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

[redacted]

FILE: SRC 02 202 54837 Office: TEXAS SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision 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.

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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner in this matter is a public university. The beneficiary is a physician. The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, seeking continuation of classification of the beneficiary under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act) as an assistant professor of surgery at an annual salary of $125,000.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary qualifies as an alien of extraordinary ability within the meaning of Section 101(a)(15)(O)(i) of the Act.

On appeal, counsel for the petitioner submits a brief arguing that the record shows that the beneficiary is an alien with extraordinary ability in his field.

The record consists of a petition with supporting documentation, a request for additional documentation and the petitioner's reply, the director's decision, an appeal, 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.

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.

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.

(C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

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 Pakistan. The record reflects that he received his medical degree in 1989 at the University of Karachi. He completed a rotating internship at the University of Karachi in 1990. He completed a residency in general surgery at the Flushing Hospital Medical Center (teaching hospital of Yeshiva University). He completed a fellowship in cardiopulmonary transplantation at the University of Wisconsin in 1998. He spent the next two years as a postdoctoral research fellow at the University of Kentucky's College of Medicine's division of cardiothoracic surgery. He was a senior resident in general surgery from 1997 to 1998 and a special trainee in general surgery at the same institution from 1998 to 1999. The beneficiary has subsequently been employed by the petitioning organization as an assistant professor of surgery. The record reflects that he was last admitted to the United States on April 5, 2002, in O-1 classification as an alien of extraordinary ability.

After reviewing the evidence submitted in support of the petition, the director found the beneficiary ineligible for O-1 classification based on finding the sum of the evidence insufficient to demonstrate that he is "at the very top" of his field of science pursuant to 8 C.F.R. § 214.2(o)(3)(ii). The director acknowledged the facts presented that the beneficiary has an impressive record, but concluded that the record failed to show that the beneficiary is recognized as a physician of extraordinary ability whose achievements have been recognized in the field through extensive documentation.

On appeal, counsel for the petitioner asserts that the director erred in weighing the evidence, and submits additional evidence. Counsel also asserts that the beneficiary satisfies the first seven criteria set forth at 8 C.F.R. § 214.2(O)(3)(iii).

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).

For criterion number one, the petitioner asserts that the beneficiary satisfies this criterion because he was awarded the Joseph W. Gayle Award for outstanding patient care in 1996 and the Dedicated Service Award in 1997 by the University of Wisconsin. According to the petitioner, the Joseph W. Gayle Award is based on exemplary patient care and is awarded to only one recipient in the cardiothoracic surgery division at the University of Wisconsin. The petitioner failed to establish that these are nationally or

internationally recognized awards for excellence in the field of endeavor.

For criterion number two, while the beneficiary is a member of the American College of Surgeons (Initiate Group), the Kentucky Medical Association, the Lexington Medical Society, the International Society of Heart Lung Transplantation, the American Medical Association, the South Eastern Surgical Congress, the Heart Failure Society and the International Society of Heart Research, there is no evidence that these are associations which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines.

For criterion number three, the petitioner provided copies of four news articles, two of which cannot be considered professional or major trade publications. The single print media publication in the record that can be considered major media, *The Lexington Herald-Leader*, published two articles that are about the lives of two of the beneficiary's patients, rather than about the beneficiary and his work.[1] The petitioner asserts that the beneficiary has been featured on three television newscasts. A description of these newscasts provided by the petitioner indicates that two of the three newscasts are about heart transplant patients, rather than about the beneficiary and his work. Further, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has failed to establish that the beneficiary satisfies this criterion.

For criterion number four, the beneficiary states that he "continues to serve as an expert reviewer of manuscripts submitted to the *Journal of Thoracic and Cardiovascular Surgery* and the *American Journal of Physiology*." The beneficiary's supervisor at the petitioning organization corroborates that the beneficiary has reviewed manuscripts for these journals. The record contains no evidence from the journals establishing the length of time he has served as a reviewer, the volume of the reviewed work, or indicating that the beneficiary was selected to perform peer review based on his expertise in the subject matter. Counsel for the petitioner asserts that the beneficiary also satisfies this criterion by virtue of his work reviewing research proposals. The beneficiary was not judging the work of others in this instance, but rather the merit of grant proposals. The petitioner has failed to show that the beneficiary satisfies this criterion.

For criterion number five, while the beneficiary has published and presented the results of his research, the record does not show that his research is considered of "major significance" in the field. By definition, all professional research must be original and significant in order to warrant publication in a professional

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[1] Another of the beneficiary's patients was featured in articles published in the *Floyd County Times* and *The Big Sandy News*, primarily local in distribution.

journal. Counsel for the petitioner asserts that the beneficiary's work is of major significance because he is successfully treating end stage heart failure using novel techniques and has successfully performed heart transplants, among other things. The petitioner failed to establish that the beneficiary's contributions are of major significance in relation to other work being performed in the same field. The petitioner provided the Service with numerous testimonials about the value of the beneficiary's work and his individual qualities. The petitioner submitted seven testimonials, five of which were written by employees of the petitioner. The Service gives credence to testimonials written by employees of the petitioner, but such testimonials are given less weight than those from independent sources, which would tend to demonstrate sustained national or international acclaim in the field. [redacted] wrote that the beneficiary "displays a remarkable ability in cardiopulmonary transplantation as well as cardiac research." Dr. Rolf Bunger wrote that the beneficiary is "one of the very few of the top of his field." [redacted] wrote that the beneficiary has "excelled among his peers at levels of his career and indeed is a top notch physician/scientist." [redacted] Waid wrote that the beneficiary's "work ethic is outstanding and his integrity is above reproach." Many of these testimonials are conclusory and fail to state how the beneficiary has made an original contribution of major significance. 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.

For criterion number six, the beneficiary has authored more than 25 scholarly articles that have been published in professional journals and co-authored a book chapter and two books. The director determined that the beneficiary satisfies this criterion. The AAO concurs.

For criterion number seven, the beneficiary has been employed as a as a fellow at the University of Wisconsin, as a fellow, resident, trainee and an assistant professor at the University of Kentucky, and as of the date of filing the petition, a co-investigator on seven clinical trials including two NIH funded research projects. The petitioner asserts that the beneficiary is a critical and irreplaceable member of the petitioner's ongoing transplant patient, teaching, research and clinical care program. The director determined that the beneficiary satisfies this criterion. This portion of the director's decision shall be withdrawn. While employment with esteemed institutions is evidence of a degree of recognition, such staff or assistant positions are not considered employment in a "critical or essential capacity" as would a provost or lead researcher on major projects.

Counsel for the petitioner asserts that they did not submit evidence in relation to criterion number eight.

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). In order to meet these criteria in the field of science, the alien must normally be shown to have a significant history of scholarly publications, have held senior positions at prestigious institutions, or hold regular seats on editorial boards of major publications in the field. The beneficiary's achievements have not yet risen to this level.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.