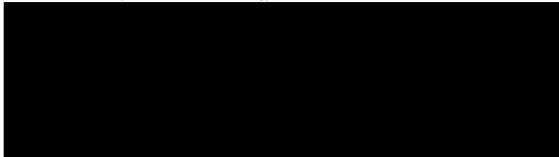


B2

U.S. Department of Homeland Security  
Citizenship and Immigration Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 Eye Street, N.W.  
Washington, DC 20536



File: WAC-02-246-52581

Office: California Service Center

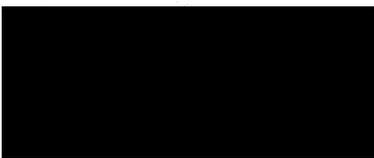
Date: OCT 8 - 2003

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)

ON 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 Citizenship and Immigration Services (CIS) 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 beneficiary's sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel argues that the director violated CIS policy by denying the immigrant visa on behalf of the beneficiary after the Service approved a nonimmigrant visa for the beneficiary in a similar classification. We do not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. As counsel acknowledges, it is CIS policy that each case must be decided on a case-by-case basis on the evidence of record. The nonimmigrant visa could have been issued based on different evidence or in error. The Service is not bound to treat acknowledged past errors as binding. See *Chief Probation Officers of Cal. v. Shalala*, 118 F.3d 1327 (9th Cir. 1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 517-518 (1994); *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084 (6th Cir. 1987).

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 CIS 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.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as a supervising engineer. 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 that, he claims, meets 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.*

Dr. [REDACTED] the beneficiary's professor at RWTH Aachen, asserts that based on the beneficiary's outstanding Master's thesis, he was awarded a three year fellowship from the German Academic Exchange Service (DAAD) to study at the University of California, San Diego, and that his subsequent doctoral thesis was awarded the Springorum Medal for outstanding academic achievement.

In response to the director's request for additional documentation, the petitioner submitted a letter from Dr. [REDACTED] Head of North American Programs at DAAD, who asserts that while DAAD selects scholarship recipients from a national competition, it "supports the specialist and personal qualification of outstanding German students, graduates, and young, up-and-coming academics and scientists."

The director concluded that the award did not place the beneficiary at the top of his field because it supported his continuous study and was aimed at those at the beginning of their careers.

On appeal, counsel argues that because the individual evidentiary requirements make no mention of being at the top of one's field or extraordinary ability, the evidence submitted for each criterion may not be evaluated as to whether it demonstrates that the beneficiary is at the top of his field or has extraordinary ability. Counsel concludes that the DAAD scholarship "evidences that [the beneficiary] has achieved national acclaim due to his scientific achievements."

Counsel is not persuasive. The plain language of the regulation requires that the award be for excellence in the beneficiary's field of endeavor. The beneficiary received the DAAD scholarship based on his academic performance and in support of his continuing education. He received it prior to completing the work on which the remaining claims of eligibility are based. We concur with the director that academic study is not a field of endeavor, but training for a future field of endeavor.

Further, we consistently hold that the evidence submitted for each criterion must be indicative of or consistent with national acclaim and placement among the very few at the top of the field. We

cannot conclude that an award for which the most experienced experts in the field do not compete or aspire to win is evidence that the beneficiary is one of the very few at the top of his field. Moreover, even if we were to consider the record as a whole, as urged by counsel, the evidence does not place the beneficiary at the top of his field. We note that the credentials of his references reflect that the top of the engineering field is significantly higher than that attained by the beneficiary.<sup>1</sup>

*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.*

Initially, counsel referenced the articles that cite the beneficiary's work as evidence to meet this criterion. In response to the director's request for additional evidence, the petitioner submitted three articles that counsel asserts evaluate and focus on the beneficiary's research.

The director concluded that the beneficiary had not met this criterion, noting that articles which cite the beneficiary's work are primarily about the author's own work, not the beneficiary. As such, they cannot be considered published material about the beneficiary.

On appeal, counsel references the three articles submitted in response to the director's request for additional documentation, asserting that they meet the plain language of the regulation because they "relate" to (defined as "to have a connection, relation, or reference to") the beneficiary's work. Counsel asserts that the fact that the articles are not "about" the beneficiary should not be considered because "the scientific community is much more interested in the results of findings, rather than the public appearances or personal lives of top Engineering researchers."

Counsel is not persuasive. The plain language of the regulation requires that the published materials be "about the alien." The "relating to the alien's work in the field for which classification is sought" language clarifies that media coverage about the alien, but relating to something other than his work in the field, will not meet the criterion.<sup>2</sup> Nor are we persuaded by the argument that the major media does not cover the personal lives of engineers. First, as we just stated, the regulation requires that the articles be about the alien and relating to his work in the field, not about his personal life. The petitioner has not established that the major media does not publish articles primarily about nationally acclaimed engineers and their groundbreaking discoveries. Even if it were true that the major media does not cover the groundbreaking discoveries of engineers, that would only

---

<sup>1</sup> For example, Dr. [REDACTED] received the Wetrems prize from the Royal Belgian Academy of Sciences in 1980, is an elected member of the Comité de Chimie de Belgique, and is a member of the editorial board of several journals. Dr. [REDACTED] is the recipient of non-academic awards and serves on an editorial advisory board.

<sup>2</sup> In 8 C.F.R. § 204.5(h)(3)(iii), the two disjunctive conjunctions between "about the alien" and "relating to the alien's work" are in a separate clause, denoted by a comma, that addresses the possible sources of media coverage. It is clear from the plain language of the regulation that the published material must be both "about the alien" and "relating to the alien's work."

establish that this criterion does not apply to the beneficiary's field. A beneficiary cannot meet a criterion by demonstrating that it does not apply.

The three submitted articles are not review articles focusing on the beneficiary's work or articles written as commentary on the significance of the beneficiary's work. Rather, they are primarily reporting the authors' own results. Admittedly, the three articles each spend several sentences summarizing the beneficiary's work. One of the articles, however, is co-authored by the beneficiary's Ph.D. advisor who is simply recapitulating his own previous work in the area. Another article was not in print as of the date of filing and, thus, cannot be considered evidence of the beneficiary's eligibility as of that date. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Regardless, we cannot conclude that, simply because these researchers conducted research that builds upon the beneficiary's research, their articles reporting their own results are somehow "about" the beneficiary.

*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.*

Several of the beneficiary's references assert that he has refereed articles for peer-reviewed journals. The director concluded that the record contained no objective evidence supporting this claim. On appeal, the petitioner, through counsel, submits a letter from Dr. [REDACTED] Professor of Engineering Physics at the University of California, San Diego, and founding editor of *Energy – The International Journal*. Dr. [REDACTED] asserts that he requested the beneficiary to referee a single paper in which the beneficiary noted an error that led to rejection of the paper. Of the beneficiary's reputation, Dr. Penner states only that he knew of the beneficiary "as a promising student" working with a colleague at UCSD.

We cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field; not every peer reviewer enjoys sustained national or international acclaim. Without evidence that sets the beneficiary apart from others in his field, such as evidence that he has reviewed an unusually large number of articles, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, we cannot conclude that the beneficiary meets this criterion.

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

The director concluded that the letters submitted as evidence of the beneficiary's contributions were all from colleagues and fellow students. On appeal, counsel notes that some of the letters were from independent experts. We will examine the content of the letters below.

Gerald Swadley, Director of Engineering at Hamilton Sundstrand Power Systems, discusses the beneficiary's work for that company. While Mr. [REDACTED] provides general praise of the beneficiary's skills, he does not identify a specific contribution and explain how it constitutes a contribution of major significance in the field.

Dr. [REDACTED] the beneficiary's advisor at the University of California at San Diego (UCSD), discusses the beneficiary's investigation of 11 replacements for Halon 1301, a flame suppressant discontinued under the Montreal Protocol on Substances that Deplete the Ozone Layer. The 11 candidates were first identified by the U.S. Air Force (USAF). Based on the beneficiary's work, the USAF recommended two of these agents for further tests. Dr. [REDACTED] further states that upon completing his degree, the beneficiary continued at UCSD as a research scientist, working with the U.S. Army Research Laboratories at Aberdeen Proving Ground on developing chemical kinetic mechanisms for computing combustion process in large-caliber-gun ballistic cycles and designing effective methods for destroying hazardous wastes including chemical agents as weapons. While Dr. [REDACTED] asserts that these projects were "in the national interest of the US" and that the tools developed by the beneficiary are being used by graduate students at UCSD he does not identify a specific contribution of major significance made by the beneficiary while working on this project. In a second letter, Dr. [REDACTED] asserts that the beneficiary's work provided "a starting point" for the USAF search for a replacement for Halon 1301 and that his techniques are being used by the National Institute of Standards and Technology (NIST) and the National Aeronautics and Space Agency (NASA). Another professor at UCSD, Dr. [REDACTED] provides similar information. The letters from NASA employees and NIST employees reveal that the beneficiary collaborated with a researcher at NIST and that a former collaborator now works at NASA. It is not clear how these connections demonstrate the beneficiary's notoriety beyond his collaborators.

Dr. [REDACTED] a former research staff member at UCSD, indicates that he is currently a payload specialist astronaut with NASA. He asserts that the beneficiary "has made the most significant contributions to date in our nation's efforts to find replacements for Halon 1301 as the fire suppressant used in both military and civilian applications." Dr. [REDACTED] asserts that the beneficiary's work in this area is "widely cited by leading combustion researchers throughout the world, and his work has been presented at the most prestigious international scientific meetings." Further, "his experiments and approaches have become a benchmark, and many other leading scientific laboratories essentially duplicate his techniques in order to build upon his results and further advance the field." More specifically, Dr. [REDACTED] subsequently states, "his techniques are used by some of the best research universities and government laboratories in the U.S." This claim, however, is not supported by independent university researchers and high-level government officials confirming their use of the beneficiary's techniques and the significance of those techniques.

Dr. [REDACTED] Leader of the Fire Dynamics Group at the National Institute of Standards and Technology (NIST), indicates that he collaborated with the beneficiary's doctoral work at UCSD. Dr. [REDACTED] states that the beneficiary's "work on flame extinction by sodium bicarbonate powder was the first of its kind, quantifying the effectiveness of this common commercially available agent for the first time." Dr. [REDACTED] continues that the beneficiary's work has benefited Professor [REDACTED] at the University of Virginia and Dr. [REDACTED] at NIST. Professor [REDACTED] is listed as a co-author of an article by the beneficiary and Dr. [REDACTED]. Dr. [REDACTED] however, never asserts in his own letter that his work has benefited from the beneficiary's research results.

Dr. [REDACTED] who obtained his Ph.D. from UCSD and subsequently worked as a researcher there, discusses the beneficiary's work at UCSD. Dr. [REDACTED] asserts that the beneficiary "played an essential role in developing a number of new testing methods for various fire suppressant[s] in the forms of gas, aerosol or powder."

Dr. [REDACTED] who studied at UCSD where he met the beneficiary, discusses the importance of the area of the beneficiary's research, counterflow diffusion flames and the safety concerns in conducting such research, but does not explain how the beneficiary's research in that area constituted a contribution of major significance.

The above letters are all from the beneficiary's collaborators and immediate colleagues. While such letters are important in providing details about the beneficiary's role in various projects, they cannot by themselves establish the beneficiary's national or international acclaim. The petitioner did submit more independent letters. The content of these letters, however, is not persuasive.

Dr. [REDACTED] Chair of the Chemistry Department at the Université Catholique de Louvain (UCL), asserts that he met the beneficiary at several international conferences and has invited the beneficiary to work with him. The record does not reflect that the beneficiary ever accepted that invitation. Dr. [REDACTED] states that the beneficiary's expertise in chemical flame inhibition has earned him "international distinction throughout the scientific community." As evidence of this distinction, Dr. [REDACTED] notes the frequent citation of the beneficiary's work and the requests he receives to review journal articles. The evidence of citation in the record is moderate and the record contains no evidence that independent journals routinely request the beneficiary's assistance as a reviewer. Finally, Dr. [REDACTED] states that the beneficiary has made groundbreaking contributions to supersonic-combustion devices for hypersonic vehicles.

Dr. [REDACTED] a professor at the University of Kentucky, asserts that when he was awarded a grant from the National Aeronautics and Space Agency (NASA) for flame spread research, he studied the beneficiary's articles. While Dr. [REDACTED] states that the beneficiary's work "helped me understand the mechanism of flame extinction," he does not identify a specific contribution that was significant to his own research.

The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim. Evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce unsolicited materials reflecting that acclaim.

This office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp., supra*, at 221 n. 7. Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* Thus, we cannot conclude that simply holding a patent is a contribution of major significance in the field. The beneficiary's U.S. patent application is assigned to the petitioner. Gerald Swadley, Director of Engineering at the petitioning company, does not indicate that the petitioner has

licensed or marketed the beneficiary's patent-pending device. Thus, the impact of the device is not documented in the record.

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

The petitioner submitted evidence that the beneficiary has authored nine published articles and citation evidence. The director did not contest that the beneficiary meets this criterion.

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

The petitioner claims that the beneficiary plays a critical role at the petitioning company [REDACTED] [REDACTED] Director of Engineering at the petitioning company, states that the beneficiary is highly regarded and has been promoted quickly, currently working as a Mechanical Principal Engineer where he leads a group of 14 development engineers and mechanics responsible for testing military auxiliary power unit gas turbine engines. Mr. [REDACTED] continues:

His leadership abilities and technical direction are crucial in our ability to assure accurate and thorough testing on our Military Programs in this time of extreme national security in our country. We depend on his expertise in the development of advanced systems like the thrust jet engines for the Miniature Air Launched Decoy (MALD), which are critical for the future defense needs of our country.

In response to the director's request for additional documentation [REDACTED] General Manager for Defense and Ground Power Programs, states:

[The beneficiary] has been leading our Development Engineering Team for all military applications for the last two years. These applications include the C5 Galaxy transport plane, the KC-130, a multi-role, multi-mission tactical tanker/transport, the V22 Titrotor plane, the Sikorsky Blackhawk helicopters, small turbojets for unmanned drones, and others. He plays a critical role in our organization, overseeing the development and certification efforts for the APUs of these aircraft essential for the national security and defense.

The director concluded that the beneficiary meets this criterion.

For the reasons stated above, at best the beneficiary minimally meets two criteria. The evidence submitted to address the remaining criteria falls well short of being indicative of national acclaim and, for the most part, does not comply with the plain language requirements of the pertinent regulation. 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 an 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 beneficiary shows talent as an engineer, but is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established the beneficiary's 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.