B2

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

JAN 18 2002

File: WAC 98 152 51139 Office: California Service Center Date:

IN RE: Petitioner:
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, California Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner for Examinations on a motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

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 as an alien of extraordinary ability in business. The petitioner was president of ADD Electronics Company, Ltd. ("ADD"), from December 1987 to March 1998, at which point he assumed the presidency of its newly established U.S. subsidiary. The petition was filed on May 7, 1998. The director determined the petitioner had not established that he qualifies for classification as an alien of extraordinary ability. The Administrative Appeals Office, ("AAO"), acting on behalf of the Associate Commissioner, concurred with the director's finding and dismissed the petitioner's appeal on August 9, 2000.

The pertinent statutory language appears in the prior AAO decision and need not be repeated here.

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.

In the motion to reopen, counsel asserts that the beneficiary is an alien of extraordinary ability as one who has received lesser nationally recognized prizes or awards for excellence in his field, as having membership in associations which require outstanding achievements of their members, as having published materials about him appearing in professional or major trade publications, as one who has made business-related contributions of major significance to his field, and as commanding a high salary in relation to others in the field. The petitioner submits additional evidence in support of the motion which will be addressed along with counsel's arguments.

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

It should be noted that prior to the instant motion, the petitioner, as an individual, claimed no prizes, but asserted that his company, ADD, had won several such prizes. The regulation is quite clear that the award must go to "the alien" rather than to a business or organization with which the alien is affiliated.

Counsel states that the AAO "discounted the award the applicant's electronics company received from the Korean Government for 'Technical Innovation' because the record contained 'no independent explanation of the significance of this award.'" This prize for "Technical Innovation"

was presented by Korea's Industrial Promotion Office on September 30, 1993 and was translated as follows:

> This is to certify that the above company has contributed to technical development and quality improvement as well as to the high value-added products manufactured by small-medium enterprise and the technical advancement.

This certificate, numbered 1264, is unaccompanied by an explanation of its national significance in Korea. It remains unclear how many other "small-medium enterprises" receive this award annually from Korea's Industrial Promotion Office. Eligibility under this criterion requires the "alien's receipt" of a "nationally recognized prize or award for excellence in one's field of endeavor." Further, the regulation at 8 C.F.R. 204.5(h)(2) defines extraordinary ability as "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." An award given to hundreds of "small-medium enterprises," as suggested by the certificate's number, would fail to satisfy this criterion.

On motion, the petitioner submits a virtually identical certificate, numbered 2264, and dated September 30, 1997. While the wording appearing above the date on certificate 2264 is the exact same as the wording appearing above the date on certificate 1264, the translations are somewhat different. This certificate also appears to be presented by Korea's Industrial Promotion Office, although the translation reflects "Korea's Industrial Advancement Office." Certificate 2264 is translated as the "Grand Prize of Technical Innovation" and states the following:

> The above-named person is awarded with this prize because he has made a great contribution to adding the superior value to the products of the small and medium sized enterprises and technical advancement by devoting himself to developing the technology and improving the product quality.

Based on the certificate numbers submitted, it appears that one thousand awards were presented by Korea's Industrial Promotion Office/ Industrial Advancement Office in the four year period from September 30, 1993 through September 30, 1997. Thus, it appears from the certificate numbers that this office gives out an average of 250 of these "Grand Prize of Technical Innovation" certificates per year.

Also worth noting is the fact that the petitioner did not provide evidence of receipt of certificate 2264 until the instant motion. Given that this purported nationally recognized "Grand Prize of Technical Innovation" was received on September 30, 1997, less than one year prior to the filing of his petition, we find it intriguing that it was not provided at that time. Nor was this prize submitted in response to the California Service Center's December 9, 1998 request for "Documentation of receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor," or in support of the initial appeal. It should be noted that the petitioner had three prior instances to supplement the record with this alleged nationally recognized prize. It was not until the after the AAO noted that "the petitioner, as an individual, claims no prizes" that this award happened to surface. Where a petitioner is put on notice of the required evidence and given a

reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Service. See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

Also submitted on motion is an "Award of Excellence of the Industrial Design" dated July 13, 1998. This award was received subsequent to the petition's filing. See Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Pursuant to this precedent decision, the petitioner cannot simply continue to add more and more documentation to an already-adjudicated petition, in hopes of eventually rendering the petition approvable.

Counsel alleges that the AAO misstated the record by discounting an invitation from the city of Puchon, dated August 27, 1996, as a "certification" rather than an "award." The invitation regarding a "commendation ceremony for a new technology approved company" states:

> We are pleased to advise you that your company was selected to be a New Technology Approved Company for your contribution in the local economic promotion and industry technology development.

This "invitation" does not appear to constitute evidence of the petitioner's receipt of an actual award. Further, as previously stated by the AAO, the "award" counsel refers to is from a single city and is clearly local rather than national or international as required under this criterion.

The Scroll of Appreciation submitted on motion, dated November 3, 1996, from the Mayor of the City of Bu Cheon, is also a local rather than national award.

Finally, as noted in the AAO's previous decision, the Korean Electronic Industry Promotion Association awarded ADD "financial support from [the] Industry Development Fund." This governmental funding does not constitute recognition of significant past achievements, but a grant to fund ADD's ongoing work regarding its digital wireless microphone system. Receipt of this funding resulted from an application that ADD filed for financial assistance. The wireless microphone system under development by ADD "was determined to be an excellent technology in accordance with the Article 5 and 6 of the Promotion of Industrialization of Technology Development Code." It appears that the product merely satisfied governmental funding regulations. Information has not been provided regarding how many other hundreds of companies annually receive this same type of financial "award." There is nothing in the record to suggest national or international recognition resulting from receipt of this "award" for financial assistance. If the petitioner's company was already successful, this award of financial assistance would seem to be unnecessary.

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.

The petitioner cites various credentials which have accrued to his Korean business. Simple compliance with governmental regulations and procedures is insufficient to satisfy this criterion. Furthermore, these credentials and memberships claimed by the petitioner appertain to his company rather than to the petitioner as an individual. Counsel argues that the petitioner is "the key player in the operation of the company and as such it is absurd to infer that the company's performance does not reflect the ability of the applicant." However, the plain wording of the regulation requires "documentation of the alien's membership in associations." Even if we were to accept counsel's argument and apply company credentials to the petitioner, the petitioner has not shown that these credentials and association memberships require outstanding achievements, as judged by recognized national or international experts in their disciplines or fields. On motion, counsel does not even address the petitioner's failure to meet this part of the regulatory criterion.

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.

The AAO previously noted that the published materials about the applicant appearing in the media merely spoke to the forthcoming exportation of the technology and expected worldwide sales. Further, many of the pieces previously submitted appeared to be advertisements and corporate press releases. Counsel states that the documentation submitted in support of the motion demonstrates that the petitioner's company "has actually enjoyed significant success." However, on motion, the petitioner has not provided any published materials from major media about his company or himself to demonstrate this "significant success" which has attracted the sustained attention of the major media. ADD's own promotional materials state "our best effort will enable us to reach the top," implying necessarily that ADD was not at the top when those materials were prepared.

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

Counsel states: "The AAO abuses its discretion by failing to recognize the self-explanatory significance of the development of new technology and by requiring 'independent corroboration of the significance of such developments.'" The structure of the regulations illustrates the Service's strong preference for verifiable, documentary evidence, rather than subjective opinions of the petitioner, the witnesses he selected, and counsel. The regulation at 8 C.F.R. 204.5(h)(3) requires "evidence that the alien has sustained national or international acclaim **and that his or her achievements have been recognized in the field of expertise**." Counsel's argument seems to incorrectly imply that the development of any new technology automatically constitutes a "contribution of major significance in the field" which would satisfy this criterion. While the Service does not dispute the originality of the remote controlled wireless microsystem, the evidence

submitted is insufficient to demonstrate that this device is a national or international contribution of major significance in the petitioner's field.

On motion, the petitioner submits two supporting documents from the same witness, Choon Ho Kim, General Director, Korea Electronic Technology Institute (KETI). The first letter, in its entirety, states:

> The [petitioner] has made a great contribution to the development of new technology and the growth of Fundamental Industrial Technology, and will contribute to the scientific and technological growth of U.S.A. with the 2.4 GHz chip (ASIC) for transmitting the Audio Signal by Spread Spectrum technique developed through joint research with KETI, which will do much for developing the electronic industry and forming an epoch especially in the innovation of wireless microphone system as a next generation new technology such as HDTV and Digital Wireless Communication.

In a separate statement, Choon Ho Kim notes: "The technology using the 2.4 GK Spread Spectrum, which the petitioner is commercializing, is the first newly-invented technique to contribute to the technological development of the world miraculously."

Choon Ho Kim mentions joint research conducted by his agency, KETI, and the petitioner's company, ADD, in developing this new technique. The petitioner has submitted a "Confirmation Form for Mutual Technology Development" reflecting their joint cooperation on the project. Choon Ho Kim's statements, however, offer no convincing evidence of the petitioner's past record of individual contributions of major significance to the field of electronics. The statements of a single collaborator, whose agency is conducting joint research with the petitioner and has a vested interest in the development of the Spread Spectrum technology, are insufficient to demonstrate eligibility under this criterion. The record remains absent evidence of any independent corroboration of the significance of the petitioner's contributions to his field.

Furthermore, Choon Ho Kim's phrases such as "will contribute" and "will do much for developing" seem to address the petitioner's future achievements and are speculative at best. Choon Ho Kim has offered no evidence to support his predictions regarding the growth of their new technology in the U.S. market. It should also be noted that incremental "contributions to the development of new technology" do not necessarily constitute contributions of major significance to one's field. While the petitioner may have played a joint role in developing new electronic technologies for transmitting audio signals by the Spread Spectrum technique, the classification sought by the petitioner requires him to establish that he has attained national acclaim for contributions of major significance to the field of electronics. The petitioner has not supported his claim of "significant and lasting influence on the field" through evidence of ADD's actual sales volume nor independent corroboration of his achievements.

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

On motion, the petitioner submits a single monthly payroll deduction sheet and two cancelled checks for June and July of 2000 reflecting a monthly income of $8,000.00 (or $96,000 per year). At the time of filing of his petition and as noted in the previous decision, the petitioner reported an income of $56,875.03 on his 1997 income tax return. No evidence has been provided regarding the petitioner's salary as claimed on his tax returns for 1998 and 1999.

The plain wording of the criterion requires the evidence of a high salary "in relation to others in the field." On motion, the petitioner has presented nothing as a basis for comparison; he has simply provided raw numbers and offers no evidence regarding the salaries of presidents from similar companies.

The petitioner has not shown that he is among the highest-paid consumer electronics manufacturers in Korea, that his products have had a significant and lasting influence on the field, that his products outsell products from other companies, or that the media attention his company commands in the trade press is at all unusual. The petitioner has submitted inconclusive and, in some cases, unfavorable evidence, and relied upon counsel's descriptions of that evidence to establish eligibility. 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). Examination of the evidence of record does not support counsel's interpretation of that evidence.

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 has failed to demonstrate receipt of an internationally recognized award, or that he meets at least three of the criteria of which must be satisfied to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability.

Review of the record does not establish that the petitioner has distinguished himself as a businessman 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 petitioner shows talent as a developer of electronics, but is not persuasive that the petitioner's achievements have 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 these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The Associate Commissioner's decision of August 9, 2000 is affirmed. The petition is denied.