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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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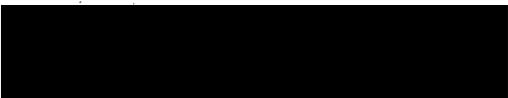
File: WAC 98 038 53996

Office: CALIFORNIA SERVICE CENTER

Date:

OCT 08 2002

IN RE: Petitioner:  
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:



**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 Associate Commissioner, Examinations, dismissed a subsequent appeal. The matter is now before the Associate Commissioner 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 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 the sciences. The director determined the petitioner had not established the sustained national or international acclaim necessary for the beneficiary to qualify for classification as an alien of extraordinary ability.

On motion, counsel asserts that the alien beneficiary is also the petitioner, which is not the case. The Form I-140 petition was signed not by the beneficiary, but by the president of the petitioning company. Counsel had prepared the petition form and therefore is aware that the company, and not the alien, was initially identified as the petitioner. The record contains multiple Forms G-28 signed by that same official, designating counsel as the attorney of record and expressly identifying the company as the petitioner.

The record contains documentation indicating that, in early 1998, the beneficiary began working for Frontline Systems, Inc. The record contains no evidence at all, from any time after late 1997, that demonstrates or even implies that the petitioner still employs the beneficiary. It is not insignificant that the submission on motion contains nothing at all from the petitioner itself. The only connection that the petitioner has with this motion is through an attorney hired by both the petitioner and the beneficiary at a time when the beneficiary worked for the petitioner. The filing of the appeal included a new Form G-28, reaffirming counsel's representation of the petitioner, whereas the motion includes no such form. If the petitioning company has no interest in further pursuing the petition, the beneficiary cannot assume the petition, or file a motion, on his own behalf. See 8 C.F.R. 103.3(a)(1)(iii)(B) which indicates that the beneficiary of a visa petition is not an affected party with appeal rights or other legal standing. The record contains no formal acknowledgement that counsel no longer represents the petitioner, but we are not entirely convinced that the petitioning company is even aware of the present motion to reopen, let alone actively interested in pursuing a petition for someone who left their employ several years ago.<sup>1</sup>

The beneficiary's change of employer raises an additional issue. Counsel argues that the beneficiary's work with Frontline Systems will "answer a serious competitive threat from abroad and . . . strengthen the international competitive position of U.S. industry, in the area of software for equation-solving and optimization." Thus, counsel offers an argument, as grounds for approval, based on circumstances that did not exist at the time the petition was filed in November 1997. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii (misspelled "Izummi" in the print version), 22 I & N Dec. 169 (Comm. 1998), and Matter

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<sup>1</sup> Correspondence from the beneficiary indicates that the beneficiary retained a new attorney in 2000.

of *Katighak*, 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.

Counsel states that the “petition appears to have been evaluated as a software engineer, **without reference to [the beneficiary’s] special expertise.**” Counsel asserts that the beneficiary “is one of only **six to ten individuals in the United States** with special expertise in interval methods for equation solving and optimization, and their implementation in software.”

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.

In dismissing the appeal, the AAO had found that the petitioner had not satisfied any of these ten criteria. On motion, counsel maintains that the petitioner has satisfied the following criteria.

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

The AAO, in evaluating one of the beneficiary’s awards, found that the award is “not indicative of national acclaim as a software engineer.” Counsel asserts “the relevant field of endeavor is

applied mathematics.” Considering that the petition form itself identifies the beneficiary as a software engineer, we cannot find that the Service committed any error by accepting the petitioner’s own description of the beneficiary’s occupation. In any event, at issue was not the specific field, but the degree of recognition conferred by the award.

As evidence of awards, counsel cites exhibits 6 and 7 of the submission on motion. Exhibit 6 merely documents the sale of programs developed by the beneficiary to the Program and Design National Fund in Bulgaria. Given that the job of a software engineer is to create software for sale to clients and customers, the sale of the beneficiary’s product cannot realistically be considered a prize or award.

Exhibit 7 indicates that, in 1989, the beneficiary “was awarded in the group of young researchers the first prize for his computer program system ‘SOLS’ in the yearly nationwide competition for development of new software products in science and technology.” The Technical University of Sofia presented the award, at a time when the beneficiary was a student at that university. Student awards carry significantly less weight because university study is not a field of endeavor; it is advanced training for future entry into such a field. The “young researchers” limitation would, at the very least, appear to exclude from consideration the most experienced and accomplished individuals in the beneficiary’s field. The record does not establish the significance of this award.

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

Counsel cites a Software Technology Transfer Agreement between the beneficiary and Frontline Systems, as well as evidence that the beneficiary “has sold two software systems, successfully implemented in industries of Eastern Europe.” Daniel H. Fylstra, president of Frontline Systems, states that “there are very few experts – perhaps half a dozen – in this technology living in the United States.” Mr. Fylstra describes his company as “a small software development company,” which nevertheless has significant reach owing to its agreements with major companies such as Microsoft and Lotus. The sale and use of the beneficiary’s software does not establish its major significance in the field, absent evidence that the software enjoys greater sales and/or impact than countless other software programs on the market. Mr. Fylstra, who seeks to license the beneficiary’s technology, clearly views the beneficiary’s work as important, but his business agreement with the beneficiary does not establish sustained national or international acclaim, or show that the beneficiary’s innovation is of substantially greater significance than most other innovations in the large field of computer software. The transfer agreement is dated July 1, 1998, several months after the petition’s November 1997 filing date.

The documentation of the beneficiary’s sale of software systems in Bulgaria does predate the filing of the petition, but this documentation shows only that the beneficiary has developed a commercially viable product.

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

Counsel notes that the petitioner had previously submitted copies of several scholarly articles written by the beneficiary. The petitioner has not established the significance or circulation of the publications in which these articles have appeared, nor has the petitioner shown that the beneficiary's published work has attracted more attention than the thousands of other articles published each year in the beneficiary's field.

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

Counsel asserts that the letter from Daniel Fylstra establishes that the beneficiary plays a leading or critical role for Frontline Systems, because Mr. Fylstra asserts that his company's future success and viability depend directly on its ongoing work with the beneficiary. As we have discussed, the beneficiary did not begin working for Frontline until after the filing of the petition, and therefore this employment cannot retroactively establish eligibility as of the filing date.

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

Counsel asserts that the petitioner meets this criterion through "a Software Technology Transfer Agreement under which [the beneficiary] will receive \$133,500.00, certainly high 'in relation to others in the field.'" The agreement in question is the beneficiary's agreement with Frontline Systems, which did not exist when the petition was filed or even when it was denied and appealed. We note the absence of comparative evidence to show that this amount is unusually high in relation to the sums commanded by others in the field. Mr. Fylstra, in his letter, states that "some larger companies could perhaps invest much greater amounts."

Counsel also cites "a contract for sale of two software systems also for solving equations and optimization (equivalent to 2 years salary in Bulgaria)." Counsel, on motion, does not cite any source for the contention that the sum in the contract is "equivalent to 2 years salary in Bulgaria," nor does counsel specify whether this means two years' salary in the beneficiary's field, or twice the annual per capita income for all Bulgarians (which may be substantially lower). Furthermore, the software was purchased not from the beneficiary as an individual, but from a "development team" of which the beneficiary was a member. Thus, the beneficiary would not have received the entire purchase price, even if we were to assume that the entire sum was paid directly to the developers rather than to a company or other entity that employed them.

Counsel cites witness letters which, counsel states, the AAO must have ignored because the AAO did not mention them in its initial appellate decision. Every one of these letters concerns the beneficiary's work with Frontline Systems and/or discusses the importance of the beneficiary's work with optimizing software. None of the letters refer to the skin care-related work for the petitioner that was outlined in the initial filing. The letters do not present a uniform

impression of sustained acclaim. For instance, Christopher Yu, program manager at Microsoft Corporation (the only official of the software industry, besides Mr. Fylstra, represented on motion) claims no personal knowledge of the beneficiary or his work. Instead, Mr. Yu states that he has conducted business with Frontline Systems, which in turn has assured Mr. Yu that the beneficiary could be a valuable asset to Frontline. This is not evidence of acclaim.

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 software engineer or mathematician 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 these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

**ORDER:** The Associate Commissioner's decision of January 25, 1999 is affirmed. The petition is denied.