

Not Quite Extraordinary Enough: The AAO Applies Unreasonable Standards to O-1 Petitions

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The extraordinary ability provisions of the O-1 nonimmigrant visa are intended to be difficult to prove. This classification is reserved specifically for foreign nationals who exhibit sustained national or international acclaim in their field of endeavor. However, recent decisions by the Administrative Appeals Office (AAO) of the U.S. Citizenship and Immigration Services (CIS) indicate that the extraordinary ability requirements for O-1 classification are being interpreted ever more strictly. Based on an evaluation of over 50 recent AAO decisions, this article highlights current O-1 trends for academics and researchers, and considers eight recent O-1 denials that exemplify these trends.

As background, the O-1 visa is reserved for nonimmigrants with extraordinary ability in the sciences, arts, education, business, or athletics. Extraordinary ability in the sciences, education, business, or athletics must be demonstrated by sustained national or international acclaim, and evidenced by either (1) the receipt of a major, internationally recognized award or (2) the fulfillment of at least three of eight criteria set forth in the regulations. These criteria are:

- (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;

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- (7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or
- (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.

8 C.F.R. § 214.2(o)(3)(iii).

These high standards mean that few people qualify for O-1 classification. For example, in fiscal year (FY) 2003, only 6,126 people obtained a visa in this category. In FY 2002, only 6,026 people obtained an O-1 visa.¹

For foreign nationals whose O-1 applications are denied by a CIS regional service center, the chances of prevailing on appeal are extremely small. Of the over 50 appeals reviewed for this article, the AAO sustained only four.

The reviewed cases represent a broad sampling of AAO opinions from all four regional service centers decided between September 2002 and November 2003. This article summarizes eight such decisions concerning O-1 appeals for academics or researchers.

Five Unsuccessful AAO Appeals

Of the over 50 appeals reviewed, more than 45 were dismissed. Discussed here are five O-1 losses that exemplify current trends.

Senior Imaging Scientist

Matter of [Name not Provided], File No. LIN 02 262 51159 (AAO Feb. 28, 2003).

The AAO dismissed an appeal of a Nebraska Service Center (NSC) decision by a biomedical research company on behalf of a researcher who was to be employed as a senior imaging scientist. The AAO determined that the scientist met only the sixth extraordinary ability standard (evidence of authorship of scholarly articles in the field), based on ten published articles and an extensive citation history. Some noteworthy points from the denial:

¹ The Department of State issues about 6,000 O-1 visas per year. Email from Charles Oppenheim, U.S. Dep't of State, to Stephen Yale-Loehr (Oct. 23, 2003, 10:06:30 EDT) (on file with authors). By contrast, the immigration statistical yearbook indicates that the number of O-1 admissions averages about 25,000 per year. U.S. Dep't of Homeland Security, 2002 Yearbook of Immigration Statistics 119 (2003) (table 26) (25,008 O-1 admissions in FY 2002; 25,685 O-1 admissions in FY 2001). This discrepancy stems from the different ways U.S. Citizenship and Immigration Services (CIS) and the State Department count visas: CIS counts the number of admissions, while the State Department counts the number of visa approvals. Each entry by an O-1 nonimmigrant, either for the first time or after international travel, is counted by CIS. O-1 visa holders averaged 4.2 entries into the United States in fiscal year 2002. Email from Michael Hoefler, U.S. Citizenship and Immigration Services, to Stephen Yale-Loehr (Nov. 10, 2003, 16:51:55 EDT) (on file with authors).

Criterion One: Documentation of the Receipt of Nationally or Internationally Recognized Prizes or Awards for Excellence in the Field of Endeavor

For the first criterion, the petitioner submitted evidence that the beneficiary participated in a fellowship in nuclear magnetic resonance at the Gerontology Research Center and at the National Institute of Aging at the National Institute of Health. He also received a number of travel awards and research grants.

The AAO determined that the beneficiary did not satisfy this criterion. In a standard response for this type of case, the AAO stated: “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,” and “a research grant is primarily designed to fund future research, and is not an award to honor or recognize past achievement.”

Criterion Four: Evidence of Participation as a Judge of the Work of Others

For the fourth criterion, the employer submitted evidence that the beneficiary reviewed manuscripts for three peer-reviewed scholarly journals: The American Journal of Physiology, Biochimica et Biophysica Acta, and Magnetic Resonance in Medicine.

The AAO determined that the beneficiary did not satisfy this criterion. According to the decision, the beneficiary did not provide unequivocal evidence that he was selected to review manuscripts for scholarly journals based upon his reputation in the field.

Criterion Five: Evidence of Original Contributions of Major Significance

The employer submitted evidence that the beneficiary published results of his research, evidence that the beneficiary was awarded a preliminary patent approval, and more than half a dozen testimonials, including two from doctors at the National Institute of Health. The testimonials included quotes supporting the beneficiary’s petition such as: “[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.”

The AAO rejected the evidence. Among other things the decision stated: “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.” About the beneficiary’s preliminary patent approval, the decision stated: “The granting of a patent documents that an invention is original, but not every patented invention constitutes a significant contribution in one’s field.” Regarding the numerous testimonials, the decision stated: “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.”

Criterion Six: Evidence of Authorship of Scholarly Articles

The employer submitted evidence that the beneficiary co-authored ten articles (seven as first author and three as second author), and included a citation history of these works. The AAO determined that the beneficiary had satisfied this criterion.

Criterion Seven: Evidence of Employment in a Critical or Essential Capacity for Organizations that Have Distinguished Reputations

For the seventh criterion, the petitioner submitted evidence that the beneficiary would be employed as senior scientist and director of imaging for the company.

The AAO determined that the beneficiary did not satisfy this criterion. In a standard response for this type of case, AAO stated: “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.” The beneficiary’s evidence only showed the critical capacity of his *prospective* employment.

Otolaryngologist

Matter of [Name not Provided], File No. LIN 03 036 51932 (AAO June 20, 2003).

The AAO dismissed an appeal of an NSC decision by an otolaryngology medical practice. The AAO determined that the doctor met only two of the extraordinary ability standards (judging the works of peers and authorship of scholarly articles). Some noteworthy points from the denial:

Criterion Four: Evidence of Participation as a Judge of the Work of Others

For the fourth criterion, the employer submitted evidence that the National Academy of Sciences selected the beneficiary to review a manuscript and that the beneficiary had served as an active reviewer of peer manuscripts for Clinical Cancer Research since 2002. The director determined that the beneficiary satisfied this criterion. The AAO concurred.

Criterion Five: Evidence of Original Contributions of Major Significance

The employer submitted evidence that the beneficiary had published 14 articles that were cited 254 times, evidence that the beneficiary had been granted a patent approval for a new tumor resection technique, and numerous testimonials about the value of the beneficiary’s work. Testimonials came from universities and hospitals across the United States and worldwide.

Despite all this evidence, the AAO determined that the beneficiary failed to meet this criterion. Regarding the beneficiary’s published research and citation rate, the AAO claimed that all professional research must be original and significant to warrant publication in a professional journal, and noted that the frequency of citation, while demonstrating impact in the field, “is considered under a separate criterion.” As for the patent approval, the decision stated that “the granting of a patent documents that an invention or innovation is original, but not every patented invention or innovation constitutes a significant contribution” to the field. The decision summed up its denial of this criterion by stating: “The nature of scientific research is to expand the body

of knowledge of science. The beneficiary's contributions are original and noteworthy, but they are best described as adding to our body of knowledge incrementally rather than as a *scientific breakthrough*" (emphasis added).

Criterion Six Evidence of Authorship of Scholarly Articles

The employer submitted evidence that the beneficiary authored fourteen articles that were published in peer-reviewed journals and were cited extensively. Both the director and the AAO determined that the beneficiary successfully met this criterion. As the AAO stated, "the citation history provided by the petitioner is evidence that the beneficiary's work has had a major impact on his field of endeavor."

Criterion Eight: Evidence of Commanding a High Salary or Other Remuneration for Services

For the eighth criterion, the employer submitted evidence that the beneficiary would receive \$200,000 per year, which is 50 percent more than the prevailing wage for otolaryngologists in the area.

The NSC determined that the beneficiary met this criterion, but the AAO held that the salary survey was geographically too restrictive. According to the AAO, "the petitioner should have submitted wage survey information for all otolaryngologists on a nationwide basis. The petitioner should have provided more than just the average (mean) wage. To evaluate whether the salary is high, the [Service Center] needs to compare it to the median and highest wages offered nationwide to otolaryngologists."

Assistant Medical Director of Clinical Trials

Matter of [Name not Provided], File No. SRC 02 191 52008 (AAO May 20, 2003).

The AAO dismissed an appeal of a Texas Service Center (TSC) denial by a medical oncology practice on behalf of a physician who was to be employed as an assistant medical director of clinical trials. The AAO determined that the O-1 candidate met none of the extraordinary ability standards. Some noteworthy points from the denial:

Criterion Four: Evidence of Participation as a Judge of the Work of Others

The employer submitted evidence that the beneficiary was chosen to be a member of the Lymphoma, Oncology, and Lung Cancer Tumor Boards, where cases in each of these specialties are presented, reviewed and discussed. The oncology practice also submitted evidence that the beneficiary evaluated and graded the abstract and oral presentations of other oncologists at the National Medical Oncology forum, assessed the work of other oncologists, residents, and medical students as a fellow, evaluated the work of other physicians competing for an oncologist position at the University of Miami, and reviewed hematology, bone marrow transplant, and oncology papers in an academic setting.

TSC had conceded that the beneficiary had satisfied this criterion based on the articles submitted. The AAO, however, overturned this determination. Although the beneficiary acted as a judge of

the work of his peers, the AAO claimed that there was not sufficient evidence that “the beneficiary was selected to perform peer review based on his expertise in the subject matter.” Regarding the other extensive documentation for this criterion, the decision maintained that the beneficiary’s judging of others’ work was part of the regular performance of his job, and therefore, was inadmissible.

Criterion Five: Evidence of Original Contributions of Major Significance

The medical oncology practice submitted numerous testimonials from experts in the field, evidence that the beneficiary co-authored several abstracts and scholarly articles that were published in professional journals, and an estimate of the total number of patients that the beneficiary treated. The testimonials noted that the beneficiary was an “expert in treating a wide variety of cancers” and a “co-investigator in a lung cancer research protocol.”

However, the AAO determined that the beneficiary did not satisfy this criterion. According to the decision, although “the testimonials’ authors all speak highly of the beneficiary’s skills,” and “the beneficiary has published results of his research,” “the evidence fails to show that the beneficiary has sustained national or international acclaim and recognition for major achievements in the field of medicine.”

Criterion Seven: Evidence of Employment in a Critical or Essential Capacity for Organizations That Have Distinguished Reputations

The employer submitted evidence that the beneficiary had been in charge of the bone marrow transplant unit of the medical practice. The AAO held that the beneficiary did not satisfy this criterion. Although the beneficiary was in charge of one of the units of the medical oncology practice, he “served in this capacity while he was employed as an intern, resident or fellow and therefore he does not satisfy this criterion.”

Director of Wound Care, Burn Management, and Trauma Center

Matter of [Name not Provided], File No. SRC 02 240 50457 (AAO Jan. 24, 2003).

The AAO dismissed an appeal of a TSC denial by a medical school on behalf of a physician who was to be employed as the initial director of a new wound care, burn management and trauma center. The beneficiary had *six* prior O-1 approvals. The AAO determined that the beneficiary now met only one of the extraordinary ability standards (judging the works of others). Some noteworthy points from the denial:

Criterion Four: Evidence of Participation as a Judge of the Work of Others

The employer submitted evidence that the beneficiary was selected to review articles for the European Journal of Plastic Surgery. The director determined that the beneficiary did not meet this criterion because he performed peer review on an ad hoc basis, and had not established that he was selected on the basis of his acclaim. On appeal, the employer submitted a letter from the editor-in-chief of the European Journal of Plastic Surgery indicating that the beneficiary was selected to perform peer review on the basis of his accomplishments in the field. The beneficiary

reviewed at least four manuscripts submitted for consideration for publication in 2000. The AAO determined that the beneficiary had successfully met the standard for this criterion.

Criterion Five: Evidence of Original Contributions of Major Significance

The medical school submitted numerous testimonials about the value of the beneficiary's work. It also submitted statements that the beneficiary provided key research in skin grafts and scar treatments, received national recognition for his work on vaginal reconstruction, was an expert in a particular kind of skin graft used to correct a specific genetic defect, and was currently researching tracheal reconstruction, the use of a chemotherapeutic agent to treat scars, and the differences between two leading kinds of wound treatment. One testimonial said "not only will [the beneficiary] make a major contribution in elucidating the cause of keloids, but his research will have broad applications in the other areas of wound healing."

The AAO determined that the beneficiary did not satisfy this criterion. According to the decision, the beneficiary would have needed to submit "*contemporaneous corroborating evidence such as news articles or articles in professional journals* about the beneficiary's research" (emphasis added) for the statements of the petitioner to have met the extraordinary ability standard for this criterion. Regarding the testimonials submitted by the beneficiary's expert peers, the AAO claimed that they only spoke to the beneficiary's expertise, ability and potential, and not the significance of his contributions.

Criterion Six: Evidence of Authorship of Scholarly Articles

The employer submitted evidence that the beneficiary authored thirteen articles and nine abstracts in professional publications. The AAO determined that the beneficiary did not satisfy this criterion. Although the AAO did not contest the employer's assertion that the beneficiary authored scholarly articles in the field, in professional journals, and other major media, the decision concluded there was not enough evidence that independent researchers had cited the petitioner's work to show the beneficiary's national or international acclaim.

Assistant Professor of Pathology

Matter of [Name not Provided], File No. SRC 02 224 52106 (AAO June 2, 2003).

The AAO dismissed an appeal of a TSC decision by a medical school on behalf of a research physician who was to be employed as an assistant professor of pathology. The beneficiary had been previously granted O-1 status and was seeking an extension. The AAO determined that the beneficiary now met only one of the extraordinary ability standards (authorship of scholarly articles). Some noteworthy points from the decision:

Criterion Five: Evidence of Original Contributions of Major Significance

The employer submitted numerous letters of support and evidence that the beneficiary has worked as a member of the faculty at University of Texas Medical Branch at Galveston (UTMB Galveston) and with the World Health Organization Collaborating Center for Tropical Diseases. The employer also submitted evidence that the beneficiary authored a chapter in a textbook, was

cited at least 22 times, and was then researching the crucial and important field of infectious diseases including hantavirus pulmonary syndrome (HPS). The letters of support submitted came from the director of anatomic pathology at New York Medical Center, the director of the mosquito research program at the University of California, and the staff pathologist and medical officer in the infectious disease pathology program at the Centers for Disease Control and Prevention, among others, who called the beneficiary's work "pioneering and a highly significant achievement to the study of the pathogenesis of HPS."

The AAO determined that the beneficiary did not satisfy this criterion. The decision states that the beneficiary's contributions were "original and noteworthy, but they are best described as adding to our body of knowledge incrementally rather than as a scientific breakthrough."

Criterion Six: Evidence of Authorship of Scholarly Articles

The employer submitted evidence that the beneficiary had co-authored nine articles that were published in peer-reviewed publications, co-authored a dozen abstracts that were disseminated at professional conferences, and co-authored a chapter for a medical textbook. Both the director and AAO determined that the beneficiary successfully satisfied this criterion.

Criterion Seven: Evidence of Employment in a Critical or Essential Capacity for Organizations That Have Distinguished Reputations

UTMB Galveston submitted evidence that the beneficiary had been employed as an assistant professor in the department of pathology for the last three years, and had been a lead researcher in a hantavirus study that had been ongoing during that three-year period.

The AAO determined that the beneficiary did not satisfy this criterion. According to the AAO, even if the record had established that the beneficiary played a "critical role on one or more research projects," it would not satisfy this criterion, as it requires employment in a critical or essential capacity for *organizations or establishments* that have a distinguished reputation, not work in a critical or essential capacity for distinguished research projects. Apparently, the AAO did not consider UTMB Galveston an organization with a distinguished enough reputation to satisfy this criterion.

Three Successful AAO Appeals

Of the over 50 recent O-1 AAO appeals that we reviewed, only four were sustained: one from an actress in the motion picture industry, and three from assistant professors at medical schools. We summarize below the three successful appeals from medical schools.

Assistant Professor of Medicine

Matter of [Name not Provided], File No. LIN 02 184 53385 (AAO Sept. 17, 2002).

The AAO sustained an appeal of a NSC decision by a medical school on behalf of a physician who was to be employed as an assistant professor of medicine in the Division of Immunotherapy. The director denied the petition, finding that the employer failed to establish that the beneficiary

met the regulatory standard necessary for classification as an alien with extraordinary ability in the sciences, and that the evidence was insufficient to establish that the position or services to be performed require a person of extraordinary ability. Upon review, the AAO determined that the beneficiary did qualify for an O-1 visa because he met at least three of the extraordinary ability standards, and because the director applied an incorrect legal standard in stating that the position offered to the beneficiary does not require a person of extraordinary ability. Some noteworthy points from the decision:

The AAO did not organize its discussion of the submitted evidence by criterion, but noted that the beneficiary authored at least twenty-eight articles for professional journal publications or presentations at professional conferences; participated in some of the pioneering early studies of stem cell transplantation for autoimmune diseases; helped to organize the first major international conference in hematopoietic transplantation for autoimmune diseases; and with his colleagues, made significant advances treating patients with fatal autoimmune diseases, such as multiple sclerosis, Crohn's disease, and lupus.

With regards to the director's determination that the evidence was insufficient to establish that the position required a person of extraordinary ability, the AAO conceded: "The director denied the petition, in part, because he determined that the evidence is insufficient to establish that the position actually requires a person of extraordinary ability. Counsel asserts that the director applied an incorrect legal standard in making this determination. Counsel cited the supplementary information from the current regulations governing O-1 petitions: 'After careful consideration, the Service agrees that there is no statutory support for the requirement that an O-1 alien must be coming to the U.S. to perform services requiring an alien of O-1 caliber.' 59 Fed. Reg. 41820 (August 15, 1994). In review, the director applied an incorrect legal standard."

Assistant Professor and Research Scientist

Matter of [Name not Provided], File No. [not Provided] (AAO Nov. 1, 2002).

The AAO sustained an appeal of a TSC decision by Baylor College of Medicine on behalf of an assistant professor and research scientist who was to be employed as an assistant professor in the Department of Molecular and Human Genetics and Department of Medicine. The director denied the petition, finding the evidence insufficient to demonstrate that the beneficiary was "at the very top" of her field. The director acknowledged that the beneficiary was an accomplished researcher and scientist who had published material in professional journals, but asserted that publishing is the norm in the field and insufficient to establish extraordinary ability. Upon review, the AAO determined that the beneficiary did qualify for O-1 classification. Some noteworthy points from the decision:

The AAO did not organize its discussion of the submitted evidence by criterion, but acknowledged that the beneficiary met at least three of the extraordinary ability standards. In the discussion, the AAO noted that the beneficiary demonstrated sustained national acclaim and recognition by submitting evidence of the publication of material about the beneficiary in professional media, and evidence of having been named one of twenty people named America's most promising biomedical researchers. Baylor showed that the beneficiary judged the work of others by submitting evidence of judging research proposals at the behest of the National

Institute of Health and NASA, among others, in addition to reviewing the manuscripts and abstracts of peers for publication in professional journals. The beneficiary's original scientific contributions of major significance were demonstrated by submitting testimonials from experts in the field attesting to the significance of the beneficiary's research, in addition to evidence of being the co-inventor on two approved patents and three pending patent applications. Employment in a critical capacity at a distinguished institution was established by submitting evidence of heading a research team and lab at Baylor Medical College, in addition to evidence of acting as principal investigator for a research project funded by an NIH grant.

Assistant Professor of Surgery

Matter of Mohammed Salik A. Jahania, File No. SRC 02 202 54837 (AAO Nov. 6, 2003).

The AAO sustained an appeal of a TSC decision by the University of Kentucky on behalf of an physician who was to be employed as an assistant professor of surgery. The director denied the petition, finding that the evidence insufficient to demonstrate that the beneficiary qualified as an alien of extraordinary ability. Upon review, the AAO determined that the beneficiary did qualify for O-1 classification by meeting at least three of the extraordinary ability standards. Some noteworthy points from the decision:

Criterion Four: Evidence of Participation as a Judge of the Work of Others

For the fourth criterion, the University of Kentucky submitted evidence of the beneficiary's work serving as a reviewer of manuscripts submitted to the Journal of Thoracic and Cardiovascular Surgery and the American Journal of Physiology. The employer also exhibited documentation of the beneficiary's work reviewing the research proposals of his peers. The Director determined that the beneficiary was not judging the work of others in this instance, but rather the merit of their grant proposals.

On motion the employer submitted a letter from the associate editor of the American Journal of Physiology, Heat and Circulatory Physiology stating that the beneficiary was selected to perform peer review based on his expertise in the subject matter.

The AAO determined that the beneficiary satisfied this criterion.

Criterion Five: Evidence of Original Contributions of Major Significance

The employer submitted numerous testimonials about the value of the beneficiary's work and his individual qualities. Initially, the employer submitted seven testimonials, five of which were written by employees of the petitioning employer. The agency originally determined that many of these testimonials were conclusory and had failed to state how the beneficiary had made an original contribution of major significance to the field.

The employer then submitted two additional testimonials, one from the World Governor of the International College of Surgeons and one from the director of the petitioner's transplant center. The employer also asserted that the beneficiary satisfied this criterion by virtue of his diagnosis

and correction of a heart device malfunction. The discovery was published in the Journals of Thoracic and Cardiovascular Surgery and resulted in a design change in the device.

The AAO determined that the beneficiary satisfied this criterion. According to the AAO, the beneficiary made a significant contribution to his field of endeavor by discerning a heart device defect and by reporting it, both to the manufacturer that implemented the design changes, and to his peers who took necessary steps to avoid injuring patients, thereby impacting his field.

Criterion Six: Evidence of Authorship of Scholarly Articles

The employer submitted evidence that the beneficiary authored more than 25 scholarly articles that were published in professional journals and co-authored a book chapter and two books. A citation history of the articles was submitted as evidence of the beneficiary's acclaim.

Both the Director and the AAO determined that the beneficiary satisfied this criterion.

Criterion Seven: Evidence of Employment in a Critical or Essential Capacity for Organizations That Have Distinguished Reputations

For the seventh criterion, the employer submitted evidence that the beneficiary was the co-investigator on seven clinical trials, including two NIH funded research projects, in addition to being a fellow at the University of Wisconsin, and a fellow, resident, trainee, and assistant professor at the University of Kentucky. The employer also asserted that the beneficiary acted as a critical and irreplaceable member of the petitioner's ongoing transplant patient, teaching, research and clinical care program, supported by testimonials from the employer's transplant center.

The employer also submitted evidence that the beneficiary was the principal investigator of two ongoing research programs, and the winner of awards from the Governor of Kentucky and the State of West Virginia. The petitioning organization noted that it is federally designated as a heart transplant center and that such designation is evidence of the petitioner's national prestige, and submitted an additional testimonial which stated in part: "It is without reservation that I say that [the beneficiary's] withdrawal from the University of Kentucky's Transplant Center will greatly reduce Medicare beneficiaries' access to [organ] transplantation in the states of Kentucky, West Virginia, Ohio and Indiana."

Despite this evidence, both the Director and the AAO determined that the beneficiary did not satisfy this criterion.

Trends in Recent O-1 Decisions

Criterion One: Documentation of the Receipt of Nationally or Internationally Recognized Prizes or Awards for Excellence in the Field of Endeavor

O-1 academics and researchers regularly submit proof that they have received nationally or internationally recognized fellowships, grants, and scholarships as evidence of prizes or awards

for excellence in their field of endeavor. However, the AAO and the service centers ignore even the most prestigious grants and fellowships, such as Fulbright grants and fellowships with the U.S. government and international organizations. The AAO generally claims that academic study is not a field of endeavor, but rather training for a future field of endeavor. As such, awards for academic work, scholarships and fellowships are not considered awards in the field of endeavor. The AAO also discounts research grants and contends that research grants are primarily designed to fund future research, not to honor or recognize past achievement.

Criterion Four: Evidence of Participation as a Judge of the Work of Others

The AAO has held that many prospective O-1 academics and researchers did not meet the fourth extraordinary ability standard because evidence was not submitted that the beneficiary was selected to perform peer review based upon their “expertise in the subject matter.” This conclusion came even in cases where the beneficiary had submitted substantial evidence of their work as the judge of their peers. To successfully satisfy this criterion, petitioners should directly address this concern, and if possible, submit a letter from the editor of any journal the beneficiary reviewed for, stating that the beneficiary was chosen as a peer reviewer based on his expertise in the subject matter. In the case of the Director of the Center for Wound Care, Burn Management, and Trauma, the submission of a letter from the editor of the European Journal of Plastic Surgery indicating that the beneficiary was selected to perform peer review on the basis of his accomplishments in the field was the difference between satisfying and not satisfying this criterion.

In other cases the AAO has held that work judging the research of others as part of a job does not satisfy this standard. This issue comes up regularly for doctors who have responsibility over residents, interns, and staff, and for academics who review the work of graduate students. In the case of the assistant pathology professor discussed above, counsel cited the minutes of a June 2002 meeting between AILA and the Texas Service Center, which stated that the TSC “has reinforced that providing official direction for a thesis or a dissertation satisfies the judge of the works of others criteria.” The AAO, however, noted that “AILA meeting minutes are not binding on the Bureau.”

Criterion Five: Evidence of Original Contributions of Major Significance

The fifth O-1 criterion is perhaps the most difficult for O-1 academics and researchers to satisfy. The AAO typically does not accept patents as evidence of a significant contribution in the field. In the case of the otolaryngologist discussed above, even evidence of a patented tumor resection technique and over 250 citations of the beneficiary’s publications failed to satisfy this criterion. The AAO takes a similarly severe stance on expert testimonials about the beneficiary’s work. Even statements specifically about the originality and significance of the beneficiary’s work by the *most* prestigious experts in the field, including doctors at the Centers for Disease Control and the National Institute of Health, have proven insufficient to satisfy this criterion.

The AAO also regularly discounts published research. Many of the AAO denials we reviewed included the boilerplate statement that “by definition, all professional research must be original and significant in order to warrant publication in a professional journal.” This occurs even when

the research has been widely cited. In the case of the otolaryngologist's O-1 petition discussed above, the AAO held that this extraordinary ability standard had not been met because the frequency of citation, while demonstrating impact in the field, "is considered under a separate criterion."

Criterion Six: Evidence of Authorship of Scholarly Articles

In the cases we reviewed, the AAO regularly held that unless there is evidence that independent researchers have cited the beneficiary's work, the authorship of scholarly articles is not enough to show the beneficiary's national or international acclaim. This was the case for the director of the wound care, burn management, and trauma center, who submitted evidence of twenty-two publications, but did not include a citation history. The AAO determined that the director did not meet this standard. Additionally, there appears to be no clear threshold for the number of articles, abstracts, and citations necessary to satisfy this criterion. In the cases discussed above, the AAO determined that beneficiaries with as many as thirteen publications and extensive citation histories had not met this standard, while beneficiaries with as few as nine and ten publications had. The cases demonstrate that to satisfy this criterion, it is best to provide evidence of the authorship of scholarly articles, the citation of the articles by other scholars, and the merit of the publishing journals themselves.

Criterion Seven: Evidence of Employment in a Critical or Essential Capacity for Organizations That Have Distinguished Reputations

In several of the cases above, and many more of the recent AAO decisions reviewed, the AAO determined that senior medical positions are "not considered to be on the same level as being employed in a critical or essential capacity as intended in the regulations." This conclusion extended even to the assistant professor of surgery at the University of Kentucky, who was the co-investigator on seven clinical trials, including two NIH funded research projects.

Interestingly, the assistant professor and research scientist at Baylor University successfully established critical capacity at a distinguished institution by acting as principal investigator for one NIH funded research project and heading a research team and lab. That another assistant professor at a less prestigious university was unsuccessful in meeting this standard, despite acting as co-investigator of seven times as many research projects as the assistant professor at Baylor, implies that the AAO discriminates against less prestigious medical schools and institutions when evaluating this criterion.

Criterion Eight: Evidence of Commanding a High Salary or Other Remuneration for Services

O-1 petitioners often submit proof of salaries that are 50 percent to 100 percent higher than the prevailing wage both locally and nationally for similarly employed academics and researchers, only to receive determinations that the high salaries offered were not high enough. The denial of the otolaryngologist's O-1 petition stated that the beneficiary's proffered salary of \$200,000, twice the wage nationwide for physicians practicing internal medicine according to Physician Services of America, was not high enough. The AAO states that "the petitioner should have provided more than just the average (mean) wage. To evaluate whether the salary is high, the

[Service Center] needs to compare it to the median and highest wages offered nationwide to otolaryngologists.” The AAO cited no authority for this statement.

Conclusion

The O-1 category is meant to be restrictive. Not everyone has extraordinary ability. Nevertheless, this sample of recent AAO O-1 decisions indicates that the AAO has been unduly restrictive in its interpretation of the O-1 regulations.

Well-crafted advocacy, however, can defend a meritorious O-1 petition. First, more is not necessarily better. Sometimes petitioners submit mountains of documents haphazardly. Busy CIS adjudicators can be overwhelmed and annoyed by unnecessary bulk. A good cover letter with a brief summary showing exactly how the beneficiary meets the regulatory requirements, is important. Equally important is a clear document or exhibit index. Advocate with your document index. Clearly set forth the evidence attached and how it satisfies the criterion in question. Setting out an easy-to-follow roadmap for the adjudicator is key.

Second, do not just attach evidence of awards, prizes, grants and fellowships. In light of the cited AAO decisions, set forth the criteria for the award and explain how the awards were in fact based upon past achievements. Award of NIH grants, for example, are based on the review committee’s evaluation of not only the proposed project but also the individuals on the research team.

Third, explain how this particular beneficiary has performed well beyond what is normally required of others in his position. Yes, academics are expected to publish, but point out that this particular academic has published truly significant work (corroborated in the support letters for the original contributions criterion), and moreover has produced more volumes of published material than the average academic. Similarly, state how the ways in which your particular beneficiary has acted as a judge of others’ work is qualitatively different from others asked to serve as judges. For example, in one successful O-1 case we stressed that the beneficiary was specifically appointed by the President of the institution to serve on a panel reviewing candidates for the Provost position, the chief academic officer of the institution.

Finally, stress the social importance of the beneficiary’s work. Our experience has shown that where the beneficiary’s work may be tied to some medical breakthrough or a significant national social or political benefit, the O-1 was more likely to be granted. Note, though, that sloppy makeovers of national interest waiver (NIW) filings into O-1 petitions will almost guarantee a request for further evidence, with coy language commenting on how the petition materials appear to have been prepared for an NIW. If you are filing an I-140 immigrant visa petition based on an NIW along with an O-1, take care to make sure your support materials and attorney documents give no impression that this is just a back-up to an NIW.