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Washington, DC 20529

U.S. Citizenship and Immigration Services

B2

[redacted]

FILE: WAC 03 100 52345 Office: CALIFORNIA SERVICE CENTER Date: APR 27 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner 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 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 the beneficiary has earned sustained national or international acclaim at the very top level.

This petition, filed on February 10, 2003, seeks to classify the beneficiary as an alien with extraordinary ability as a research scientist. At the time of filing, the beneficiary was working as a "Scientist III in the Functional Genomics Department" of Nuvelo, Inc.

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 that, counsel 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 submitted correspondence from the Medical Research Council (MRC) of Canada reflecting that the beneficiary received a "MRC Studentship Award" from 1998 to 1999 to pursue studies at McMaster University. Information provided in support of this award from the Canadian Institute of Health Research states that such awards "are intended to provide special recognition and support to students who are pursuing a doctoral degree in a health related field in Canada or abroad. These candidates are expected to have an exceptionally high potential for future research achievement and productivity."

The preceding MRC scholarship represents financial support for the beneficiary's studies and scientific training. Receipt of such funding does not reflect achievement at the very top of the beneficiary's research field. Rather, the beneficiary's award was limited to graduate students seeking to further their advanced scientific training. We note here that more experienced scientists (such as associate professors, assistant professors and full professors) who have already completed their graduate studies are excluded from consideration to receive the MRC Studentship Award. While the scholarship award may be from a national entity (MRC), it represents funding for ongoing studies and research training rather than recognition for past contributions of excellence in the field of endeavor. We cannot artificially restrict the beneficiary's field to exclude all those researchers who have finished their education and advanced scientific training and therefore do not compete for such scholarships. The visa classification sought by the petitioner is intended for aliens already at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time (as implied by the statement that candidates have a "high potential for future research achievement and productivity"). We do not find that obtaining financial support for one's graduate studies or postdoctoral training is a rare mark of acclaim or extraordinary ability.

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.

In order 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 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. Furthermore, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner submitted evidence of the beneficiary's membership in the American Association for Cancer Research (AACR). The petitioner also provided information from the AACR's website indicating that this society has more than 19,000 members. Under the heading "Qualifications for Membership," the AACR website states:

> **Active** membership in the AACR is open to investigators worldwide. Individuals who have conducted two years of research resulting in peer-reviewed publications relevant to cancer or and cancer-related biomedical science, or who have made substantial contributions to cancer research in an administrative or educational capacity, are eligible. Evidence of patents relevant to cancer research may be submitted as qualifications for membership in lieu of peer-reviewed publications.

Therefore, an individual who "conducted two years research resulting in peer-reviewed publications" is eligible for membership in this society. As publication is an inherent duty of researchers, the mere publication of scholarly articles is not adequate to demonstrate "outstanding achievement" in one's field.[1] The above guidelines make it clear that outstanding achievement is not a prerequisite for membership in the AACR.

On appeal, counsel attempts to equate "substantial contributions" with "outstanding achievement," but the record contains no evidence showing that the beneficiary was admitted to the AACR based on his "contributions to cancer research in an **administrative** or **educational** capacity." [emphasis added] For example, the petitioner submitted an AACR membership support letter from [redacted] of Beth Israel Deaconess Medical Center in Boston. That letter cites the beneficiary's publication record rather than specific contributions in an administrative or educational capacity.

The evidence presented by the petitioner is not adequate to demonstrate that the beneficiary's membership in this society required outstanding scientific achievement or that he was evaluated by national or international experts in consideration of his membership. The record contains no evidence to establish that this society requires outstanding achievement of its members in the same manner as highly exclusive associations such as (for example) the U.S. National Academy of Sciences.

> *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.*

In general, in order for published material to meet this criterion, it must be primarily about the beneficiary and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution.

The petitioner submitted a two-page editorial commentary about the beneficiary's findings appearing in a 1999 issue of *Human Gene Therapy*. The commentary discusses an article by the beneficiary and his colleagues that appears in that same issue. It states: "[The beneficiary] and colleagues, in a study reported

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[1] The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement 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 report reinforces Citizenship and Immigration Service's (CIS) conclusion that publication of scholarly articles is not presumptive evidence of outstanding achievement.

this issue (pages 697-709), utilized a more potent strategy that combines cytokines and chemokines, initially proposed by Dilloo *et al.* in 1996." We find it routine for editors to discuss topics relevant to a particular journal issue in this manner. We do not find that a single editorial discussion of one's research topic is unusual in the beneficiary's field or indicative of *sustained* national or international acclaim.

In regard to citations of the beneficiary's work, articles which cite the beneficiary's work are primarily about the author's own work, not the beneficiary's work. As such, they cannot be considered qualifying published material about the beneficiary's work. We cannot ignore that the articles citing the beneficiary's work similarly referenced numerous other authors. In the beneficiary's field, it is the nature of research work to build upon work that has gone before. In some instances, prior work is expanded upon or supported. In other instances, prior work is superseded by the findings in current research work. In either case, the current researcher normally cites the work of the prior researchers. Clearly this is not the same thing as published material written about an individual's work in the field. This type of material does not discuss the merits of an individual's work, the individual's standing in the field, or any significant impact that his or her work has had on work in the field. Citations of the beneficiary's work will be addressed under the "authorship of scholarly articles" criterion.

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

We concur with the director's finding that the petitioner's evidence is adequate to satisfy this criterion.

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

We withdraw the director's finding that the evidence presented by the petitioner was not adequate to satisfy this criterion. The petitioner submitted evidence of the beneficiary's authorship of articles appearing in publications such as *Human Gene Therapy*, *The Journal of Immunology*, *Gene Therapy*, *Genetics*, *Cell Immunology*, and *Proceedings of the National Academy of Sciences of the U.S.A.*

On appeal, the petitioner submits a citation index showing that the beneficiary's published articles have garnered an aggregate total of 338 citations. When judging the influence and impact that the beneficiary's published work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the beneficiary's findings. In this case, however, the large number of cites to the beneficiary's articles demonstrates widespread interest in, and reliance on, his work. These citations show that numerous other researchers have acknowledged the beneficiary's influence and found his work to be significant. Therefore, we find that that the petitioner's evidence satisfies this criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

In order to establish that the beneficiary performed a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of the beneficiary's role within the entire organization or establishment and the reputation of the organization or establishment.

Counsel asserts that the beneficiary performed in a leading or critical role as a Post-Doctoral Fellow at the National Institutes of Health (NIH) National Cancer Institute from 1998 to 1999, as a Research Scientist with [redacted] from 2000 to 2001, as an Instructor in Medicine at Harvard Medical School from 2001 to 2002, and as a Scientist III in the Functional Genomics Department of Nuvelo, Inc. from 2002 to present.

In regard to the beneficiary's role as Post-Doctoral Fellow at NIH's National Cancer Institute, we note that the record includes no letter from NIH discussing the beneficiary's role there as a Post-Doctoral Fellow. Furthermore, such a role represents temporary training for a future professional career in a field of endeavor rather than a leading or critical role.

The petitioner submitted a letter from [redacted] Vice President of Research, [redacted] dated March 28, 2001, requesting that the beneficiary reconsider his "decision to resign and remain as a Research Scientist wit[redacted] states:

> You will continue in your role as the breast cancer pre-project leader and also, be given greater responsibilities, with respect to the scientific management with the Immunology Platform. In this expanded role, you will have greater input into external collaborations and the management of cross-platform interactions to ensure research efficiencies, i.e. reagent development.

The petitioner provided an internet website printout showing that Aventis Pasteur has a staff of over 8,500 employees, including 1,000 researchers. There is no evidence showing that the beneficiary's research section at Aventis Pasteur enjoyed a national reputation, nor is there evidence elevating the importance of the beneficiary's position above that of the 1,000 other researchers employed by this company.

Three months later, in July 2001, the beneficiary joined the Biotherapeutics Development Laboratory (BDL) in the Hemotology-Oncology Division at Beth Israel Deaconess Medical Center in Boston. The beneficiary's title was "Instructor, Harvard Medical School." We accept that Harvard Medical School has a distinguished reputation, but there is no evidence demonstrating the national reputation of the BDL.

The petitioner submitted a letter from [redacted] Director, BDL, Division of Hematology-Oncology, Beth Israel Deaconess Medical Center, and Assistant Professor of Medicine, Harvard Medical School, stating:

> Your participation in this program within the BDL should provide you with . . . a period of protected time in which to consolidate and strengthen your credentials to support your academic and professional advancement. As you are able to secure independent grant resources, this will additionally contribute to your stature and support and emerging independence, in which I will avail you of my own experience in fostering your growth. Ultimately, I would foresee your ability to evolve a completely autonomous program of your own . . . .

The petitioner submitted a letter from the Office of the Secretary, Harvard University, dated January 31, 2002, reflecting that the beneficiary's Instructor in Medicine position was a one-year, temporary appointment. The petitioner also submitted copies of grant proposals from the BDL naming [redacted] (rather than the beneficiary) as the "Principal Investigator." There is no evidence showing that the beneficiary gained tenure at Harvard Medical School, that he developed his own autonomous research program, or that he secured independent grant resources as a principal investigator in the same manner as [redacted]

[redacted] Vice President of Research, Hyseq, Inc. (now Nuvelo, Inc.), states:

> We recruited [the beneficiary] from his previous position at the Biotherapeutics Development Lab at Beth Israel Deaconess Medical Center in Boston to head up our internal efforts to develop antibody immunotherapies.
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> * * *
>
> Our initial impressions of [the beneficiary] have only enhanced upon working with him over the past months. He heads up a critical project in our company investigating the use of proprietary gene sequences as antibody targets for the treatment of cancer. . . . We expect fully that he will provide critical leadership not only for the initial discovery phase, but also for the advancement of these targets into human clinical trials.
>
> * * *
>
> I have no doubt that his scientific and management skills will launch him into the executive rank in the relatively near future . . . .

Assertions from witnesses (such as Drs [redacted] that the beneficiary has a promising future do not establish eligibility, for the regulations clearly call for evidence that the beneficiary already enjoys major success and national acclaim. Expectations that the beneficiary "will provide critical leadership" or that he will someday have his own "completely autonomous program" cannot meet the extremely high threshold of extraordinary ability. The petitioner seeks a highly restrictive visa classification, intended for aliens already at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time.

On appeal, counsel argues that the beneficiary satisfies this criterion "by virtue of his inventions that have been patented by his employers." The beneficiary's patents and patent applications are relevant to the "original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field" criterion, which has already been met. Here it should be emphasized that the regulatory criteria are separate and distinct from one another. If evidence sufficient to meet one criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three different criteria would be meaningless.

The evidence presented is not adequate to establish the beneficiary's leading or critical role in the preceding organizations. The record contains no evidence detailing the extent to which the beneficiary has exercised substantial control over personnel or research decisions executed on behalf of the organizations for which he

has worked. Nor is there evidence showing that the beneficiary often directly secured significant amounts of research funding as a principal investigator (in the same manner as [redacted] for example). This criterion, like all of the criteria, is intended to separate the beneficiary from the majority of his colleagues in the biomedical field. Therefore, when determining the beneficiary's eligibility, it is entirely appropriate to compare the beneficiary's role to that of his colleagues. In this case, it is immediately apparent that the importance of the role of individuals such as Drs. [redacted] and [redacted] far exceeded that of the beneficiary. While we accept that the beneficiary has contributed to research projects overseen by his superiors, it has not been shown that these roles elevate him to the very top of his field at the national or international level. For the above reasons, we find that the petitioner's evidence falls short of establishing that the beneficiary has performed in a leading or critical role for a distinguished organization, or that his involvement has earned him sustained national or international acclaim.

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 submitted a copy of its May 17, 2002 job offer letter to the beneficiary promising him a starting salary of $98,500 per year. The petitioner also submitted a June 5, 2001 job offer letter from Dr. [redacted] Director, BDL, Division of Hematology-Oncology, Beth Israel Deaconess Medical Center, offering a starting yearly salary of $85,000 for the beneficiary's Instructor position. The petitioner also provided evidence from the U.S. Department of Labor showing that the "Level 2 Wage" for "Medical Scientists" in California and Massachusetts was $84,885 and $80,475, respectively. The petitioner, however, must demonstrate that the beneficiary's salary places him at the top of his field at the national level, not simply in the top half at the local level. Local prevailing wage figures from the Department of Labor do not meet this standard. Furthermore, the petitioner did not initially provide evidence showing the amounts the beneficiary actually earned in 2001 or 2002.

The director's decision stated that the petitioner did not "establish the beneficiary's actual remuneration" or "that the [beneficiary] has commanded a high salary or other significantly high remuneration for services compared to others in the field for a sustained period."

On appeal, the petitioner submits copies of the beneficiary's Form W-2, Wage and Tax Statement, for 2002 and 2003. According to the W-2 forms, the petitioner paid the beneficiary $41,883 during part of 2002 and $115,251 for all of 2003. Once again, counsel argues that local prevailing wage statistics from California and Massachusetts are adequate to show that the beneficiary's compensation amounts satisfy this criterion. Counsel's use of median local salary statistics as a basis for comparison, however, is not appropriate. Furthermore, the crux of counsel's argument regarding the beneficiary's hourly rate of compensation rests on the beneficiary's current salary rather than his income as of the petition's filing date. A petitioner, however, must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Subsequent developments in the beneficiary's career cannot retroactively establish that he was already eligible for the classification sought as of the filing date. We do not find that the evidence presented by the petitioner is adequate to show that the beneficiary is among the highest-paid research scientists in his field at the national or international level.

In this case, we find that the evidence presented satisfies only two of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

The fundamental nature of this highly restrictive visa classification demands comparison between the beneficiary and others in his field. The regulatory criteria describe types of evidence that the petitioner may submit, but it does not follow that every scientist who has published his work, authored a patent, or trained under prominent researchers, is among the small percentage at the very top of the field. While the burden of proof for this visa classification is not an easy one to satisfy, the classification itself is not meant to be easy to obtain; an alien who is not at the top of his or her field will be, by definition, unable to submit adequate evidence to establish such acclaim. This classification is for individuals at the rarefied heights of their respective fields; an alien can be successful, and even win praise from experts in his field, without reaching the top of that field. It has not been shown, nor does the totality of the evidence suggest, that the beneficiary has reached the very top of his field. Even if it were unanimously agreed that the beneficiary would one day reach such a level, this visa classification is reserved for those already at the top of their field, not for those who are expected eventually to reach that level.

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. The petitioner in this case has failed to demonstrate the beneficiary's receipt of a major internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the sustained national or international acclaim necessary to qualify as an alien of extraordinary ability.

Review of the record does not establish that the beneficiary 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 is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at the 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.