PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Justice

Immigration and Naturalization Service

B2

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

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 17 2003

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]

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 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Hayward

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas 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 business. 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 CFR 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 CFR 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.

The petitioner is identified as a "[s]upplier of customer care and billing solutions for telecommunications companies and internet service providers." It seeks to employ the beneficiary as vice president of its Global Partner Program, having hired the beneficiary shortly before the filing of the petition. The company, established in April 2000, four months before the petition's August 2000 filing date, employed "35 professionals" as of the filing date. The record contains revenue projections, and discussions of capital infusions, but no indication that the petitioner was actively generating revenue (as opposed to start-up capital) at the time of filing.

On the I-140 petition form, the petitioner answered "no" in response to the question "[h]as an immigrant visa petition ever been filed by or in behalf of this person." Service records contradict this claim. Another employer filed an immigrant visa petition on the beneficiary's behalf in July 1998, seeking to classify the beneficiary as an executive or manager of a multinational corporation under section 203(b)(1)(C) of the Act. That petition was approved on October 2, 1998, but the beneficiary did not subsequently adjust status or enter the U.S. with an immigrant visa. By departing from that company to work for the present petitioner, the beneficiary has effectively abandoned the classification he received in 1998.

The regulation at 8 CFR 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. B.J. Thirkettle, the petitioner's director of operations, contends that the petitioner has met the following criteria.

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

Scott Wharton, then senior vice president and general counsel of LHS Group, Inc., an "international telecommunications software and information technology services company,"[1] states:

> An example of [the beneficiary's] extraordinary abilities is evidenced by his involvement in the launch of a wireless PCS operator, Telecorp, Inc., and the corresponding highly unusual and complex three-party agreement among Cap Gemini, LHS Group, Inc., and Telecorp, Inc. [The beneficiary] played a key role – in fact, the key role – in the financing and marketing of Telecorp, Inc., developing a new model for the valuation and allocation of revenue. Without [the beneficiary's] involvement, the launch of Telecorp, Inc. would not have occurred. He was able to resolve extraordinarily difficult financing and marketing issues no one else was able to resolve.

Assisting in the creation of a new company or venture is not, on its face, a contribution of major significance. The record offers no other information about Telecorp. The petitioner asserts that the beneficiary's "new model for the valuation and allocation of revenue" is now widely used, but the petitioner provides no independent documentation to support this claim. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Alexandre Haeffner, chief executive officer and group vice president of Cap Gemini Telecom, states that the beneficiary "established the principles for International Centers of Excellence, and he had a key role in the implementation of these in Cap Gemini Telecom & Media for new business in

[1] Mr. Wharton has since become an officer of the petitioning company.

Europe, Americas and Asia. It has already resulted in a major product win at WorldOnline in the Netherlands with proposals in Americas and Asia." While the beneficiary's principles may have helped Cap Gemini win projects and contracts in various countries, Mr. Haeffner does not explain why this achievement is important to the field as a whole, and not just to Cap Gemini. Outperforming one's rivals to land important projects is not inherently a contribution of major significance in the field.

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

The beneficiary co-wrote an article in the October 1999 edition of *Billing & Payment Directory 1999/2000.* This piece does not appear to be a scholarly article in the sense of, for example, an article in a scientific journal. Rather, the article contains a general discussion of the trend toward prepaid services in the wireless communications industry. The article at times is essentially an advertisement for Cap Gemini (the beneficiary's employer at the time he wrote the article). For instance, the last sentence of the article reads "[f]or those operators looking for help to implement prepaid solutions, a systems integrator such as Cap Gemini offers the strategies and some excellent tools and products to overcome the problems of volume and cost." A sidebar to the article offers a description and contact information for the Cap Gemini Group.

The petitioner has not established that this publication is a major trade publication or journal. If *Billing & Payment Directory* is an internal Cap Gemini publication, or one distributed only to Cap Gemini's clients (which would be consistent with the tenor of the article), then its distribution is too limited to be capable of contributing to the national or international acclaim of the article's authors.

The petitioner shows that the beneficiary has participated in seminars and workshops, such as conducting the 15-minute introduction and a breakout session of a daylong workshop on "Managing and Billing Next Generation IP Services." The "scholarly" content of these workshops is not evident from the documentation in the record, which consists of copies of PowerPoint slides. The presentations appear to be of a general instructional nature, rather than reporting findings from scholarly research.

The petitioner also submits a copy of the November 1997 guidelines prepared by the Alliance for Telecommunications Industry Solutions ("ATIS"), "developed to assist Leaders and Administrators at the Ordering and Billing Forum (OBF) to understand the mission and processes of the OBF." From the description provided, the guidelines appear to have been prepared for very limited distribution to the "Leaders and Administrators" of the OBF, rather than "published" for national or international circulation. Furthermore, the cover and introductory pages credit no author or authors. The end of the guidelines identify four OBF and ATIS officials, none of whom are the beneficiary. Even if the beneficiary wrote the entire work himself, without a credit it is not clear how it could add to his acclaim or recognition.

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

B.J. Thirkettle asserts that the beneficiary "is expected to play a leading role in the establishment and expansion of [the petitioner's] operations in North America and abroad." The regulation demands evidence that the alien has performed, rather than will perform, in a leading or critical role. The petitioner's future plans for the beneficiary cannot satisfy this criterion. Furthermore, as of the petition's filing date, the petitioner had existed for only four months and there is no evidence that the petitioner had already earned a distinguished reputation as of the filing date. The fact that it is a newly created subsidiary of an established company does not necessarily mean that the reputation of the parent company is instantly transferred to the new subsidiary.

As noted above, the CEO of Cap Gemini asserts that the beneficiary "played a critical role for Cap Gemini Telecom & Media," a sentiment echoed by other witnesses. The record establishes that Cap Gemini has earned a degree of distinction in the international telecommunications field, and therefore the petitioner has satisfied this criterion.

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

B.J. Thirkettle alters the wording of this regulatory criterion to "[e]vidence that the Beneficiary will command a high salary or other remuneration for services," and states:

> [The beneficiary] will receive an annual salary of $180,000 plus an annual incentive bonus of up to $40,000. [The beneficiary] also will receive 125,000 stock options, conservatively valued at present at 3.75 million. The options will vest over a four-year period, giving a present annual value of $937,500. Therefore, [the beneficiary's] total annual compensation package will be approximately $1.1 million.

The petitioner's attestations regarding what it plans to pay the beneficiary in the future do not establish that, as of the time of filing, the beneficiary had already commanded top-level compensation in relation to others in the field. The record contains no evidence regarding compensation that the beneficiary had already received before the filing date, from the petitioner or any prior employer. We note that the petitioner's job offer letter to the beneficiary, dated April 17, 2000, states that the beneficiary's "basic annual salary will be US$160,000." We also note that the record contains no evidence to establish the market value of the shares.

The regulation at 8 CFR 204.5(h)(4) allows for the submission of comparable evidence if the ten criteria at 8 CFR 204.5(h)(3) do not readily apply to the beneficiary's occupation. B.J. Thirkettle states "[l]egislative history and case law strongly suggest that the 'comparable evidence' provision was inserted in the legislation to cover people in business, who, more often than not, cannot provide – and should not be expected to provide – evidence of the listed criteria." The petitioner's citation of "case law" consists of an unpublished appellate decision from 1994, which is unpublished and has no force as a precedent. The petitioner contends that the cited case shows that "testimonials from leaders in the field" are comparable evidence of sustained acclaim, but the burden remains on the petitioner to demonstrate that the witnesses are in fact leaders in the field rather than simply former employers, collaborators, and satisfied clients.

The burden is on the petitioner to show that the standard criteria "do not readily apply to the beneficiary's occupation." The blanket claim that the criteria do not apply in business cannot suffice, especially in light of arguments by the petitioner with regard to four of the ten criteria. Review of the ten regulations indicates that a majority of the criteria are in fact applicable to business figures, who for example can receive national awards, be the subject of major media coverage, earn high remuneration, and so on. The inability of a particular alien to meet those criteria does not show that the criteria do not readily apply to the occupation. The fact that individual business figures "more often than not" cannot meet those criteria is entirely consistent with the legislative intent that the immigrant classification be limited to a small percentage at the very top of the field.

The "comparable evidence" for which the petitioner desires consideration consists of witness letters, some of which are described above. These letters discuss the nature of the beneficiary's role at the companies where he has worked, and offer specific examples of contributions that the beneficiary has made. Thus, the letters appear to address specific regulatory criteria, rather than demonstrate that those criteria do not readily apply to the beneficiary's occupation. Even if the criteria did not apply, the "comparable evidence" must still demonstrate sustained national or international acclaim, and it must still represent "extensive documentation" as required by the plain wording of the statute. Letters, solicited for the purpose of supporting a petition, from witnesses whom the petitioner and/or the beneficiary has chosen, cannot carry the same weight as objective, documentary evidence that was generated by the beneficiary's acclaim. Such evidence would exist whether or not the beneficiary had sought immigration benefits, which cannot be said of the letters. Furthermore, while some letters indicate that the beneficiary is held in high regard throughout the industry, the authors of those letters have all worked closely with the petitioner. A reputation that is restricted to one's coworkers and collaborators is not national or international acclaim.

On April 25, 2001, the director instructed the petitioner to submit additional evidence to establish the beneficiary's eligibility for the highly restrictive classification sought. In response, the petitioner has submitted copies of several previously submitted documents. The petitioner has also submitted a letter from B.J. Thirkettle, who for the most part repeats earlier claims and describes duties that the beneficiary has undertaken in the time following the filing of the petition. The beneficiary's achievements after the filing date cannot establish eligibility if he was not already eligible as of the filing date. *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.

B.J. Thirkettle states that "[u]ltimate recognition of [the beneficiary's] extraordinary ability came in 1999 when he received the World Billing Award for 'Most Helpful Systems Integrator' at the 1999 Billing Systems Conference on behalf of CAP Gemini." The background information submitted by the petitioner does not establish the significance of the award. While the information establishes that the beneficiary was the Cap Gemini official who accepted the award on behalf of the company, there is no evidence from the awarding entity to establish the extent to which the beneficiary was responsible for the award, or to which the award was intended as

recognition for him specifically. Also, we note that previously submitted letters from Cap Gemini officials did not even mention this award, even though it was presented several months before the officials wrote their letters on the beneficiary's behalf, which suggests that Cap Gemini's own executives either did not strongly associate the award with the beneficiary, or else did not consider the award worth mentioning. Even the petitioner did not mention this award at the time of filing, despite the petitioner's subsequent declaration that the award is the "ultimate recognition."

The director denied the petition, citing several factors. The director stated that the petitioner has not shown that [redacted] (which filed the petition) and [redacted] (which responded to the request for evidence) are in fact the same company. This finding, however, does not appear to have been central to the denial of the petition. Materials submitted on appeal show that the company changed names in November 2000, three months after the filing of the petition. In another ancillary finding, the director noted that the beneficiary "is the beneficiary of an approved first preference I-140, Immigrant Petition for Alien Worker (E13)," despite the petitioner's previous assertion that no immigrant petition had previously been filed on the beneficiary's behalf.

The director acknowledged that the beneficiary accepted an award on behalf of Cap Gemini, but the director noted that the award was for the company and not specifically for the beneficiary. The director also found that, while the petitioner has offered the beneficiary a high salary, there is no evidence that the beneficiary had actually earned high compensation as of the filing date. The director concluded that the petitioner's documentation "is not extensive and does not point to the beneficiary as being within that small percentage at the very top of the field."

On appeal, the petitioner submits further evidence of business deals that the beneficiary had arranged after the petition's filing date, which, for reasons stated above, cannot retroactively qualify the beneficiary as of the filing date. Apart from the chronological issue, the petitioner must show that these deals demonstrate sustained acclaim, rather than routine duties of an official of a corporation with international business ties.

Counsel argues that, while the director acknowledges that the petitioner has submitted letters from "international experts," the director evidently disregarded the letters because "[i]f the testimonials had been considered by the Texas Service Center, they would have compelled a different decision." As noted above, the authors of the letters have all dealt closely with the beneficiary in various capacities. Their subjective opinions of the beneficiary as being "without peer" and "a person of extraordinary ability" do not compel the approval of the petition if the documentation in the record does not support such a finding. The letters do not show that the beneficiary has earned a reputation that extends beyond partners and clients.

Having argued, above, that the Service should have approved the petition immediately upon reading the witness letters in the record, counsel offers the somewhat contradictory sentiment that "[w]ords are cheap. The best evidence of a person's worth or standing in a field is the compensation he or she commands." With regard to the director's statement that "[t]here is no evidence to show the beneficiary has ever been paid such a salary," counsel states that the

director's "failure to consider the compensation documentation submitted is outrageous." Counsel identifies the "compensation documentation" in question as "an employment contract." The document is actually a job offer letter, specifying the beneficiary's salary. The contract was signed at the outset of the beneficiary's employment and is not evidence that any actual payments were made. We note that counsel's own initial letter submitted with the petition repeatedly refers to what the beneficiary "will receive," with no references or documentation of what the petitioner had already paid to the beneficiary.

On appeal, the petitioner submits pay documents dated 2001, the year after the filing of the petition, indicating that beneficiary earned gross pay of $180,000 in that year.[2] The only documentation that predates the filing of the petition, and pertains to the beneficiary's compensation, is a document dated July 13, 2000, noting the beneficiary's receipt of options for 75,000 shares of the petitioner's stock. Counsel states that the beneficiary has received stock options with "a total minimum value of $335,000" (there is no mention of the earlier figure of $3.75 million). The options, however, simply allow the beneficiary the opportunity to purchase the petitioner's stock at $2.68 per share; thus, to exercise his stock options, the beneficiary would have to pay $335,000 to the petitioner and not vice versa. The value of a stock option lies in the difference between the option price and the market price of the same number of shares. There is no actual documentation of the stock prices (counsel's attestations cannot serve as evidence in this regard). Furthermore, in the initial letter submitted with the petition, counsel had stated that the petitioner "will receive 125,000 stock options" that "will vest over a four-year period." Counsel's repeated and consistent use of the future tense when discussing the beneficiary's compensation does not suggest that the petitioner had already paid the beneficiary anything as of the filing date.

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 beneficiary 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 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.

---

[2] Given that the petitioner had earlier specified $180,000 as the beneficiary's "base pay" before bonuses, the documentation that the beneficiary received a gross total of $180,000 in 2001 suggests he received no bonus.