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U.S. Department of Justice
Immigration and Naturalization Service

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

[Redacted]

File: [Redacted] Office: Nebraska Service Center

Date: AUG 23 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

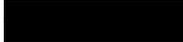
If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office



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

The petitioner seeks classification 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 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

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(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 he has sustained national or international acclaim at the very top level.

The petitioner seeks employment as a software design engineer and optical design researcher. At the time he filed the petition, the petitioner worked at Microsoft Corporation. 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, he claims, meets the following criteria.

Counsel states that the petitioner meets three of the regulatory criteria, but then discusses four such criteria:

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Counsel asserts that the petitioner has received 12 such awards, either individually or as a member of a research group.

In 1997, the petitioner received the Nielsen Star Award “for exceeding expectations when rewriting and upgrading Ebb and Flow software.” This appears to be an internal award presented to Nielsen employees, rather than a nationally or internationally recognized prize or award. The petitioner has not shown that the prize has any significance outside of the company that presented it.

The remaining certificates indicate that the petitioner received second and third grade awards for “significant contribution to the progress of science and technology.” The certificates themselves are “form” documents with specific information added in pen or via computer printer. One certificate from the National Education Committee of the People’s Republic of China is numbered 93-08907; another, from the Chinese Academy of Sciences, is numbered 93J-3-071-03. The record contains nothing from the various awarding entities to establish the prestige of the awards, the number issued each year, and so on. The use of serial numbers on the certificates seems to suggest the issuance of several such awards each year. Many of the certificates do not identify the petitioner at all; they identify only the institution where the projects were conducted. Counsel asserts without corroboration that the petitioner made especially significant contributions to the projects.

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

Counsel states that the petitioner has made several such contributions:

[A]s a software engineer with Ability Asia Pacific . . . , [the petitioner] was a critical developer of a pioneering E-Commerce product . . . [which] was a key factor in leading the company to become a leading e-commerce solution provider.

From October 1996 to September 1997, [the petitioner] was an Analyst Programmer and Design Engineer with AC Nielsen, a world leading market research company. During that time, he was involved in the development of TV-rating and other media application software. . . . [The petitioner] was a core participant in the development of a new version of the software, Media Advisor. . . .

Prior to his work with AC Nielsen, [the petitioner] was a visiting scholar at the Optical Science Center, University of Arizona, the world's most famous research center for optics. . . . His contributions include developing modeling programs sponsored by Eastman Kodak and 3COM. . . . The work is expected to increase the density of the optical R/W disk by a factor of four. . . .

[A]s a Research Associate at the Changchun Institute of Optics and Fine Mechanics . . . he made very significant achievements in the areas of optical design, optical software, optical lens database and optical expert systems which have earned him an international reputation as an expert in his field.

Counsel observes that the petitioner's work has resulted in the filing of patent applications. A patent, even if granted, reflects only the originality rather than the significance of a given innovation. The mere filing of patent applications has no probative value with regard to the claim that the inventions to which the applications pertain are original contributions of major significance.

The petitioner submits five witness letters discussing his work. All of the witnesses have ties to the petitioner, having supervised or collaborated with him or having worked at the same facility as the petitioner. Dr. Tom D. Milster, associate professor at the University of Arizona, states:

Before joining my team in [the] Optical Sciences Center, [the petitioner] worked with Changchun Institute of Optics and Fine Mechanics for more than six years. During that time, he made very significant achievements in the areas of optical design, optical software, optical lens database and optical expert systems which have earned him an international reputation as an expert in his field. . . . [The petitioner has designed] a very complex and high precision critical optical system. In some aspects, the performance of his system has passed that which was developed by NASA. His software system, CIOES, which was demonstrated at [the] Optical Sciences Center, has similar functionality with the world-leading software Code V. His research in optical design expert systems and optical database systems . . . introduced modern computer technology into [the] optical industry and research in China. . . .

[The petitioner] worked in my research group in the Optical Data Storage Center . . . performing leading-edge research in the field of optical data storage. . . . He made very significant contributions to the research activities, and the computer simulation programs developed by him are still used in the center. His investigation of a new optical detection method called quadrant pupil detection . . . could potentially increase the density of optical R/W disk[s] by a factor of four.

Another University of Arizona faculty member, research professor Dr. Weiping Zhang, states that the aforementioned CIOES software system "is a product standing among a few best products in the world."

Michael Halcoussis, director of Development at Microsoft Visual Studio, states that the petitioner “has been a key person” in the design of certain components of new software systems. Paul S. Kuklinski, Jr., technical lead at Microsoft, deems the petitioner “a strong contributor to Microsoft Corp.’s innovations in designing and building distributed Internet applications that target [important industry] standards.” Neither of these witnesses explain how the petitioner’s work is of greater importance than that of other software designers who prepare critical elements of commercial software systems.

Xinshu Wang, previously a senior systems analyst at Masterpack International while the petitioner was also employed there, states that the petitioner “has made great contribution[s] in developing Masterpack’s first e-commerce product CIS Order Entry. . . . [He] found a fatal bug in an external program . . . [and] applied many cutting-edge technologies in developing the web applications.” It is not clear how these developments are especially significant outside of Masterpack.

The above witnesses indicate that the petitioner has offered valuable services to his various employers, but they do not show how the petitioner’s work has attracted attention outside of the companies and universities where he performed that work. The vague assertion that the petitioner has earned international recognition tells us little about the nature or extent of that reputation. The record does not show that the petitioner has been the originating or driving force behind an extremely influential or popular software package, or that his methods or innovations are so important that they have been widely implemented even at companies where he has never worked.

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

The petitioner has written seven articles and six conference presentations, mostly while he was a graduate student. Absent evidence that publication is a privilege generally reserved for those at the very top of the field (rather than a routine responsibility expected of competent academic researchers or graduate students), the mere existence of published material cannot establish extraordinary ability or sustained acclaim. To hold otherwise would render this criterion meaningless as a way to distinguish between the top researchers and the vast majority of others in the field. The record is silent as to the influence of the petitioner’s published work. Evidence of such influence could take several forms, such as evidence of heavy citation by other researchers, letters from recognized independent authorities attesting to the importance of the petitioner’s published work, and so on.

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

Counsel states “[a]s a Software Design Engineer on the Visual Basic (VB) team at Microsoft, [the petitioner] plays a critical role in the development of their products.” Counsel asserts that the petitioner “was also a key person in the development of the Microsoft Visual Studio . . . [which] is an internationally recognized software package.”

B. Ashok of Microsoft attests that the petitioner “is a Software Design Engineer on the Visual Basic (VB) team working on VB’s Data Designers. The quality of his work has been exceptional. He is critical to the success of our project and without him, we will not be able to complete our features and ship the next version of VB as planned.” The petitioner’s role as a major contributor to a specific Microsoft project does not indicate that the petitioner plays a leading or critical role for Microsoft as a whole, and the petitioner has not shown that the VB design team is, itself, an organization or establishment with a distinguished reputation. As one of the nation’s largest and most prominent corporations, with tens of thousands of U.S. employees, Microsoft would appear to have a significant number of design teams at work on new products at any given time. The petitioner has not shown that Microsoft Corporation, outside of its VB team, considers the petitioner to be a key employee.

The director instructed the petitioner to submit additional evidence, stating that the initial submission did not establish sustained acclaim or extraordinary ability. In response, counsel maintains that the petitioner has satisfied the criteria pertaining to awards, original contributions, authorship of scholarly articles, and performance of a critical role. Counsel also claims that the petitioner has satisfied a fifth criterion through “evidence of commercial success.” The only criterion that refers to “commercial success” reads, in full:

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The petitioner does not work in the performing arts, and thus there are no box office receipts or sales of recordings. Nevertheless, major sales of products developed by the petitioner could help to establish that the petitioner is a leading figure in his field.

Counsel states that the petitioner “has . . . achieved commercial success through the development of products that are available commercially and used throughout China. The commercial success of these products is a result of the [petitioner’s] extraordinary expertise.” This general and uncorroborated statement does not specify the products, the extent of their success, or the significance of the petitioner’s involvement. 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 also cites the petitioner’s work with AC Nielsen as evidence of commercial success. While the Nielsen company measures the commercial success of television programs, counsel does not explain how the petitioner’s work for Nielsen constitutes evidence of the petitioner’s commercial success.

The director denied the petition, stating that the bulk of the petitioner’s evidence falls short of the evidentiary standard for extraordinary ability. The director stated that the petitioner has met two of the evidentiary criteria at 8 C.F.R. 204.5(h)(3), but identifies only one criterion as having been met (that criterion being awards and prizes). As explained above, we cannot concur with the

director's finding regarding the petitioner's awards. The petitioner has not demonstrated the significance of the awards from the Chinese Academy of Sciences. The assertions of counsel regarding those awards cannot establish such significance, especially in light of counsel's untenable claim that the petitioner's in-house performance award from AC Nielsen represents a nationally recognized award.

Counsel indicates that the director has acknowledged the petitioner's satisfaction of the criterion pertaining to scholarly articles, but the director, in the decision, plainly stated that such publications appear to be a routine requirement of the profession. The director also noted the absence of direct evidence of the impact of the petitioner's publications.

On appeal, the petitioner submits a substantial quantity of documents, but almost all of these appear to be copies of previously submitted materials rather than new exhibits. The only new document submitted on appeal is a letter from Dr. Hong Fu, formerly a research assistant professor at the University of Arizona's Optical Science Center, who states:

[The petitioner] demonstrated that he is indeed one of the best in his fields of expertise. His ability to integrate the field of optics with computer science has resulted in very significant developments that have resulted in his international reputation. . . .

I have learned that CIOES, mainly developed by [the petitioner,] is widely adopted in China and it is recognised as a world-class software. . . .

I can attest that few others, if any, possess expertise that exceeds that of [the petitioner,] especially in bringing modern computing technology into optical research and industry.

Dr. Fu does not cite the source through which he "learned that CIOES . . . is widely adopted in China and . . . recognised as a world-class software." The record contains no documentation, for instance, establishing major sales of the software package. If the petitioner has created a highly successful software package that is recognized throughout China, it is not unreasonable to expect there to exist some from sources more direct and authoritative than the petitioner's former co-workers.

The petitioner also submits a brief from counsel. Counsel argues that the petitioner's awards are, themselves, evidence of the significance of the petitioner's publications, as well as the major significance of the petitioner's work. The petitioner has not established the extent to which the awards are linked to the publications. Counsel's arguments amount, in essence, to the contention that the satisfaction of one criterion (in this case, prizes) implies the satisfaction of others (publications and contributions). While there is some interconnection between the various criteria – for instance, a major contribution could be reported in a scholarly article and be the subject of major media coverage – we cannot conclude that evidence under one criterion presumptively satisfies other criteria.

The remainder of counsel's brief consists essentially of quotations from the record and discussion of ambiguous or seemingly contradictory passages in the director's decision. While the director's decision is not ideally worded, the director has nevertheless set forth reasonably specific grounds for denial and thus afforded the petitioner an opportunity to wage a meaningful appeal.

The record establishes that the petitioner has been a productive and successful researcher. Much of the petitioner's recognition appears to derive from universities and companies where his research has taken place. The petitioner has not established a consistent pattern of significant recognition or acclaim at a wider national or international 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 and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a researcher in optics and computer science 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 petitioner'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.