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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 09 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)

ON 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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The director subsequently reopened the matter on the petitioner's motion, and again denied the petition. The matter is now before the Administrative Appeals Office 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 pertinent regulations 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 mechanical engineer. At the time he filed the petition, the petitioner submitted documentation identifying him as an advanced design engineer at Barber-Colman Aerospace. In the words of his supervisor, [redacted] the petitioner was responsible for "predicting the performance and simulation of environmental control systems and components to provide a comfortable and safe aircraft cockpit and cabin environment."

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.

> *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.*

An article in the March 21, 1986 issue of *The Hindu* discusses "a low-cost fuel-efficient wood-burning stove," or *chulha*, designed by the petitioner. The article indicates that "nearly 100 families [have been] using it for about a month now" and that "any local potter" can make a similar *chulha*. A photograph of the *chulha* shows it to resemble a large, perforated clay pot. *The Hindu* is a national publication in India, although documentation in the record shows that several regional editions are produced in addition to the "Main Edition." Given the numerous local references in the article about the petitioner's *chulha*, it appears that the article may have circulated only in a local edition.

The petitioner submits a copy of a document entitled *Study Done On Behalf of Madras Refineries Ltd.*, by C.S. Benjamin of the Madras School of Social Work. This study represents a survey among users of the petitioner's *chulha*. The report is mostly technical in nature, and is not "about the alien" as the plain wording of the regulation requires. Also, there is no evidence that this report was ever published in major media. Its very title indicates that it is a study, privately commissioned by Madras Refineries, rather than a work of journalistic reportage, and its spiral binding (plainly visible in the photocopied pages) is not generally typical of a widely circulated national or international publication.

Even if we were to infer that the petitioner's design of a clay cooking stove relates to his work in the field for which classification is sought, we cannot find that a single article, published some 15 years before the petition's filing date, establishes a sustained pattern of acclaim at a national or international level. The record is devoid of evidence that the petitioner's *chulha* has since seen wider national or international use.

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

An introductory letter submitted with the petition cites three documents as evidence of the petitioner's original contributions. One document is identified simply as "Silica Gel Proposal." This term appears to refer to an August 1995 dissertation proposal by the petitioner, entitled *Design, Performance, Prediction and Evaluation of an Alternate Air-Conditioning System*; the system uses the desiccant silica gel to dehumidify incoming air. The proposal was submitted to the Mechanical and Aerospace Engineering Program at the Florida Institute of Technology.

The petitioner also submits a copy of a paper that he presented at the 3rd International Conference on Nonlinear Problems in Aviation and Aerospace, conducted in Daytona Beach, Florida, in May 2000. The title of the petitioner's paper is "Study of Transient Moisture Transport by Silica-Gel Adsorption."

The petitioner's technical writings cannot, by themselves, establish the major significance of the petitioner's work. The petitioner therefore submits a letter from Dr [redacted] associate professor of Aerospace Engineering at the Florida Institute of Technology, who states:

> [The petitioner] has been my doctoral student since Fall-1993 and I have been closely associated with his work from that time. I have found him to be a capable student with excellent understanding of the subject matter.
>
> [The petitioner] has helped me on various diverse projects – the re-design of the inlet manifold for the SEA-DOO personal watercraft, design of an evaporative cooling jacket for a power generation steam turbine – to mention a few. In addition, due to his multi-disciplinary background, he came up with a patentable idea for a desiccant cooled, freon-free air-conditioning system. The conceptual development and his capability to prove the feasibility of the same has earned us funding in a competitive environment from the Florida Solar Energy Center. If this concept reaches commercialization, it can have a very far reaching impact on society since it can potentially replace the traditional air-conditioning system.

Certainly, a radically new type of air conditioning system, eliminating the need for environmentally hazardous refrigerants, could be a major innovation. The petitioner, however, bears the burden of showing that this innovation has already earned him sustained national or international acclaim. It cannot suffice for the petitioner simply to show that his own doctoral advisor believes the project to have enormous potential.

Other witnesses include several of the petitioner's superiors at Barber-Colman Aerospace. These individuals attest to the petitioner's competence and skill, but their letters do not show national or international acclaim. Another witness is [redacted] who identifies himself as the petitioner's "son's Physics teacher" at Auburn High School. Mr [redacted] states that the petitioner "volunteered to help coach a seven student team who participated in the Illinois regional JETS TEAMS-2001 (Tests in Engineering and Mathematics and Science) competition." Mr [redacted] adds that the petitioner "helped our school earn the Illinois regional first prize." While the petitioner's active participation in local science education is laudable, this work has not earned the petitioner national acclaim or otherwise placed him among the small percentage at the very top of his field.

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

The petitioner does not show that he has written any journal articles, but he has made presentations at conferences, the published proceedings of which have included papers or abstracts by the petitioner. The four conferences are the Stormwater Research Conference, sponsored by the Southwest Florida

Water Management District in 1993; the Low Temperature Engineering and Cryogenics Conference, held at the University of Southampton, United Kingdom, in 1990; the International Symposium on Thermal Application of Solar Energy, sponsored by the Japan Solar Energy Society in 1985; and the 8th National Passive Solar Conference, conducted by the American Solar Energy Society in Santa Fe, New Mexico, in 1983.

The petitioner submits bibliographies that list some of the above conference papers. For instance, the petitioner's 1983 paper is listed in the "Desiccant Cooling and Dehumidification Bibliography – Section 1," compiled by the Advanced Desiccant Cooling and Dehumidification Program of the National Renewable Energy Laboratory at the U.S. Department of Energy. The bibliography "contains 871 pieces of literature about desiccant cooling" and appears to be a compilation of every relevant article or abstract that the program's staff could locate in various citation sources. This information shows that the petitioner is neither the first nor the only researcher exploring the use of desiccants for refrigeration and/or air conditioning. Much of the literature dates back to the 1960s and 1970s, with one cited article from 1939.

The petitioner submits no evidence to show that his scholarly writings have attracted significant national or international attention, or that they in any way stand out from the hundreds of other articles published on the subject.

On June 7, 2001, the director informed the petitioner that the evidence, while establishing the petitioner as "an accomplished engineer," does not demonstrate sustained national or international acclaim. The director instructed the petitioner to "submit any available additional evidence that would address the issue of your standing in the field."

In response, the petitioner submits evidence that he now works for Cessna Aircraft Company. A letter in the record indicates that Colman-Barber Aerospace was forced to terminate the petitioner's employment there for foreign policy reasons, unrelated to the petitioner's performance. The petitioner discusses the immigration difficulties that he has encountered as a result of this change of employment, and he states that approval as an alien of extraordinary ability would enable him to avoid some of the delays that might be encountered if he sought a lesser immigrant classification.[1] The petitioner's efforts to obtain other immigration benefits, including other classifications, are immaterial to the central question of whether he has earned sustained national or international acclaim. The classification for an alien of extraordinary ability is a highly restrictive one, rather than merely a convenient avenue or "shortcut" around requirements for other classifications.

The petitioner maintains that his initial submission satisfied the three criteria already discussed above, and he asserts that he has also satisfied a fourth criterion:

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

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[1] In this respect, we note that Cessna Aircraft Company filed a petition on the petitioner's behalf, seeking to classify him as a professional pursuant to section 203(b)(3)(A)(ii) of the Act. The petition, with a priority date of December 3, 2001, was approved on March 25, 2003.

The petitioner states that his work with Cessna Aircraft Company constitutes a leading or critical role for a distinguished organization. Cessna is a very well-known and respected company, and its reputation is not in question here, but the petitioner must show that he holds a leading or critical role for the company. Cessna documents in the record indicate that the petitioner is a senior design engineer with a base salary of $65,000 per year.

The petitioner's supervisor, [redacted] chief technical engineer in the Environmental Section of Utility Systems Design and Integration at Cessna, states:

> [The petitioner's] contributions to Cessna's product development process have been and, we hope, will continue to be of major significance in the area of specialized simulation of environmental systems. [The petitioner] is supporting Cessna's product development process and performing in a leading and critical role for a widely recognized international supplier of business and civilian aircraft.

The assertion of the petitioner's supervisor that the petitioner performs in a leading or critical role for Cessna is not persuasive. The petitioner appears to be several rungs down the hierarchical management "ladder" at Cessna, and the record does not distinguish the petitioner from the unknown number of other senior design engineers employed by Cessna.

Furthermore, the petitioner did not begin working for Cessna until April 30, 2001, several days after he filed the petition on April 27, 2001. When he filed the petition, the petitioner was aware that he would soon begin working at Cessna (although he never mentioned that in his initial submission), but he had not yet actually begun working there.

The petitioner submits copies of documents relating to his ongoing doctoral studies and professional training, in addition to student papers that he has written. Like the other evidence submitted, these materials show that the petitioner is active in his field, and pursuing further training, but they are not indicative of sustained acclaim.

On October 1, 2001, the director denied the petition, repeating the earlier finding that the petitioner is an "accomplished engineer" but not a nationally or internationally acclaimed alien of extraordinary ability. The director stated that "the record taken as [a] whole is not persuasive that the petitioner's contributions are recognized as having major significance to the field." The petitioner subsequently filed an untimely appeal, which the director treated as a motion to reopen, pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*).

In a new letter, [redacted] senior engineering specialist at Cessna, states that the petitioner is "a key analyst at Cessna in the area of reliability analysis," able to complete required analyses in a fraction of the time that many other engineers require to perform the same task. Mr. Whitaker asserts that the petitioner would be "very difficult to replace." Leaving aside the recent approval of an immigrant visa petition filed by Cessna on the petitioner's behalf, the petitioner's good reputation among his chain of supervisors and managers does not demonstrate national or

international acclaim. Mr[redacted] states that the petitioner's salary is high in relation to the salaries earned by others in the field, but the record contains no documentary evidence or exact figures to allow a meaningful comparison. It remains that the petitioner filed his petition before he actually began working at Cessna, and therefore if he was not already eligible at the time of filing, his work at Cessna could not retroactively establish eligibility. 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 Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Immigration and Naturalization Service (now the Bureau) held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Most of the remaining submission with the first appeal (treated as a motion) consists of copies of previously submitted documents; the remainder of the submission concerns medical grounds which are said to have delayed the filing of the appeal. Counsel continues to refer to the petitioner's freon-free air conditioner as "patentable," but there is no indication that the petitioner has actually sought such a patent, or that the concept has advanced beyond a dissertation proposal. There is no evidence that the petitioner has even constructed a working prototype, let alone a version amenable to mass production. The assertion that the petitioner could seek a patent for this creation cannot suffice to establish its major significance.

On August 26, 2002, the director again denied the petition, discussing perceived deficiencies in the evidence such as the 1986 newspaper article. On appeal from this second decision, counsel maintains that the petitioner has met the criteria claimed and discussed above. Counsel attempts to define the evidence into the claimed criteria, without explaining how any of the evidence in the record establishes that the petitioner is acclaimed, nationally or internationally, as one of the very top figures in his field. Many of these arguments have been covered, at least broadly, already in this decision.

Counsel asserts that the petitioner was a doctoral student when he made the published conference presentations. Counsel contrasts the petitioner with postdoctoral appointees, who are generally expected to produce published work. Counsel, however, submits no supporting evidence to show that publication is indeed a rare accomplishment for doctoral students in engineering. 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).

Even if the petitioner had shown that doctoral students rarely publish their work, the petitioner's field is mechanical engineering, rather than "doctoral student in mechanical engineering." The petitioner must place himself at the top of his entire field, including tenured professors and chief engineers at major corporations. It cannot suffice for him to show that he, as a doctoral student, outperformed other doctoral students.

The petitioner submits information from the Salary.com web site, http://swz.salary.com, indicating that the median salary for a "Reliability Engineer III" in Wichita, Kansas, is $61,592; the 75th percentile is $68,771, indicating that one in four professionals in that occupation in the Wichita area earns more

than that amount. The Wichita figures are somewhat lower than the overall U.S. figures. Because the petitioner must demonstrate acclaim at a national or international level, it is more appropriate to use national figures instead of lower local figures. The U.S. median is $62,277; the 75th percentile is $69,536. Counsel asserts that that the petitioner's "salary is above the median. . . . Thus, he commands a high salary in relation to others in the field," thereby satisfying an additional regulatory criterion at 8 C.F.R. § 204.5(h)(3)(ix). As with numerous other arguments, counsel here fails to place the petitioner's evidence in the context of sustained national or international acclaim (the standard required by both statute and regulation). Given that the petitioner's $65,000 salary falls well below the 75th percentile mark, we cannot infer that the petitioner's pay is within a small percentage at the very top. Rather, it appears that roughly one "Reliability Engineer III" out of every three earns a salary equal to or greater than the petitioner's salary. The regulatory phrase "small percentage at the very top of the field," which derives from the legislative history, cannot reasonably equate to everyone "above the median."

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 mechanical 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 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.