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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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ULLB, 3rd Floor  
Washington, D.C. 20536



File: WAC 99 213 50012 Office: California Service Center Date: 25 JAN 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]

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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, 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 --

(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 is a senior software engineer at WaiLAN Communications, Inc. The regulation at 8 C.F.R. 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the

alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner initially submitted evidence to satisfy the following criteria.

*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 carried out extensive research in the development of new protocol[s] and system[s] for high speed data transmission in [the] communication industry and has made significant contributions in several important technical areas." Counsel states that the petitioner has "investigated" several telecommunication protocols, and notes that the petitioner has filed patent applications in the United States, Europe and Japan.

With regard to the petitioner's patent applications, the awarding of a patent establishes the originality, but not the major significance, of a given invention. In this instance, the petitioner has merely applied for the patents. The filing of a patent application is not in any way evidence of sustained acclaim or extraordinary ability. The record does not contain documentary evidence to establish that the petitioner's inventions are widely used, or that major national or international demand exists for those inventions.

To establish the significance of his work, the petitioner submits five witness letters. [REDACTED] who supervised the petitioner's graduate studies from 1988 to 1994, states:

[The petitioner] is one of the few leading researchers who has investigated and modeled the multimedia data transmission through N-ISDN (Narrow band ISDN). He was a key researcher and designer of the data communication system over ISDN, which was the most important technical achievement of my research group and had been widely accepted by the data communication industry. [The petitioner] is the first one to use ISDN to transmit multimedia and implement the distributed server-client database system. He developed a multimedia transmission system to transmit image, text, data file and voice together through ISDN. . . .

[The petitioner's] extensive research experience and major contributions to the data communication technology ha[ve] earned him the professional recognition as an expert in this field.

Professor [REDACTED] of the University of California, Santa Barbara, who met the petitioner through [REDACTED] and who has "known [the petitioner] personally for over eight years," states:

[The petitioner] is one of the few leading researchers who have made important contribution[s] to the research and development of networking technology of data communication and data broadcasting. His research provides an effective method to solve the bottleneck problem of data broadcasting over the Internet. He invented an innovative data broadcasting system HyperFM that broadcasts a large amount of multimedia data toward computers through FM radio channel. This invention is the most important technical achievement for developing the next-generation Internet. . . . His research results have been widely accepted by the data communication industry.

[REDACTED] of the University of California, Berkeley, like [REDACTED] first met the petitioner through Prof. Hirano. [REDACTED] essentially repeats statements from the above two letters.

Kozo Ueda, president of the Laboratories of Image Information Science and Technology, states:

[The petitioner] joined my research laboratories as a researcher after [he] received his Ph.D. degree from Kobe University in Japan in October 1994. He was promoted as a senior researcher in January 1997. As one of our key researchers, [the petitioner] played a critical role in several key research projects in our laboratories. . . .

[The petitioner] conducted extensive research in the field of image processing and communication and invented an innovative technology HyperFM for data broadcasting and communication. . . . This new technology is widely regarded as a key technology for broadcasting multimedia to be used as the infrastructure for the next generation of information technology.

Paul Lee, director of WaiLAN Communications, Inc., states:

Before [the petitioner] joined WaiLAN, I have seen several of his papers published in scientific journals widely circulated in the professional field and three books published as technical book[s] and university textbook[s] in Japan. . . .

[The petitioner] has made significant contributions to our new product development efforts in just a few months after he joined WaiLAN Communications. He studied our most advanced xDSL products and has demonstrated their connection on networks. He investigated the network connection performance

of our xDSL products and has greatly enhanced the performance of our products. He has successfully developed the Web-based management and configuration software WebSNMP for our new product DeltaFire 500 and DeltaFire 520. This product has greatly improved our xDSL products and pushed our new products to a higher stage. . . .

[The petitioner] is the key engineer at our company and his outstanding work is crucial to maintaining the competitiveness of WaiLan Communications as well as [the] U.S. data communication industry.

The above witnesses, while knowledgeable in the petitioner's field, are all the petitioner's supervisors, professors, or long-time acquaintances. Their statements do not constitute first-hand evidence that the petitioner's achievements are considered significant throughout the entire field (as opposed to those in the field who know him personally and/or have a vested interest in his work).

*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 several articles and books, although the record does not establish (through citations, for instance) the degree of influence that the petitioner's published work has had on others in the field, or that the petitioner is among the most widely published writers in his area of expertise.

Counsel states that the petitioner "was invited as an expert in data communications to give technical speeches at important national industrial events." The record shows that the petitioner gave presentations at trade shows and conferences but there is nothing from the entities that hosted these events to show, first-hand, the circumstances under which the petitioner joined the roster of presenters. The evidence in the record does not establish that such presentations are demonstrative of sustained acclaim.

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

Counsel states that the petitioner "played an essential role in [the] innovative research and development efforts" of the Laboratories of Image Information Science and Technology, operated by the Japanese government. As cited above, Kozo Ueda has stated that the petitioner was "one of our key researchers" who "played a critical role in several key research projects in our laboratories." The record does not show that the petitioner played

a leading or critical role for the institution as a whole; an individual project undertaken there is not, itself, an organization or establishment.

On July 7, 2000, the director informed the petitioner that the documentation submitted with the petition was not sufficient to establish extraordinary ability. The director clearly set forth the criteria outlined in section 203(b)(1)(A) of the Act, and specified that the Service has defined "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." The director also requested evidence of demand for the petitioner's services.

In response, the petitioner submits a list of 41 "potential employers" including Microsoft, Sun Microsystems, Lucent Technologies, and many others. Counsel cites "correspondences from these potential employers," specifically electronic mail messages. Some of these messages invite the petitioner to discuss employment opportunities, while others appear to be courtesy letters acknowledging a past job interview or receipt of the petitioner's resume in response to an advertised opening. The overall tone of the messages reflects a staffing shortage in the software industry but does not suggest that the petitioner is among the best-known figures in that industry.

The petitioner submits copies of four job offer letters, two of which predate the petition's filing date. A letter from WaiLAN Communications, dated February 15, 1999, offered the petitioner \$87,000 per year as a senior software design engineer. An April 1, 1999 letter from HiNT Corporation offered the petitioner \$80,000 per year to work as a network and communication software manager. The third letter, dated December 30, 1999, offered the petitioner \$110,000 to work as a senior software engineer at PacketStream, Inc. The final letter, from June 9, 2000, from Xpeed, Inc., offered the petitioner \$100,000 annually as a senior software engineer. The petitioner signed all four of these job offer letters, indicating that he accepted all of them in writing, and yet continued looking for jobs, in the last case accepting a new offer with a \$10,000 reduction in annual salary.

To further discuss the importance of his work, the petitioner submits additional witness letters as well as copies of previously submitted letters. These letters, like those submitted before, are from the petitioner's employers, mentors, and others who have known him personally since he was a student, and the witnesses offer no direct evidence that their opinions of the petitioner's work are shared throughout the country or the world.

In addition to the criteria discussed above, counsel asserts that the petitioner's new submission satisfies three further criteria:

*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 petitioner submits translated articles from Japanese newspapers, regarding the HyperFM system. None of the submitted articles identifies the petitioner, and therefore the articles are not published materials about the alien. The articles, published in 1997, describe the impact that HyperFM was then expected to have; the record does not clarify whether or not subsequent events justified those expectations.

*Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.*

Counsel states that the petitioner "was invited by [REDACTED] of Kobe Design University, Japan, to review the technical papers submitted to the professional transaction magazines and international conferences." As noted above, [REDACTED] supervised the petitioner's graduate studies at Kobe University for six years, before Prof. Hirano moved to Kobe Design University. On various occasions, Prof. Hirano organized technical conferences and edited a special issue of a technical journal. In conjunction with those activities, he received a number of papers submitted for presentation or publication. [REDACTED] then personally referred some of the manuscripts to the petitioner for review. The fact that the petitioner's own professor called upon him to review manuscripts does not demonstrate that the petitioner had earned a reputation beyond Prof. Hirano's own laboratory. Rather, the above information says much more about [REDACTED] reputation than that of his graduate student.

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

Counsel states that WaiLAN "has raised [the petitioner's] annual salary from \$87,000 to \$110,000 in just one year after he joined WaiLAN." Counsel states "the average median annual salary for Project Manager-Engineer in San Jose is around \$86,000 and the average high annual salary is around \$100,000.00. [The petitioner's] current salary is significantly higher than the salary earned by similar level engineers in his field in Silicon Valley."

The above comparison is flawed for several reasons. The comparison must be at a national or international level, rather than for a

small region of one country. Also, the petitioner must not only be among the highest-paid among "similar level engineers," but in his entire field of endeavor, including engineers who unlike the petitioner finished their education decades ago and have long-established careers, and who operate their own well-established companies. The petitioner cannot place himself at the top of his field simply by redefining that field in a limited way that excludes those who rank above him.

Regarding "the average high annual salary," the documentation submitted by the petitioner indicates that "the top half of earners are paid an average of \$100,039" per year, meaning that \$100,039 is an average rather than the top end of the range.

Also, the petitioner was not yet earning \$110,000 per year when he filed the petition in July 1999; his annual salary as of the filing date was \$87,000, which according to counsel was roughly equal to the prevailing wage at that time and well below "the average high annual salary" of \$100,000.

The director denied the petition, stating that the record establishes that the petitioner is a qualified and capable researcher in his field but not that the petitioner stands at the very top of that field. On appeal, the petitioner submits a brief from counsel.

Counsel states that the director "totally ignored the value of petitioner's pending parent [sic] applications." The director acknowledged that the petitioner had applied for a number of patents, but the burden is on the petitioner to establish the value of his work, rather than on the Service to refute it. The petitioner has not established that his inventions are intrinsically more important than any number of other inventions that also await patent approval.

Regarding the patent applications, counsel makes several assertions of uncertain relevance. For instance, counsel observes that the petitioner filed patent applications in several countries at once rather than only in one country. Counsel fails to explain how the filing of multiple applications has any effect on the impact or importance of the petitioner's inventions, or the acclaim (if any) that the petitioner has earned as a result. The very act of filing patent applications (regardless of number or location) is not an activity that is inherently limited to the top figures in a given field.

Counsel protests the director's statement that the petitioner did not submit translations of his textbooks. The director's comment in this regard, however, occupies two lines of the decision and was clearly not a major factor in the denial of the petition. Rather, it is part of the director's factual description of the evidence

submitted by the petitioner. The director correctly observed that the books were untranslated, but did not state that the petition would have been approved had such translations been submitted.

Counsel asserts that the director ought to have given the witness letters greater weight, because they "are all from distinguished professors and experts" in the field. It remains that all of these individuals have demonstrable ties to the petitioner, and several of them list accomplishments and credentials which dwarf those of the petitioner. The regulations at 8 C.F.R. 204.5(h)(3) demand objective evidence of acclaim, in keeping with the statutory requirement of "extensive documentation" of acclaim. Counsel has declared that the petitioner's professors and employers are the very top figures in the field. Even if counsel had substantiated this claim (which is not the case), it cannot suffice for the petitioner to submit letters from the top figures in the field. The petitioner must, himself, rank alongside these individuals, rather than simply earn their respect while working as their student or subordinate.

Observing that the petitioner has several potential offers of employment, counsel asserts that the demand for the petitioner's services demonstrates his acclaim. The messages relating to these offers shows that the petitioner, not the employers, initiated contact in most cases, often in response to job announcements in local newspapers. The large number of job announcements, coupled with the nature of the responses, suggests that local employers in the petitioner's field were having difficulty filling available positions, but the available evidence in this regard does not support the claim that these employers have singled out the petitioner as a nationally-acclaimed expert and have taken the initiative to pursue him.

Counsel offers related arguments, asserting that the director must have "completely disregarded" the petitioner's submissions because otherwise the petition would have been approved. There is a considerable difference between disregarding evidence, and simply finding it to be unpersuasive, and we do not accept the argument that counsel's disagreement with the director's conclusions regarding that evidence is *prima facie* evidence of error.

Counsel argues that the evidence in this proceeding is similar to that submitted with another petition, which in turn was approved. The approved case that counsel cites is not a published precedent and therefore it is not binding on the Service. Not having the documentation of the approved case before us, we cannot make a meaningful comparison between the two records of proceeding.

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 petitioner has distinguished himself as a software engineer 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 in his field, and has worked with some distinguished figures in that field, but 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.