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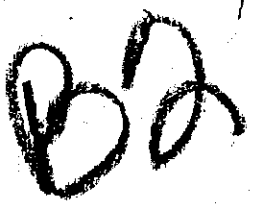

U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

Public Copy

File: WAC 99 001 50160 Office: California Service Center Date: APR 13 2001

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)

IN BEHALF OF PETITIONER:

[redacted]

Identifying data ... prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a designer and manufacturer of radio frequency/ microwave components. It 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 business and 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 Service 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 sustained national or international acclaim at the very top level.

This petition seeks to employ the beneficiary as its director of strategic marketing. Donee Angel, the petitioner's director of Human Resources, asserts that the beneficiary "is truly one of the

few individuals who possess the necessary background and knowledge to perform the position's duties." The claimed scarcity of qualified workers is immaterial to the issue of whether the beneficiary is nationally or internationally acclaimed throughout his field. There exist lesser visa classifications, with a labor certification requirement. Labor certification is the proper means by which to address a shortage of qualified workers for a given position.

The regulation at 8 C.F.R. 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence which, it claims, meets the following criteria.

> *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.*

Ms. Angel states:

> [The beneficiary] is a Member of the Institute of Electrical and Electronics Engineers (AU). The AU is the world's largest technical professional society with more than 320,000 members in 152 countries. Full membership is limited to those who have achieved professional competence and recognition demonstrated by advanced academic degrees and by their proven research experience in their field of expertise.

Professional competence, advanced degrees and research experience are not outstanding achievements. These criteria may distinguish full members from student members and associate members, but an organization simply cannot swell to nearly a third of a million members while admitting only the elite in the field. Ms. Angel does not explain how the AU can be the world's largest organization of its kind and yet be the type of highly exclusive organization described in the regulation. An example of a qualifying association would be the U.S. National Academy of Sciences, which elects only a handful of new members each year, and admission to which is not merely a professional credential but an instantly recognized badge of distinction in the sciences. AU membership is not of this high caliber, and such membership does not meet this criterion simply because the AU holds its members to a given standard.

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

Ms. Angel states that the beneficiary's "original scientific contributions in microwave engineering design are evidenced by . . . 9 patents, approved and pending." Patents recognize the originality of an invention, but not its significance in the field. The record suggests that the U.S. Patent Office has issued over 5.5 million patents; it is unrealistic to assert that every one of these millions of patented inventions represents a contribution of major significance.

The petitioner submits several letters to support the petition. [redacted] an independent microwave consultant, states:

> I have been professionally associated with [the beneficiary] in the field of microwave electronics for some twenty years and I am familiar with his engineering career. We were both employees of the GEC organization. . . .
>
> His innovative mind, scientific/technical competence and remarkable basic engineering of electronic engineering is outstanding. . . . Some of his particular achievements that have created ground-breaking technology, have included outstanding innovative work on oscillators, tuneable dielectric resonators, frequency dividers/downconverters, and the application of these and other components to the novel design and build of frequency synthesisers, automotive radars and wireless LAN transceivers.

[redacted] product line manager, Broadcast Products, for Andrew Corporation, states:

> [The beneficiary] is contributing to the ability of service providers to launch new competitive telecommunications services to customers via fixed broadband wireless and satellite-based infrastructures. His designs have improved the price/performance point for wireless access technology such that wireless systems can compete with wireline solutions. Specifically his designs for millimeter wave transmitters and receivers will benefit users of the emerging Local Multipoint Distribution Service recently licensed by the FCC.

[redacted] communications engineering manager for GEC Plessey Semiconductors, states that the beneficiary "is well known world wide in the Microwave Industry."

A fourth letter is attributed to [redacted]. Mr. [redacted] however, did not sign the letter, nor does it appear that he wrote it. At the top of the unsigned letter is the word "[date]" rather

than any actual date, and below the unsigned signature block is this notation:

> [As I may have mentioned to you on the telephone, [the beneficiary] is presently serving as Strategic Marketing Director which requires him to have a good knowledge of market needs as well as technical developments in the field. Did any of his work with you require an appreciation of market needs/trends etc. or was it strictly a technical position]

This notation was obviously written by an unidentified third party, presumably the same individual who wrote the letter for Mr. Barsotti's signature. This unsigned letter has no value as evidence except to suggest the possibility that the other letters in the record were prepared in a similar manner.

All of the above witnesses have worked with the beneficiary for varying degrees of time. Their letters do not represent first-hand evidence that the beneficiary has earned significant acclaim among engineers who have not worked with him. The letters also do not discuss the beneficiary's "appreciation of market needs/trends etc.," which is a key function of his job according to the anonymous author of the letter attributed to Mr. [redacted].

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

The petitioner asserts that the beneficiary is the author of 15 published articles and conference presentations, as well as a book chapter. The record contains actual evidence regarding one presentation, one article in IEEE Transactions on Microwave Theory and Techniques, and a chapter in Microwave Measurements. The record does not establish the circulation of these publications or the impact (e.g., through citation) which the petitioner's work has had on the field.

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

Ms. [redacted] notes that the beneficiary worked for General Electric from 1965 to 1995, ultimately holding the position of systems engineering manager, Communications, in which capacity the beneficiary "held authority and responsibility over as many as 26 professional engineers and technicians at one time, and over a $25 million project." As Ms. Angel also notes, however, General Electric is a major corporation which "employs 276,000 people worldwide." The record contains no evidence from any ranking official of General Electric to indicate that the beneficiary played a leading or critical role for the corporation as a whole,

as opposed to one office operated by one of its many subsidiary corporations.

Since 1996, the beneficiary has been director of Strategic Marketing for the petitioning corporation, which according to Ms. Angel "has secured a 30% market share of the satellite communications market." The petitioner submits no independent evidence to show that it enjoys a distinguished reputation (success and viability being not necessarily synonymous with distinction). The petitioner's own annual report is, by nature, somewhat self-serving, its purpose being to promote the company rather than report impartially.

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

Ms. [redacted] indicates that the beneficiary earned $95,000 in 1994; $111,108 in 1995; and $145,568.44 in 1996. Ms. [redacted] adds that the beneficiary "is compensated at $128,000 annually," but does not explain the substantial decrease in the beneficiary's annual salary from the figure for 1996. The petitioner does not cite or provide any evidence to establish that the aforementioned figures are significantly high in relation to others in the field. Because the plain language of the regulation demands comparison with others in the field, the petitioner cannot satisfy this criterion simply by disclosing the beneficiary's annual earnings.

The director denied the petition, stating that the evidence described above does not place the beneficiary at the very top of his field of endeavor. On appeal, counsel protests that the director failed to request additional evidence as required by 8 C.F.R. 103.2(b)(8). At this point, the decision already having been rendered, the most expedient remedy for this complaint is the full consideration on appeal of any evidence which the petitioner would have submitted in response to such a request. We discuss this evidence below.

The director had stated that the beneficiary's patents do not demonstrate extraordinary ability or "the relative value or practicality of any invention," but rather the patent process ensures that a given invention does not use, without attribution, previously patented innovations. In response to this assertion, the petitioner submits a letter from patent attorney Gregory J. Koerner, who asserts that "patentable subject matter must not only be novel and original, but must also be non-obvious in light of any existing prior art." Mr. Koerner, who has assisted the beneficiary in preparing patent applications, implies that the process of obtaining a patent is so difficult and complex that actually obtaining patents is evidence of extraordinary ability. The petitioner offers no corroboration from the U.S. Patent Office or

any other entity which is not paid to represent the interests of the petitioner and the beneficiary.

Counsel asserts that because the beneficiary's work has been published, the petitioner "has provided proof of qualifying under [this] evidentiary requirement." Counsel appears to contend that the very fact of publication is sufficient to meet the criterion pertaining to publication, despite the repeated use of the word "major" in the pertinent regulation. The burden is on the petitioner to establish the status and circulation of the publications which have carried the beneficiary's work. The stated purpose of the regulatory criteria is to establish a level of sustained national or international acclaim that places the beneficiary at the very top of the field, consistent with Congressional intent made plain in the legislative history. While an individual may place himself or herself at the top of the field in part through publishing influential articles in major publications, we must still consider the nature of the publication and the impact of the articles. An journal article or book chapter with a circulation of a few thousand copies simply does not have the exposure or impact of an article published in a top journal with tens of thousands of readers. A fifteen-minute presentation at a conference does not inherently stand out from dozens of other fifteen-minute presentations at the same conference, or the countless other presentations at hundreds of other conferences.

[redacted], vice president of Engineering at Triton Network Systems, asserts that the beneficiary's authorship of scholarly articles is all the more remarkable because the beneficiary possesses only the equivalent of a bachelor's degree. The beneficiary's field of endeavor includes individuals with master's and doctoral degrees; his work must be compared to their output as well as to individuals with only a bachelor's degree or its equivalent. A given paper which may be beyond the capacity of most B.S. holders could be well within the abilities of an average Ph.D. in the same field.

Counsel observes that, in addition to his aforementioned salary, the beneficiary has received stock options worth over one million dollars. The petitioner still has not offered evidence to allow a meaningful comparison between the beneficiary and others in the field. If such a stock option package is the norm at his level of management, then the beneficiary's package is not significantly high. Counsel asserts "[i]n comparison to IBM, Intel and other large corporations, [the beneficiary's] salary and stock options . . . are significant remuneration for his type of position." The record contains no evidence to support this claim. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel observes that the petitioner is a relatively small corporation, but after having argued that the Service must adhere to the "plain language" of the regulations, counsel does not explain what part of the regulatory language allows the petitioner to limit "others in the field" to employees of corporations of similar size. Furthermore, the beneficiary's salary was even lower during the decades that he worked for the massive General Electric Corporation.

The petitioner has established that the beneficiary has earned the respect of his current and former employers and collaborators, and that the beneficiary has led a long and successful career. The record, however, does not demonstrate that the beneficiary enjoys sustained national or international acclaim as one of the very top figures not only at one company, but throughout the field. Many of counsel's arguments on appeal appear to be based on the erroneous assumption that, merely by claiming to have established eligibility, the petitioner has shifted the burden of proof to the director to refute that claim.

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.

Review of the record, however, does not establish that the beneficiary has distinguished himself as an engineer, or as a director of strategic marketing, 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 indicates that the beneficiary shows talent in his field, and has won some respect from his peers, but is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.