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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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

[redacted]

File: LIN 02 262 51159 Office: NEBRASKA SERVICE CENTER Date: FEB 28 2003

IN RE: Petitioner: [redacted]
Beneficiary:

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]

"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 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a biomedical research company. The beneficiary is a researcher. The petitioner is seeking O-1 classification of the beneficiary under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien with extraordinary ability in science. The petitioner seeks to employ the beneficiary temporarily in the United States for a period of three years as a senior imaging scientist at an annual salary of $70,000.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary has sustained recognition as being one of a small percentage at the very top of the field of science.

On appeal, counsel for the petitioner submits a brief asserting that the record contains substantial evidence that the beneficiary is an alien with extraordinary ability in the field of science.

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, and brief.

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 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 Australia. The record reflects that he received a bachelor degree of science in physics in 1994 at the University of New South Wales, Sydney, Australia. He earned a Ph.D. at the Centre for Medical Health Physics, School of Physical Sciences, Queensland University of Technology, Brisbane, Australia in 1999. Since December 1999, the beneficiary has participated in a fellowship at the Nuclear Magnetic Resonance (NMR) at the Gerontology Research Center and National Institute on Aging at the National Institute of Health (NIH) in Baltimore, Maryland. The record reflects that he was last admitted to the United States on May 12, 2002, in J-1 classification as an exchange visitor and that he is subject to the two-year foreign residency requirement.

After reviewing the evidence submitted in support of the petition, the director found the beneficiary ineligible for O-1 classification based on finding 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 that the facts presented the beneficiary as an innovative researcher, but concluded that the record failed to show that the beneficiary has been recognized as a research scientist 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 evaluating the evidence.

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's receipt of a two-year fellowship, several travel awards and research grants are nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Academic study is not a field of endeavor, but training for a future field of endeavor. As such, awards for academic work, scholarships and fellowships cannot be considered awards in the field of endeavor. Moreover, only students compete for such awards. As the beneficiary did not compete with nationally or internationally recognized experts in the field, the awards cannot be considered evidence of the beneficiary's national or international acclaim.

Regarding the beneficiary's research grants, research grants simply fund a scientist's work. The past achievements of the principal investigator are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and is not an award to honor or recognize past achievement.

For criterion number two, the petitioner asserts that the beneficiary satisfies this criterion by virtue of his student membership in the International Society for Magnetic Resonance in Medicine (ISMRM) and his graduate full membership in the Australian Institute of Physics. 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, nor is there evidence of such a requirement on the organizations' websites.

For criterion number three, the petitioner has not submitted published material in professional or major trade publications or other major media about the alien. While the beneficiary's articles have been cited sixteen times, and his work referenced three times, citations and references to someone's work do not constitute articles about the individual or his work.

For criterion number four, the petitioner indicates that the beneficiary has reviewed manuscripts for three peer-reviewed scholarly journals, *The American Journal of Physiology, Biochimica et Biophysica Act* and the *Magnetic Resonance in Medicine*. The petitioner did not provide unequivocal evidence that the beneficiary was selected to review manuscripts for scholarly journals based upon his reputation in the field.

Instead, the petitioner provided weaker evidence in the form of the beneficiary's curriculum vitae and a reference letter from a third party. The beneficiary failed to satisfy this criterion.

For criterion number five, while the beneficiary has published 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 journal. The record does not show that the beneficiary's research is of major significance in relation to other similar work being performed.

The petitioner provided the Service with testimonials about the value of the beneficiary's work. One wrote that the beneficiary's "talent was demonstrated by the numerous presentations he made at major international conferences." Dr. Richard Spencer at NIH wrote that the beneficiary's "findings have led to a significant increase in our knowledge of when and how the heart produces more energy when its workload needs to be increased." Dr. Edward Lakatta at NIH wrote that the beneficiary's "work...received widespread recognition at international meetings...[and] during his time at NIH, [the beneficiary] has made a large contribution to the field in other endeavors such as his membership of ISMRM, and his active role in reviewing articles written by peers in the field for ...high quality journals." [redacted] wrote that the beneficiary's "work on the quantitation of fat and body composition in diabetic Zucker rats led directly to a patent currently pending for a device we have named the 'lever-coil.'" [redacted] wrote that the beneficiary "has undertaken much exceptional work in his field." [redacted] wrote that the beneficiary "has applied his outstanding talent to some of the most important health problems facing the United States and the world today, making a significant contribution to our knowledge in these areas." [redacted] wrote that the beneficiary "gave frequent seminars on his research to the department. It was clear from these presentations...that [the beneficiary] had an exceptional depth of understanding and insight into the Nuclear Magnetic Resonance field." While all of the testimonials' authors value the beneficiary's work, they do not establish that the beneficiary has made original scientific contributions of major significance relative to the work of others in the field.

The petitioner asserts that the beneficiary has made a significant original contribution by virtue of a preliminary patent approval. The granting of a patent documents that an invention is original, but not every patented invention constitutes a significant contribution in one's field. The petitioner offered no evidence showing that the NMR industry

experts have hailed the beneficiary's patent as a significant contribution.

For criterion number six, the beneficiary has co-authored ten articles (seven as first author and three as second author). A citation history of his works has been submitted. The beneficiary satisifies this criterion.

For criterion number seven, the petitioner asserts that the beneficiary satisfies this criterion by virtue of his *prospective* employment as senior scientist and director of imaging for the petitioning organization. This criterion requires evidence that the alien *has been employed* in a critical or essential capacity for organizations and establishments that have a distinguished reputation. 8 C.F.R. § 214.2(o)(3)(iii)(B)(7). The beneficiary does not satisfy this criterion.

For criterion number eight, no evidence of the beneficiary's salary history was provided, nor were salary surveys supplied to the Service so that the current salary offer could be evaluated.

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.