for further evidence, observed that all of the initial witnesses are from universities where the petitioner has studied, or research facilities where the petitioner has worked. The letters, therefore, are not first-hand evidence that the petitioner has earned any significant reputation outside of the institutions where he has personally worked or studied.

In response, the petitioner has submitted new letters from a broader range of witnesses. Some of the witnesses are, like the initial witnesses, individuals who have worked with the petitioner. Others appear to be more independent. Dr. Jeffrey E. Green, a principal investigator at the National Institutes of Health, states that the petitioner "is a scientist of top quality" because he successfully "generated the first recombinant adenovirus, in which Rb gene is expressed."[1] Dr. Green does not specify how he first became aware of the petitioner's work.

Professor Paul Rennie of the University of British Columbia writes of the petitioner, "I got to know his name through several of his excellent publications regarding gene therapy." Prof. Rennie characterizes the petitioner as "extremely outstanding," but does not credit the petitioner with any specific contributions of major significance in the field. He mentions the petitioner's research regarding "the development of engineered adenovirus which specifically kill tumor cells," but says only that "[t]he thought processes behind this research are quite innovative."

Professor Kazunari K. Yokoyama of the Institute of Physical and Chemical Research, Ibaraki, Japan, states that one of the petitioner's gene transfer vectors "represents a remarkable scientific breakthrough, as I am quite aware that the clinical trial in the United States is extremely strictly regulated." Thus, Prof. Yokoyama appears to be saying that that the vector must be a "breakthrough" because it was approved for clinical trial. Other witnesses make similar assertions, or else stress that the petitioner's work was ready for clinical trial in one year rather than the more typical two to three years. We are not persuaded that every drug or delivery vector approved for clinical trial is, by definition, a contribution of major significance. Also, as noted elsewhere in this decision, the FDA only partially approved the clinical trial, leaving some restrictions in place due to deficient data. Furthermore, the clinical trial had not yet been approved as of the petition's filing date.

Counsel has listed a letter from the Food and Drug Administration (FDA) among independent appraisals of the petitioner's work. This letter, dated June 11, 2002 (several months after the filing date), indicates that the petitioner's "dose escalation proposal" has been cleared for clinical trials (although a "partial clinical hold" remains for other aspects of the plan). Clinical trials are a routine, indeed mandatory, step in the drug development process. This letter from the FDA does nothing to distinguish the petitioner's work from that of countless others seeking to develop new pharmaceutical products. It shows only that the petitioner has partially, but not entirely, complied with FDA requirements, and that the petitioner "may not proceed to dose cohorts six through nine" until the petitioner has resolved deficiencies in the safety data provided to that agency.

> *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 copies of several published articles, abstracts, and book chapters, as well as some unpublished manuscripts. The director observed that publication is routine among scientific researchers, and stated that some evidence would be necessary to show that the petitioner's published work stands out from that of others in the field. Publication itself is not a rare privilege reserved for top researchers.

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[1] Dr. Green's letter contains several grammatical irregularities. For example, articles such as "a" and "the" are omitted, and one sentence begins: "This is quite challengeable task for him as the laboratory he worked did not have any background."

In response to the director's notice, counsel states that the director "admits that [the petitioner's] publications are widely cited." We can find, however, no evidence of citation in the petitioner's initial submission, and the petitioner's detailed introductory letter mentions no such citations. The director's assertion appears, therefore, to have been erroneous. Counsel asserts that "one of [the petitioner's] papers was cited by **Dr. Bert Vogelstein** in SCIENCE, and the PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA." The second of these citations was published in February 2003, well after the petition's filing date. Thus, the petitioner has apparently documented one citation of his work as of the filing date. Counsel's emphasis on Dr. Vogelstein's credentials and reputation serve only to illustrate that Dr. Vogelstein has reached heights of achievement and leadership considerably above the petitioner's own level.

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

The petitioner asserts that his "salary is higher than [that of a] normal post-doctoral fellow." According to Oneida Citron, administrative manager at Mount Sinai School of Medicine, the petitioner's "annual salary is $40,000 in comparison to the usual postdoctoral salary of $32,000 - $35,000." Being a postdoctoral fellow is not a field in itself; it is a training position within a field of endeavor such as medical or biological research. Postdoctoral fellows occupy a relatively low rank in the research hierarchy, and we cannot arbitrarily exclude everyone who is not a postdoctoral fellow when considering the petitioner's remuneration.

The director advised the petitioner that "the record is not persuasive in demonstrating that the [petitioner] has or is now currently receiving exceptional remuneration relative to his peers." In response, counsel maintains that the petitioner's salary "is quite high for a scientist with only three years of post-doctoral fellow experience." The petitioner's field, however, is not composed entirely of scientists with only three years of post-doctoral fellow experience. Tenured professors, department heads, and chief researchers at private firms work in the same field as the petitioner. The regulatory standard requires comparison to "others in the field," not "others with comparable experience in the field."

Counsel notes that the petitioner has been promoted to "assistant scientist" and received bonuses. Pursuant to *Matter of Katigbak, supra*, the petitioner's promotion after the filing date is without consequence to his eligibility as of the filing date. Furthermore, the petitioner has not shown that "assistant scientist" is a rarefied rank, achieved only by acclaimed top scientists. The director had observed that the petitioner is clearly subordinate to Prof. Woo, rather than an independently established researcher in his own right. Counsel has responded to this assertion by listing Prof. Woo's credentials. While this information speaks well of Prof. Woo, it also demonstrates a level of achievement that the petitioner has yet to attain.

The director denied the petition, stating that the evidence, as a whole, does not demonstrate that the petitioner has earned sustained national or international acclaim as a top researcher. On appeal, counsel maintains "we have provided solid evidence that clearly [meets] . . . at least three of the ten categories, with supplementary evidence to support three additional categories." Counsel states that the petitioner "has clearly and unambiguously met" the criteria relating to judging the work of others, original contributions of major significance, and authorship of scholarly articles.

Counsel repeats the assertion that the petitioner's work must be of major significance because it "was deemed worthy of clinical study by the National Cancer Institute (NCI) and approved by the Food and Drug Administration (FDA) for use in clinical trials." As noted above, the clinical trials were only partially cleared, and this partial clearance took place well after the filing date. The petitioner has submitted nothing from the

FDA to show that clinical trials are approved only in instances involving contributions of major significance. A Mount Sinai School of Medicine newsletter, submitted on appeal, contains a short article about the clinical trial that is said to cement the petitioner's claim. The article does not mention the petitioner by name or title. Given that Mount Sinai School of Medicine itself did not think to credit the petitioner for the trial, we cannot conclude that this same trial has earned the petitioner sustained national or international acclaim.

New documentation shows that other journals, besides the one for which the petitioner's supervisor is an associate editor, have asked the petitioner to review manuscripts. These requests are dated long after the March 2002 filing date. One of the new journals, *Human Gene Therapy*, has an associate editor on the faculty of Mount Sinai School of Medicine.

Several of counsel's arguments on appeal are couched in terms of the petitioner's previous status as a postdoctoral researcher. For instance, counsel asserts "only a quite limited numbers [sic] of post-doctoral fellows write a grant [proposal] and **get it funded**," and counsel continues to stress the petitioner's Ivy Wu Fellowship. The petitioner must establish that he is a *researcher* of extraordinary ability, rather than a *postdoctoral fellow* of extraordinary ability. The petitioner's acclaim and recognition must compare favorably not only with other postdoctoral fellows, but also with established professors such as Savio Woo. The petitioner is still at a relatively early, training-based phase in his research career, and the burden is on him to show that he has already reached the top of his field. He cannot permissibly limit consideration to researchers at his own level of experience and training. A Nobel Prize-winning medical researcher is in the same "field" as a first-year postdoctoral trainee, and we will not, *can* not, limit consideration to the most inexperienced and subordinate ranks of the research hierarchy.

The petitioner has engaged in some degree of peer review, and has produced scholarly articles, but there is no credible evidence that the petitioner's activities in these areas have consistently set him apart from others in his field to an extent that amounts to sustained national or international acclaim. Indeed, much of the evidence of record points in exactly the opposite direction. Given counsel's demonstrably untrue assertions about such matters as the petitioner's memberships in professional associations, we can give little credence to counsel's interpretation of the remaining evidence of record.

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 the field of endeavor. Review of the record, however, does not establish that the petitioner has distinguished himself as a 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 is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. 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.